



REPUBLIC OF KENYA



**National Oil Corporation of Kenya Limited v Futurerock Limited
(Formerly Future Way Limited) (Insolvency Notice E139 of 2023)
[2024] KEHC 11139 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E139 OF 2023
FG MUGAMBI, J
SEPTEMBER 20, 2024**

BETWEEN

**NATIONAL OIL CORPORATION OF KENYA LIMITED JUDGMENT
DEBTOR**

AND

**FUTUREROCK LIMITED (FORMERLY FUTURE WAY LIMITED) DECREE
HOLDER**

RULING

1. Before the court is the Judgment Debtor's application dated 31/10/2023, brought under Sections 384 (2) of the *Insolvency Act*, 2015, Regulations 10, 16 and 17 of the Insolvency Regulations 2016, Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules. The applicant seeks to set aside the statutory demand dated 24/10/2023.
2. The application is supported by the affidavit and further affidavit sworn by Robai Musilivi on 31/10/2023 and 2/2/2024 respectively. The applicant contends that alongside the statutory demand, the respondent had equally filed garnishee proceedings in COMM. MISC NO. 532 OF 2018 vide a Notice of Motion dated 31/7/2023 which application is pending ruling on 15/12/2023. The said ruling would be rendered nugatory if the statutory demand is not set aside.
3. Based on the foregoing, the applicant contends that the statutory demand is malicious and an abuse of court process. That the same is aimed at undermining the authority of a competent court which is seized with an almost similar matter and jumping to the most drastic of remedies is to destabilize the applicant. The applicant denies that it is unable to pay its debts as per Section 384 (2) of the *Insolvency Act*, 2015 and should therefore not be subjected to liquidation proceedings.



4. The applicant further contends that it is ready, able and willing to pay the respondent the decretal sum within the current financial year since the same has been provided for in its annual budget estimates for this calendar year. The applicant also avers that liquidation proceedings will cause irreparable and irreversible harm, not only to its reputation as a state corporation but also as an entity that is fundamental to the growth of the country's economy.
5. The application is opposed by way of a replying affidavit sworn by the respondent's director, Maryanjeline Barasa on 14/11/2023. The respondent insists that the statutory demand was not filed not out of malice, but out of a genuine belief that the judgment debtor should be liquidated for inability to pay its debts.
6. It reiterates that a judgment debt is due to itself as the decree holder, and the applicant has been unable to settle it for over 1 year. The respondent further confirms that the applicant has been declared to be technically insolvent by the Auditor General of the Republic of Kenya and that the respondent is currently in the process of splitting itself into 3 legally distinct subsidiaries, and transferring ownership and control of its assets to those subsidiaries.
7. It is further the respondent's case that regardless of the outcome of the garnishee application between the parties, the debt due will remain substantially unpaid and there are no other viable avenues for enforcement left for it to pursue.

Analysis and Determination

8. I have carefully considered the pleadings, submissions and evidence placed before this court by rival parties. The sole issue for determination is whether the applicant has made a case for the setting aside of the statutory demand.
9. In determining this issue, the court is guided by Regulation 17(6) of the Insolvency Regulations which provides the following grounds for setting aside a statutory demand:

“The Court may grant the application if:

- a. The debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;
 - b. The debt is disputed on grounds which appear to the Court to be substantial;
 - c. It appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt, or;
 - d. The Court is satisfied, on other grounds, that the demand ought to be set aside.”
10. A statutory demand is a precursor to formal liquidation proceedings and is used to demonstrate that a debtor is unable to pay their debts as they fall due before the liquidation proceedings can begin. This is by dint of section 384(1) of the Act which sets out the circumstances in which a company is unable to pay its debts as follows:

“(1) For the purposes of this Part, a company is unable to pay its debts—



- a. if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;
- b. if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.”

11. This court is therefore called upon to determine whether the application meets the threshold of setting aside the statutory demand. By default, whether it has been established that the applicant is unable to pay its debts.

12. The court has seen a copy of the Decree issued on 28/10/2023 by the Court in HC Misc. Civil Case No. 532 of 2018, in which the court adopted for enforcement, an arbitral Award in favour of the decree holder, against the judgment debtor. The court certified the amount due and owing on the Decree, as at 30/11/2022, to be Kshs. 62,560,708.13 as per the warrants of attachment subsequently issued.

