



REPUBLIC OF KENYA



**Mihrab Development Limited v Cementers Limited (Insolvency Notice E126 of 2022)
[2023] KEHC 20004 (KLR) (Commercial and Tax) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E126 OF 2022**

FG MUGAMBI, J

JULY 7, 2023

BETWEEN

MIHRAB DEVELOPMENT LIMITED DEBTOR

AND

CEMENTERS LIMITED CREDITOR

RULING

1. Before the court is the application dated September 2, 2022 brought under section 17(1) and section 17(3) of the *Insolvency Act* and Regulation 17 of the *Insolvency Regulations*, 2016.
2. The application seeks the following orders;
 - i. That, the statutory demand issued herein dated July 25, 2022 be set aside.
 - ii. That the creditor does pay the cost of the application
3. The application is premised on the grounds on the face of it, supported by the affidavit and further affidavit sworn by Harurani Suleman Abdulshakur as Director of the Debtor company, on September 2, 2022 and November 11, 2022 respectively as well as the written submissions dated November 15, 2022.
4. The uncontroverted facts underlying the application are that the parties herein entered into a construction agreement July 22, 2022. It was a term of the said contract that the completion date was on July 13, 2015. The creditor however notes that the debtor handed over the site on March 13, 2016.
5. Arising from the contractual works, the debtor claimed that the creditor had issued it with a statutory demand seeking payment of Kshs 137,874.820.39 being the amount due under the interim certificate no 35 and 37 and the final payment certificate. The debtor disputes the amount stated on the



statutory demand and particularly the payment under interim certificate No 37 which does not have a corresponding payment certificate from the architect. The debtor further submits that the amount cannot be paid without such approval from the architect signified by a payment certificate, for purposes of accountability as this would be in breach of clause 14.7(b).

6. The debtor's second ground of objection is based on the fact that the debtor has a counterclaim against the petitioner. The said counterclaim arises out of a mediation settlement agreement between the parties which the creditor had not responded to despite being served. The same was based on damages as envisaged in the contract and also as a result of rectification of defects.
7. In any case, it is the debtor's case that there exists an arbitration clause in the contract between the parties and if the creditor had found the debtor to be in breach, they ought to have invoked the arbitral clause so as to settle the dispute first. The debtor submits that it was solvent, able and willing to make payment upon the amounts due being ascertained and the payment certificate being issued.
8. The application was opposed by the creditor vide a replying affidavit sworn by Dipak Halai dated October 18, 2022 and submissions dated December 14, 2022. It was the creditor's contention that the application to set aside the statutory demand should have been filed within 21 days according to regulation 16 of the Insolvency Regulations 2016. The same had been filed 13 days out of time and without leave. In the circumstances, the creditor had gone ahead and filed a petition for insolvency against the debtor.
9. In any case, the creditor also avers that the jurisdiction of the court had not been properly invoked as the application was brought under regulation 17 of the *Insolvency Act* which applies to personal bankruptcy.
10. More specifically, the debtor argued that the debtor had not proved that it had a counterclaim, setoff or cross demand which equaled or exceeded the amount of debt specified in the demand. That the interim payment certificate no 35 had already been issued by the architect and nothing was stopping the debtor from paying the same. The debtor had invited the creditor to agree on a payment plan meaning that the debt was not disputed.
11. Finally, regarding the arbitration proceedings, it was the creditor's case that the jurisdiction to supervise liquidation proceedings lay with this Court and not with the arbitration tribunal hence the present proceedings.

Analysis

12. I have carefully considered the pleadings, rival submissions and authorities presented by the parties to advance their respective positions. There are three issues for determination:
 - i. Whether the court has been correctly moved
 - ii. Whether the statutory demand has been filed out of time
 - iii. Whether there are sufficient grounds for setting aside the statutory demand dated 25th July 2022.
13. The creditor avers that the debtors have not moved the court properly because the application is brought under Regulation 17 of the *Insolvency Regulations*, 2016. It has been stated that regulation 17 of the *Insolvency Act* applies to personal bankruptcy.
14. It is now a well settled fact that the court still retains inherent jurisdiction to strike out a statutory demand that is not well founded and amounts to an abuse of the court process notwithstanding that



a specific provision for dealing with companies does not exist in the regulation 17(5) of the Act. In fact, the creditor notes at paragraph 22 of their submissions that the said conditions (under regulations 17(6)) should with the necessary modifications form the basis of and guide this Honourable Court in its decision.

