Sugar Company Limited v Sybyl Kenya Limited (Insolvency Cause E020 of 2021) [2023] KEHC 2415 (KLR) (Commercial and Tax) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2415 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E020 OF 2021

A MABEYA, J

MARCH 23, 2023

BETWEEN

SUGAR COMPANY LIMITED ..... APPLICANT

AND

SYBYL KENYA LIMITED ..... RESPONDENT

RULING

1. Before Court is an application dated May 10, 2021. It was brought under Regulations 16, 17, 77 & 78 of the *Insolvency Regulations 2016*, and Sections 17 & 384 of the *Insolvency Act*.

2. The application sought the setting aside of the statutory demand dated April 16, 2021 and that the respondent be restrained from filing the intended petition and advertising the intended insolvency petition.

3. The grounds for the application were set out on the face of the application and on the supporting affidavit of Harshil Kishore Kotecha sworn on May 10, 2021. It was averred that there was already an ongoing insolvency petition against the applicant being Nairobi Insolvency Petition No 07 of 2019 which was published in the Daily Nation Newspaper on July 8, 2018 and republished on October 22, 2019 inviting other creditors to join the proceedings. The copies of the advertisements were attached as HKK 2. That other creditors joined but the respondent ignored the advertisement and instead now seeks to file a separate insolvency petition to embarrass the applicant and cause unnecessary economic hardship and injure its reputation.

4. That the statutory demand was also defective as it was signed by the Deputy Registrar of this Court and not the creditor contrary to section 384 of the *Insolvency Act*.

5. The respondent opposed the application vide the replying affidavit of Renjith Mani sworn on August 25, 2021. He is the Director of the respondent/creditor. He contended that the applicant owed the respondent Kshs 661,125.30/= and USD 74,913.30. That the applicant had no reasonable prospects of settling the debt thus it was just that the insolvency proceeds. That it was not aware of the ongoing Insolvency Petition No 07 of 2019 thus the statutory demand was not issued maliciously.

6. That the respondent was not barred from exercising its recovery of debt so long as the mode of debt recovery was not frivolous, vexatious and in bad faith. That the respondent was free to choose the method to recover the debt.

7. That the statutory demand was duly served upon the applicant and was valid as per section 384(1) of the *Insolvency Act*. That equity considered the substance and not form such that if form arose, it was curable by considering the full circumstances of the case and could not invalidate the case on technicality. That the allegation that the demand was not signed by the creditor was mute as no prejudice on the applicant was disclosed. That the allegation did not form a ground of setting aside a statutory demand under the Act and Insolvency Regulations.

8. The application was canvassed by way of written submissions. The applicant's submissions were dated March 21, 2022 and while those of the respondent were dated June 3, 2022. The main issue for contention is whether the statutory ought to be set aside.

9. Regulation 17 (6) of the Insolvency Regulations, 2016 lists the grounds under which the Court is to set aside a Statutory Notice. The same provides: -

> ' 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 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. In the present case, it is evident that the applicant does not dispute the debt, it does not have a counterclaim, set-off or cross demand that exceeds the debt amount. It is also evident that the respondent does not hold any security in respect of the debt. In the circumstances, it was upon the applicant to satisfy this Court that the demand on other grounds, ought to be set aside.

11. The applicant contended that there already existed another insolvency petition being Nairobi Insolvency Petition No 07 of 2019 against the applicant. That two advertisements had been published in the Daily Nation. The copies of the advertisements were produced in support thereof. The respondent did not deny the existence of that petition but contended that it was unaware of the same.

12. The respondent was however adamant that the existence of that petition did not bar it as a creditor from proceeding with the insolvency. This Court is now called to decide whether two concurrent Insolvency Petitions can run concurrently against one company.

13. Section 430 of the *Insolvency Act* provides that: -

> ' If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void.'

14. My understanding is that, the spirit behind the *Insolvency Act* is to restrain any adverse action over a company which is within the jurisdiction and supervision of an Insolvency Court. This is because any adverse action against such a company would defeat the statute's objective of having a controlled insolvency that caters for the needs of all creditors according to their ranks. It seeks to prevent the dragging of the insolvent company through a multitude of cases, effectively damaging its finances even further, and subjecting it to embarrassment and ridicule due to the multiplicity of suits or adverse actions from its creditors. The Act intends for there to be an orderly and controlled administration or liquidation of a company.

15. In this case, it is not in dispute that an insolvency petition already exists. Allowing the respondent to continue these proceedings would be contrary to the spirit of *Insolvency Act*.

16. Further, this Court agrees with the applicant's submission that it would be repugnant to have two insolvency proceedings running concurrently against the same company, as this would lead to a possibility of there being two contrasting decisions. The fact that the respondent was unaware of the said petition is not an answer. The advertisement of the petition was intended to be a notice to the whole world, the respondent included. In any event, the respondent is now aware and can join those proceedings and agitate its case.

17. In *Flower City Limited v Polytanks & Containers Kenya Limited (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR)* similarly quoted by the applicant, the Court therein stated that insolvency proceedings were class actions by their very nature, and that was the reason why the law required that the proceedings be advertised. Going by that, the law expects that once an insolvency petition is advertised, all creditors ought to join those proceedings and present their debts against the company.

18. The law does not envision a situation where each creditor is free to file its own petition against a company in distress. That would not only be extremely prejudicial to the company, but it would lead to a judicial catastrophe whereby each court would be making its own decision without full information about the company such as priority of creditors.

19. Having found that two insolvency petitions cannot run concurrently against the same company, the Court will not address itself on whether or not the statutory demand was defective.

20. The upshot is that the application dated May 10, 2021 is found to be merited and is allowed with costs to the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE