



**Cabanas Highway Limited v Comroad Construction & Equipment Limited (Insolvency Cause E136 of 2022) [2023] KEHC 17815 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17815 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E136 OF 2022**

**A MABEYA, J**

**MAY 19, 2023**

**BETWEEN**

**CABANAS HIGHWAY LIMITED ..... CREDITOR**

**AND**

**COMROAD CONSTRUCTION & EQUIPMENT LIMITED ..... DEBTOR**

**RULING**

1. Before the Court is an application dated 4/10/2022 and its brought under section 384 of the *Insolvency Act*, 2015 and sections 1A, 1B, 3 &3A of the *Civil Procedure Act*.
2. The application seeks to set aside the statutory demand dated 14/9/2022. The application is supported by the affidavit of Christine Wangechi sworn on 4/10/2022. The grounds thereof are that; the current directors had taken over the company from the previous directors and a memorandum of understanding was signed to the effect that any liability in terms of lawsuits, debts, dues, accounts and bills, covenants and promissory notes incurred would be borne by the previous directors. That upon acquiring the company the current directors noted that judgment had been entered against the company.
3. That the respondent issued a statutory demand to settle a decree made in CMCC No 4838 2014 *Cabanas Highway Ltd vs Comrod Constructions & Equipment Ltd*. That the applicant was in the process of seeking an appeal against the said judgment.
4. It was the applicant's contention that there was an ongoing case number HCCOMM/E311/2022 against the directors seeking judgment on admission made on July 3, 2019 where they had undertaken to settle all the debts of the applicant. That great injustice would be occasioned to the applicant company if the statutory demand was not set aside.



5. In opposition to the application, the respondent filed a replying affidavit dated November 14, 2022 sworn by William Macharia a director of the respondent company. He stated that the directors were aware of the judgment and decree issued on CMCC NO 4838 of 2014 and had participated in the suit. That the applicant had applied to set aside the said judgment but the same was dismissed on 24/3/2022.
6. It was the respondent's case that the director of the applicant, Christine Wangechi called for a meeting proposing a plan for settling the decree and the same amounted to an admission of the debt. That despite claims that it was solvent, the applicant has failed to satisfy the decree of Kshs 3,670,994.28/-.
7. The application was canvassed by way of written submissions. The applicant submitted that the statutory demand ought to be set aside in line with regulation 17(6) on sufficient ground for the applicant was in the process of seeking recourse in respect of the subject judgment. Counsel submitted that the statutory demand was issued prematurely before exhausting the mechanisms for execution. That the creditor did not venture into other models of execution before preferring liquidation.
8. On the other hand, it was submitted for the creditor/respondent that the application did not meet the threshold for setting aside the statutory demand. That the applicant did not dispute the debt as it acknowledged that there was a debt that was outstanding and did not provide any security with respect to the debt in issue. The respondent submitted that regulation 17(6) was not applicable as it relates to bankruptcy proceedings and not liquidation proceedings. It was submitted that the creditor had started execution proceedings that was frustrated by the applicant as a result of which the warrants of execution were returned unexecuted.
9. I have considered the rival affidavits as well as the submissions on record. This is an application to set aside the statutory demand dated 14/9/2022.
10. The applicant wishes to set aside the statutory demand on the ground that it is challenging decree upon which the demand is founded. The applicant further contends that the company had been taken over from previous directors who had accepted to take over any liability the company was faced with prior to the taking over aforesaid. That as a result, there was a pending case against the said directors seeking judgment on admission.
11. The applicant relied on Regulation 17 of the *Insolvency Regulations* particularly 17(6)(d) which provides that where a Court is satisfied, on other grounds, that the statutory demand ought to be set aside, it should do so.
12. Regulation 17 (6) of the *Insolvency Regulations*, 2016 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.”



13. The above regulation is made pursuant to section 17 of the Act which relates to bankruptcy of natural persons. However, in my view, the same provides a good guide on the principles that may guide the Court in an application for setting aside a statutory demand by an un-natural person. The question is whether the reasons advanced by the applicant give genuine grounds for setting aside the statutory demand
14. From the record it is clear that the debt is not disputed. What is really stated is that in line with a memorandum of understanding between the former directors of the company and the present ones, the liability to pay the debt the subject matter of the statutory demand lies with the said former directors and not the company. That the issue is subject to a court case which is still ongoing.
15. While I appreciate that the reasons advanced by the applicant are supported by evidence, my take is that already there exists a decree in favour of the respondent. The same is yet to be satisfied. The respondent or 3<sup>rd</sup> parties are not privy to the internal arrangements of the company or its directors. The liability under the decree is that of the company.
16. In any event, the suit against the aforesaid directors has nothing to do with the decree that is issued and pending against the company in favour of the respondent. The company, its present directors and the previous directors may deal and sort out their differences without necessarily dragging the respondent or the Court to it.
17. It would not be in the interest of justice to deny the respondent its rights that have accrued on the basis of internal disputes in the company. No attempt has been made to settle the decretal amount. My view is that the respondent is justified to recover the decretal sum without any delay.
18. The applicant had submitted that the respondent ought to have exhausted the execution proceedings first. In *Pride Inn Hotels and Investments Limited v Tropicana Hotels Limited* [2018] eKLR, Visram JA., reading the majority judgment of the Court, stated: -

“This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the *Insolvency Act* or the *Companies Act*, which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.”
19. From the foregoing, there was no requirement for the respondent to exhaust the execution process first before issuing the statutory demand.
20. I have carefully weighed the grounds raised by the applicant against the interests of all the parties and it is my finding that the applicant has not established a basis for setting aside the statutory demand.
21. In the premises, the application dated 4/10/2022 is without merit and is hereby dismissed with costs.  
It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