15. The reason given by the debtor for filing the present application outside the 21 days required by law is that having sent a counterclaim to the creditor on August 16, 2022, it gave the creditor time to respond to the same and that the time was also affected by the electioneering period and Sunday falling in between. I am satisfied with this explanation and I find that the delay herein was not inordinate to render the application untenable and as such, I will proceed to decide on the substantive prayers as sought.
16. The essence of a statutory demand is to be able to prove the solvency or otherwise of the company, upon which a winding up or liquidation cause can be supported. It is for this reason that a debt must be proved as due and owing using the threshold set out in regulation 17(6) which for the avoidance of doubt requires that a statutory demand may be defeated under the following circumstances:
 - i. The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand
 - ii. The debt is disputed on grounds which appear to the court to be substantial
 - iii. It appears that the creditor holds some security in relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt
 - iv. The court is satisfied, on other grounds, that the demand ought to be set aside.
17. The applicant seeks striking out of the statutory demand on the grounds that the debt is disputed and that it had filed a counterclaim to the statutory demand. The Court of Appeal in the case of Universal Hardware Limited v African Safari Club Limited, MSA CA Civil Appeal No 209 of 2007 [2013] eKLR, held as follows:

“The principle as I understand is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceeding on account of the company’s inability to pay its debts. The case law and scholarly writings are categorical that a creditor’s petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.”
18. Likewise, in the case of Re: Global Tours and Travels Limited [2001] EA 195, the learned Judge held 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.”



19. In *Flower City Limited v Poly tanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) the court stated that;

“When a debtor claims to have a counter-claim within the meaning the above regulation, the court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue. The function of the bankruptcy court, on the hearing of an application brought under regulation 17(6) is not to conduct a full hearing of the putative claim. Rather, it is simply to determine whether the claim in question, after having regard to “all the circumstances,” raises a “genuine triable issue.”

20. In the instant case, it is not disputed that the payment from payment certificate no 35 has already been approved and is therefore due. The creditor states that the debtor ought to have paid this amount but the debtor alleged that the creditor wished for the entire amount to relating to the 2 certificates to be paid together. The only confirmation of this position is a letter dated August 16, 2022 which also indicates that the debtor has asked the creditor for a meeting to agree on a payment arrangement for the balance of certificates 34 and 35. This amount of Kshs 13,000,000/= is not disputed by the debtor.
21. I am not convinced that this fact alone would point out to the insolvency of the debtor since there appears to be no response to the said letter which has not been controverted also by the creditor. The said letter also speaks to mediation proceedings between the parties and a meeting to settle the outstanding issues between the parties. The debtor has also placed before the court a report, written by BECS which though undated, is evidence of a dispute between the parties. The report in fact points to a long-standing dispute between the parties. The contents of the report are again not controverted by the creditors.
22. I do therefore concur with Mativo, J in *Flower City Limited v Poly tanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) that once a debtor shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. Further, I note and concur that the purpose of a statutory demand is not to put unjustified pressure upon the applicant to pay a debt which was bona fide disputed. This would amount to nothing more than an abuse of the court process.
23. I am also mindful of the policy objective of the *Insolvency Act* and the purpose for which it was enacted, to allow companies an opportunity to meet their financial obligations, particularly where there is doubt as to their insolvency as in the present case. It is for this reason that the court has jurisdiction not only to set aside a statutory demand, but to make an order that it deems fit and just in the circumstances.

Determination

24. In conclusion, I adjourn these proceedings for a period of 6 months to enable the parties agree on the outstanding amount through the forums that parties had laid out in their agreement.
25. For the avoidance of doubt, the final orders of the Court are that: -
- i. The application dated September 2, 2022 is adjourned for a period of 6 months from the date hereof to enable the parties settle the dispute as to the outstanding amount and agree on a framework for settlement of the debts subject of the statutory demand.
 - ii. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 7th DAY OF JULY 2023.



F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

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