



Marula Estate Limited v Tamani Construction Company Limited (Insolvency Notice E059 of 2023) [2024] KEHC 13674 (KLR) (Commercial and Tax) (5 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E059 OF 2023**

**JWW MONG'ARE, J
NOVEMBER 5, 2024**

BETWEEN

MARULA ESTATE LIMITED CREDITOR

AND

TAMANI CONSTRUCTION COMPANY LIMITED DEBTOR

RULING

1. Before the court is the Defendant's application dated 23rd June 2023 seeking an enlargement of time to file the instant Application and to set aside the Statutory Demand dated 11th May 2023. The application was premised on the grounds set out on the face of it and supported by the affidavit of Miriam Waruinu Kariuki a director of the Applicant.
2. The grounds on which the application is sought are that the Statutory Demand Notice is based on the decree of the High Court in Naivasha HCC No E009 of 2021 issued on 16th May 2022 which has been challenged by the Applicant. That the Statutory Demand is discriminatory as Natures Choices Fresh Produce Exporters Limited the 1st Defendant in Naivasha HCC No E009 of 2021 has not been served with the statutory notice.
3. In any case, the Applicant avers that the consent judgment in the said suit has been set aside by the court and thus, there is no basis upon which the statutory demand is anchored.
4. The Application was opposed and the Respondent filed the replying affidavit sworn by Benjamin G. Wainaina, the advocate in the conduct of the matter dated 14th July 2023. In the said Affidavit, the Advocate averred that the orders sought were untenable as an application seeking to set aside a consent judgment was not a ground for setting aside a statutory demand. It was argued that the statutory demand emanated from the consent judgment dated 16th May 2022, and by the terms of the said consent judgment the Applicant and another were to pay the Respondent a sum of Kshs



62,770,041.00/= plus costs of Kshs 1,200,000/= and interest at the rate of 3% per month. In the part performance of the consent, the Applicant paid a total sum of Kshs 10,000,000/= towards the settlement of the debt and therefore the debt was undisputed as there was no counterclaim, set-off or cross demand to the suit. It was further contended that the Applicant failed to set aside the statutory demand within the stipulated timelines.

5. The Advocate averred that an Insolvency Petition No 040 of 2023 had also been filed and as such the present Application had been overtaken by events, and in any event, the grant of the Application herein will render the petition nugatory, that the Applicant was insolvent and therefore unable to pay its debts.

Analysis and Determination

6. I have considered carefully the record, the averments, annexures, submissions and the oral highlights by counsels. I note that the following issues arise for determination by this court, to wit:
 - i. whether this court ought to extend the time within which to set aside the statutory demand and
 - ii. Whether the statutory demand ought to be set aside.

Whether this court ought to extend the time within which to set aside the statutory demand

7. Under section 95 of the [Civil Procedure Act](#), this Court is granted discretion to extend time fixed for doing any act as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. Order 50 Rule 6 of the [Civil Procedure Rules](#) also has similar provisions as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the Application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any Application to extend such time and of any order made thereon shall be borne by the parties making such Application, unless the court orders otherwise. “

9. For justice to prevail, the above provisions allow the court to exercise its discretion and enlarge time for a party as justice of the case may require. In the instant case, the law required that the Applicant ought to have filed an application to set aside the statutory demand within 21 days, but failed to do so, and continued to pay the amount disputed while it moved the High Court at Naivasha to set aside the consent judgment. I note the High Court in Naivasha has since set aside the consent judgment which was done way after the 21 days provided for setting aside a statutory demand had lapsed.
10. In my view, allowing the statutory demand to remain in force will cause prejudice to the Applicant who disputes the debt owed, and who has since paid part of the decretal amount pursuant to the consent judgment.
11. Furthermore, I note that this Court is now obliged by Article 159 (2) (d) of the [Constitution](#) to administer substantive justice without undue regard to procedural technicalities, and this suit thus



deserves to be heard on its merit. In exercise of my discretion, I therefore allow the application to enlarge time within which the Applicant was to set aside the statutory demand issued dated 11th May 2023.

Whether the statutory demand ought to be set aside

12. Regulations 16 and 17 of the *Insolvency Regulations*, outlines the grounds for setting aside a statutory demand and the procedure to be followed. The provisions state in part as follows:
 16. Application to set aside statutory demand
 - (1) The debtor may, apply to the Court for an order to set aside the statutory demand—
 - a. within twenty-one days from the date of the service on the debtor of the statutory demand; or
 - b. (b)if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier.
 - c(2) Subject to any order of the court under regulation 17 (7), time-limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the court.
13. Further, Regulation 17 (6) on Hearing of Application to set aside statutory demand states,
 - (6) 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 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.
14. The statutory demand emanates from the decree of the High Court in Naivasha HCC No E009 of 2021 that was issued on 16th May 2022, where the Applicant and another were to pay the Respondent a sum of Kshs 62,770,041.00/= plus costs of Kshs 1,200,000/= and interest at the rate of 3% per month. In compliance with the said decree, the Applicant paid the Respondent a sum of Kshs 10,000,000/= before setting aside the consent judgment on 17th July 2024. The setting aside of the consent judgment precipitated the filing of the instant Application. It is argued that in the absence of a judgment the statutory demand cannot stand.
15. In the case of *Re: Global Tours and Travels Limited* [2001] EA 195, the court concluded 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.”

16. Similarly, 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, stated 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 proceedings 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.”

17. Looking at the evidence adduced, I agree that the debt is disputed on substantial grounds. The decree which is subject to the statutory demand has also been set aside, I am thus satisfied that the Applicant has adduced sufficient grounds to set aside the statutory demand.

18. For these reasons cited above, I find and hold that present application dated 23rd June 2023 is merited and I allow the same with costs to the Applicant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 5TH DAY OF NOVEMBER 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Kinyanjui for the Applicant.
2. Mr. Wainaina for the Respondent.
3. Amos - Court Assistant

