



**Fatania v Greenview Developers (Insolvency Cause E010 of 2024)
[2024] KEHC 11943 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E010 OF 2024**

PM MULWA, J

OCTOBER 4, 2024

BETWEEN

SURESH FATANIA APPLICANT

AND

GREENVIEW DEVELOPERS RESPONDENT

RULING

1. The respondent filed a Notice of Motion dated 27th February 2024 seeking that the filing of any liquidation petition be stayed pending hearing and determination of this application and that the statutory demand issued by the applicant dated 26th January 2024 be struck out and/or set aside.
2. The application is based on the grounds set out in the motion, the supporting and further affidavits sworn by its director, Chandulal Fatania on 27th February 2024 and 29th April 2024 respectively.
3. In brief, the grounds are that the debt of Kshs. 47,000,000.00 for construction services at its Peponi View Property on LR No. 1870/VIII/120 claimed through the statutory demand is unsupported and that the applicant is a director in the respondent company and has initiated the insolvency proceedings to exert pressure on other directors to accede to his demands.
4. The application is opposed by the applicant through a replying affidavit sworn on 15th March 2024. The salient depositions were that the respondent is aware of the debt as it was discussed at a company meeting held on 26th April 2018; that the debt is admitted and he has made several but futile attempts to have the debt settled; that the proceedings are not meant to exert pressure; the company has not been in business for the past five years and is facing financial strain due to numerous litigation and mediation proceedings and that he has not been given the company's audited accounts, returns and court papers despite his requests.



5. In turn, the respondent deposed that the minutes of the said meeting which in any case indicated that the payments were subject to confirmations were un-signed and the letter that purportedly acknowledged the debt does not contain an admission of the alleged debt and was drawn by a different entity, Taibjee and Bhalla Advocates.
6. The application was canvassed through written submissions which the respondent and the applicant filed dated 9th May 2024 and 5th June 2024 respectively.

Analysis and Determination

7. I have considered the application, the grounds, the parties' respective affidavits and submissions. The issue for determination is whether the respondent has made a case for the setting aside of a statutory demand.
8. Regulation 17(6) of the *Insolvency Regulations* stipulates the grounds on which the Court can set aside a statutory demand, thus:
 - 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.
9. Section 384(1) of the *Insolvency Act* lays out the circumstances in which a company is deemed 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 a 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.”
10. The key principle for consideration is that the company must give reasonable grounds why it is disputing the debt. The Court of Appeal in *Universal Hardware Limited v African Safari Club Limited* (MSA CA Civil Appeal No. 209 of 2007) [2013] eKLR, observed that:-

“The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the



debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.”

11. The parameters to be established by a debtor to warrant the setting aside of a statutory demand were set out by the Court in *Flower City Limited v Polytanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) as follows:-

“ 11. The rationale for applications of this nature is to enable the debtor to satisfy the court that he genuinely disputes the debt. Simply put, a debtor must demonstrate the existence of a genuine dispute. Though it may not be possible to provide a closed list of the elements of a genuine dispute, the applicant must:

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- (i) Show a plausible contention requiring investigation;
- (ii) Be bona fide, genuine and real;
- (iii) Be in good faith and show a prima facie plausibility;
- (iv) Truly exist in fact, and contain a serious question to be tried;
- (v) Be something more than mere bluster or mere assertion;
- (vi) Be a claim that may have some substance;
- (vii) Have a sufficient degree of cogency to be arguable;
- (viii) Have objective existence; and
- (ix) Have sufficient factual particularity.

12. A genuine dispute therefore should not: -

- a. Be spurious, hypothetical, illusory or misconceived;
- b. Be plainly vexatious or frivolous;
- c. Be so devoid of substance that no further investigation is warranted;
- d. Be merely spurious claim, bluster or assertion; and
- e. Be merely fanciful or futile.”

12. The rationale behind this principle is that the role of an insolvency court is not to go into an inquiry into evidentiary issues. Its role is circumscribed to establishing that there is proof of a debt which a debtor is unable to pay or that there are circumstances for setting aside the statutory demand (See *N. K. Brothers Limited and Royal Ngao Holdings Limited* (Insolvency Notice No. E150 of 2022).

13. In this matter, the creditor issued the respondent with a statutory demand dated 26th January 2024 for payment of a debt of Kshs. 47,000,000.00 for construction services at Peponi View. The respondent claims that the statutory demand is premature as the debt claimed has not been determined. It also



- claims that the debt is unsupported and that the applicant is a director in the respondent company and has initiated the insolvency proceedings to exert pressure on other directors to accede to his demands.
14. The creditor produced copies of a forwarding letter and minutes of the company meeting held on 26th April 2018, copies of requests for audited accounts, the company returns and litigators against the company and an arbitral award.
 15. The respondent disputes the debt and argues that the minutes of the said meeting which in any case indicated that the payments were subject to confirmation were un-signed and the letter that purportedly acknowledged the debt does not contain an admission of the alleged debt and was drawn by a different entity, that is Taibjee and Bhalla Advocates.
 16. From a scrutiny of the documents exhibited, there are no documents to support a claim for payment for construction services such as invoices, agreement for services, construction certificates and/or bills of quantities. I am also not persuaded that there was an admission of the alleged debt by the respondent from a reading of the minutes and the letter by the advocates.
 17. Insolvency proceedings are not meant to cajole the debtor into settling the debt (See [Nairobi Business Ventures Limited v Greenhills Investment Limited](#) (Insolvency Notice No. E068 of 2020) [2021] eKLR). Issues regarding the failure to avail the company's audited accounts, the company returns and litigators against the company are matters that are best resolved through a civil action, not an insolvency petition as they require more than affidavit evidence, hearing and cross-examination. These are not proper grounds for winding up.
 18. Accordingly, it is my finding that the respondent has demonstrated reasonable grounds for disputing the debt. Its application dated 27th February 2024 has merit and is allowed as prayed.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF OCTOBER 2024.

P. MULWA

JUDGE

In the presence of:-

Ms. Obiria for applicant

Mr. Kioko h/b for Mr. Mbaabu for respondent

Court Assistant: Carlos

