



Yang in the Care of Yang Zenghui v Suraya Properties Group Limited (Insolvency Petition E042 of 2021) [2023] KEHC 20221 (KLR) (Commercial and Tax) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E042 OF 2021**

EC MWITA, J

JULY 7, 2023

BETWEEN

LIN XIN YANG IN THE CARE OF YANG ZENGHUI PETITIONER

AND

SURAYA PROPERTIES GROUP LIMITED RESPONDENT

RULING

1. This is a ruling on a preliminary objection date 26th November 2021, raised against the petition dated 5th May 2021. The petition seeks liquidation of Suraya Properties Group Limited (the company).
2. The objection is that the insolvency petition is incompetent as it offends sections 17(3(a) and 384(1)(b) of the *Insolvency Act* (the Act) since the statutory demand was signed by a person other than the creditor of the company. In that regard, the statutory demand and petition are defective and unsustainable.
3. The company argued that the statutory demand dated 23rd October 2020 was signed by advocates for the creditor and was served on the firm of Kiprop & Co Advocates for the company on 29th October 2020. The statutory demand does not also have the seal of the court and signature of the Deputy Registrar.
4. The company relied on *Re FM Macharia (K) Limited* [2017] eKLR on the ingredients of a statutory demand. The company again relied on *Blueline Properties Limited v Mayfair Insurance Company Limited* [2019] eKLR on the issue.
5. The company further relied on the decision in *re Kipsigis Stores Limited* [2017] eKLR that where an invalid statutory demand is served, the liquidation petition filed is still born.



6. Regarding who a creditor is and the meaning of inability to pay debts, the company relied on sections 2 and 834 (1)(a) of the Act respectively. The company urged that the preliminary objection be sustained and the petition be struck out with costs.

Response

7. The petitioner only filed written submissions in opposing the preliminary objection. The petitioner argued that the preliminary objection is not founded and should be disallowed with costs.
8. The petitioner asserted that in the *Blueline* case, the court was of the view, that only a creditor or his authorised agent could sign the statutory demand as required by section 384(1) of the Act, and that inability to pay a debt is anchored in section 384(1)(b) and not 384(1)(a).
9. The petitioner argued that the decision in *Xplico Insurance Co. Limited v Musyimi Paul Maingi t/a Maingi Musyimi & Associates Advocates & another* [2020] eKLR, the court explained the import of section 2 of the Act. It is the petitioner's case that the statutory demand was lodged with the Registrar of the court and met the substance of the requirements under the Act.
10. The petitioner relied on the decision in *Re Sucasa at Mombasa Road Limited* [2019] eKLR, on the requirements of a statutory notice. The petitioner maintained, therefore, that the statutory noticed conformed with the requirements of the Act.
11. The petitioner took the view, that the petition is properly before the court since the notice was served on the company's advocates who received and signed the notice on behalf of the company.
12. According to the petitioner, the debt arose from a decree and the debt in the form of the decree was communicated to the company through a demand letter and later the statutory demand. The petitioner took the view that if the company had any issue regarding the mode of service of the statutory demand, it should have raised the issue within the period of 21 days allowed in law.
13. The petitioner argued, therefore, that the company neither challenged the statutory demand nor filed a response to the petition.

Determination

14. I have considered the preliminary objection and arguments by parties together with the decisions relied on. Two issues arise from the preliminary objection. First, whether the statutory demand was properly signed and second, whether the statutory demand was served.

Whether the statutory demand was properly signed

15. The company argued that the statutory demand was not signed as required by law rendering the petition incompetent. In the view of company, the statutory demand was signed by the advocates instead of the Deputy Registrar of the Court or the creditor thus violated the law. This rendered the petition incurably incompetent. The petitioner maintained that the statutory demand was properly signed and is therefore capable of supporting the petition.
16. Section 384 of the Act provides;

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. (emphasis)

17. A creditor, must issue a valid statutory demand to the debtor before instituting a liquidation petition.
18. in *Re F.M. Macharia (K) Ltd* [2017] eKLR, the court cited *Halsbury's Laws of England* 4th Ed Vol 7(2) para 1446 on the ingredients of a valid statutory demand, stating:

The statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf. The statutory demand must state the amount of the debt and consideration for it or if no consideration the way if (debt) arises...The statutory demand must include an explanation to the Company of the following matters: (a) Purpose of demand and fact that if demand is not complied with, proceedings may be initiated for winding up; (b) time for compliance with notice if consequential is to be avoided and (c) methods of compliance open to the company.

20. The import of the decision is that a statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf.
21. The issue of validity of a statutory notice and, in particular, who should sign the statutory demand was considered in *Blueline Properties Limited v Mayfair Insurance Company Ltd* [2019] eKLR. The argument before the court was that the statutory demand was null and void because it had not issued by the creditor, Blueline Properties Limited as required by section 384 (1) (a) of the *Insolvency Act*. The court considered section 384(1)(a) and observed that the section requires that the statutory notice be issued by a creditor. The court referred to the definition of a creditor in section 2 of the *Act* and stated:

[40.] That definition does not include an agent, such as an advocate. A creditor on the facts before court would be Blueline, not its advocate. It follows, as rightly submitted on behalf of Mayfair, that the Statutory Notice issued to Mayfair did not meet the threshold set out in section 384 (1) (a) of *Insolvency Act*. Blueline was therefore not entitled to rely on the Statutory Notice issued by its advocate to seek liquidation of Mayfair. It follows that without that Statutory Notice Blueline is unable to prove that Mayfair is unable to pay its debts.”