13. I note that the applicant does not dispute the debt. The evidence presented to this court confirms that out of this amount, the applicant has only paid the amount of Kshs. 2,643,057/=; Kshs. 2,000,000/= on account of auctioneer's fees for a proclamation and attempted attachment of goods and Kshs. 643,057/= on account of a garnishee absolute decree issued by the court against the judgment debtor's banker, NCBA Bank Kenya Ltd. This too is not denied. That brings the balance of the decretal amount to Kshs. 61,917,651/=.

14. The court has considered an audit report from the Auditor General, which confirms the applicant's financial status at pages 5 and 6. An excerpt of the Report which is relevant to these proceedings reads as follows:

“The Corporation recorded a loss of Kshs.969,798,000 during the year under review (2020: Kshs.494,502,000) raising its accumulated losses to Kshs.4,025,234,000 from Kshs.3,055,436,000 in 2020. In addition, the Corporation's current liabilities balance of Kshs.8,954,268,000 exceeded the current assets balance of Kshs.2,648,708,000 by amount of Kshs.6,305,560,000. These events or conditions, along with other matters set forth in the Note indicate material uncertainty regarding the Corporation's ability to continue as a going concern.

The Corporation is therefore, technically insolvent and its continued existence as a going concern is dependent upon the financial support of the Government, bankers, and its creditors unless Management puts in place measures to improve the performance of the Corporation and to reduce reliance on financial support from the shareholders.”

15. The Auditor General confirms that the judgment holder is technically insolvent and can only be salvaged if the government intervenes. The approved budget for the Financial Year 2023/2024 for Kshs.



- 90,955,751,136.00/= has been produced by the judgment debtor. The same shows an allocation of Kshs. 70,000,000/= towards contingency for liability and legal fees.
16. On this issue, it is my considered view that the approval of a budget does not equate to a guarantee of the availability of the specified funds. If these funds had indeed been disbursed within the stated financial year, the applicant could have easily confirmed this to the court.
 17. The fact that the respondent continues to pursue its debt strongly suggests that the anticipated funds have not been received. In any event, if these funds do become available during the course of the liquidation proceedings, they will be duly considered at that stage. For now, it is my finding that this ground is not sufficient to set aside the statutory demand.
 18. The applicant further seeks the suspension of the statutory demand, arguing that the debt has been substantially reduced through garnishee proceedings. In support of this request, the applicant cites the decision in *Oldonyo Nairasha Estates (Narok) Limited V OCP Kenya Limited [2021] eKLR*, where the court suspended a statutory demand after the debtor demonstrated its ability to pay by settling a substantial amount of the debt.
 19. The applicant asserts that, as a result of garnishee proceedings in MISC No. 532 of 2018, involving its funds held at Equity Bank Kenya Limited, the garnishee (Equity Bank) transferred Kshs. 42,642,997/= to the decree holder. Based on this, the applicant contends that it has paid more than two-thirds of the debt. The respondent vehemently disputes this claim, insisting that the amount held in the garnishee proceedings was only Kshs. 17,030,424.66, and even if the judgment debtor were successful in its assertion, it would still owe Kshs. 44,887,226.34/-, exclusive of interest.
 20. I have carefully considered the replying affidavit sworn by Anne Kanana, the Operations Manager of the Garnishee, Equity Bank Kenya Limited, on 16/8/2023, in response to the application dated 31/7/2023. The affidavit confirms, at paragraph 9, that as of 10/8/2023, the account balance in the specified account stood at Kshs. 17,030,424.66/=. This assertion is corroborated by the attached Bank Account Statement.
 21. Based on the evidence before me, I am convinced that, whether the garnishee absolute has been issued or is still pending, a substantial portion of the debt remains outstanding.
 22. Having reviewed the totality of the evidence before me, I am not convinced that the applicant has paid a substantial portion of the debt, as claimed, to justify the suspension of the statutory demand. Even under the most favorable interpretation, it appears that out of the decretal amount of Kshs. 62,560,708.13/=:, the applicant would have paid, at most, Kshs. 19,673,481/=. This leaves a significant outstanding balance of Kshs. 42,887,227/=:, which continues to accrue interest. Therefore, I find that the circumstances of this case do not align with those in the *Oldonyo Nairasha Estates* decision (*supra*).

Disposition

23. Accordingly, the judgment debtor's application dated 31/10/2023 does not meet the threshold for setting aside the statutory demand. The application is dismissed for want of merit with costs to the decree holder.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