20. In *Global Truck Limited v Borderless Tracking Limited* [2020] eKLR, where a statutory demand had been signed by the deputy registrar, the court concluded that the statutory notice had been issued contrary to statute and was not valid to mount a petition for liquidating a company.
21. I have perused the petition and the supporting affidavit. To the petition, is annexed a statutory demand dated 23rd October 2020. The statutory demand was signed by TrippleOKLaw LLP Advocates on behalf of the creditor.
22. The position espoused in *Halsbury's Laws of England* 4th Ed Vol 7(2) para 1446 is that a statutory demand should be dated and signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf. The person who can issue a statutory demand on behalf of the creditor would include an advocate who acts as the authorised agent of the creditor. I, therefore, find and hold that the statutory demand signed by advocates acting on behalf of the creditor was properly signed for purposes of the *Act*.



Service of statutory demand

20. The next issue is whether the statutory demand was served on the company. The company argued that the statutory demand was served on the firm of Kiproop & Co Advocates on 29th October 2020 and not the company. The petitioner maintained that the statutory demand met the substance of the requirements under the Act.
21. Section 384(1)(a) requires a creditor to “serve on the company, by leaving it at the company's registered office, a written demand” requiring the company to pay the debt within twenty-one days. If the company fails to take appropriate measures to settle the indebtedness to the satisfaction of the creditor, the creditor may take appropriate steps, including instituting a liquidation application.
22. Service of process is critical. As was stated in *Bray Head (Ascot) Ltd v Berkshire County Council* (1964) 2QB 303), the purpose of service is to bring to the attention of the opposite party that a serious action is contemplated against it unless the demands in the notice are met.
23. I have perused the petition and attachments. There are two affidavits of service attached to the petition. There is an affidavit by Wycliffe O. Ojore sworn on 20th November 2020. Ojore deposed that he was instructed by Kivindyo Munyao Advocate to serve the statutory demand on the debtor's advocates. Following those instructions, he served the Firm of Kiproop& Company Advocates on 29th November 2020.
24. The second affidavit of service is by Mr. Kivindyo Munyao, an associate advocate in the law firm of TripleOKLaw LLP, the law firm acting for the petitioner. That affidavit was sworn on 19th January 2021. Mr. Munyao deposed that on 3rd November 2020, he served the statutory demand on the company by email. He sent the statutory demand to the email address suemuraya@suraya.co.ke. Mr. Munyao attached to his affidavit of service, a message he sent to the company which read as follows:

“From: Kivindyo Munyao

Sent: Tuesday, 3 November 2020 23.11

To: Sue Muraya

Subject: Insolvency Notice Petition No. 031 of 2020 STATUTORY NOTICE

Attachments: Insolvency Notice Petition No. 031 od 2020 pdf

Good Evening,

We refer to the above matter and write on behalf of the Creditor Li Xin Yang

Kindly find attached, the statutory Notice.

Upon receipt, kindly acknowledge if you can.”

20. Regarding the first service, I must state that serving a statutory demand on the company's advocates is not the service contemplated under the Act. Section 384(1) (a) prescribes that a company will be deemed to have failed to pay its debts where the creditor has “served on the company, by leaving it at the company's registered office, a written demand.” The statutory demand should be served on the company and not counsel.
21. It is the company that is to be notified that of the amount of the debt claimed, the period the company is required to remedy the situation and the consequences in default. In this case, the service of the statutory demand on the advocate was not service on the company for purposes of the Act.



22. The second service by Mr, Munyao was not any better. First, the message purportedly sent to the company and which is attached to Mr. Munyao's affidavit of service does not have an email address through which the statutory demand was sent. Mr. Munyao did not also say how he obtained the email address used or that the email address belonged to the company. Further, the email address seems to belong to Sue Murarya and not Suraya Properties Group Limited. Mr. Munyao did not explain who Sue Murarya is to the company and why service had to be to that individual and not the company.
23. The law requires that service of the statutory demand be effected on the company as the debtor. The purpose of the service of the statutory demand under the *Act* is to bring to the attention of the company that the creditor would be open to instituting a liquidation application if the amount of the debt in the statutory demand is not paid or the company does not take necessary steps to remedy the situation.
24. Liquidating a company is an act of last resort. That is why the law places a burden on the creditor to ensure that the statutory demand is served on the company, that the period of twenty-one days has lapsed but the company has not paid thus, the company is unable to pay its debts.
25. It is only after a statutory demand has been properly served, does the right to institute a liquidation application does crystallise. A liquidation application filed before a statutory demand has been served and the period of twenty-one (21) days has lapsed after service, is premature and incompetent.
26. From the foregoing, it is clear to this court that the statutory demand was not served on the company as required by law. In the circumstance, a statutory demand that has not been served or an improperly served statutory demand cannot be the foundation of a liquidation application.
27. Having considered the preliminary objection and arguments made on behalf of the parties, the preliminary objection is sustained to the extent that the statutory demand was not served on the company. The consequence is, that the liquidation application (petition) dated 14th January 2021 filed pursuant to the statutory demand dated 23rd October 2020, is incompetent and invalid.
28. In the premise, the petition is struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2023

E C MWITA

JUDGE

