



**Pan Africa Chemicals Limited v Juanco Limited (Insolvency Cause E029 of 2023)
[2024] KEHC 14373 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E029 OF 2023
A MABEYA, J
NOVEMBER 20, 2024**

BETWEEN

PAN AFRICA CHEMICALS LIMITED PETITIONER

AND

JUANCO LIMITED RESPONDENT

RULING

1. Before Court is the application dated 11/12/2023. It is brought under Order 52 rule 1, order 42 rule 6(3) of the *Civil Procedure Rules 2010*, section 1A,1B,3A and 63(e) of the *Civil Procedure Act* CAP 21 Laws of Kenya, section 384(1)(a) of the *Insolvency Act* 2015.
2. It seeks the striking out of the petition dated 2/9/2022 filed on 10/5/2023 with costs.
3. The application is based on the grounds set out on the face of it and the affidavit of Comfort Clemence Kalugendo on 11/12/2023. The applicant contended that the deputy registrar signed a statutory demand on 15/4/2021 notifying the respondent that a liquidation order will be filed by the petitioner if the debt of Kshs. 18,234,212/- was not paid by the respondent.
4. That the petitioner proceeded to file a petition on 10/5/2023 seeking to have the respondent company liquidated under the provisions of the *Insolvency Act* (“the Act”). The applicant challenged the statutory demand on the grounds that it was signed by the deputy registrar instead of the creditor or any person authorized by the creditor as stipulated by section 384(1) of the Act.
5. In this regard, the applicant urged that the petitioner could not rely on the statutory demand making it incurably defective and invalid. It is on this background that the applicant seeks to strike out the liquidation proceedings which it has termed to be null and void ab-initio. According to the applicant the petition is incompetent and incurably defective.



6. The respondent opposed the application vide a replying affidavit of Vijay P. Dawda sworn on 31/1/2024. He termed the application as an abuse of the court process meant to delay the proceedings. According to him, regulation 77B(2) of the Insolvency Regulations 2016 made it clear that the petition should be accompanied by a statutory demand in form 32E set out in the 1st schedule.
7. That the said form 32E provides that a statutory demand ought to be endorsed by the deputy registrar and not the creditor as alluded by the applicant. That the applicant could not therefore state that the statutory demand was defective or invalid since it was in the format set out in form 32E in the first schedule of the Insolvency Regulations.
8. The application was canvassed by way of written submissions which I have considered. In its submissions, the applicant buttressed the facts laid out in the supporting affidavit stating that, the petition was initiated by a statutory demand signed by the deputy registrar and not the creditor. That the statutory demand was inconsistent with the mandatory legal requirement and was therefore invalid.
9. The respondent/petitioner submitted that the Court did not have the jurisdiction to set aside a statutory demand served upon a debtor company as the applicant did not satisfy the conditions set out in section 17(6) of the regulations. That section 384(1)(a) of the Act provides the ingredients of a statutory demand and not the format. However, regulation 77B(2)(a) of the Regulations was clear that a statutory demand ought to be endorsed by a deputy registrar and not a creditor as alluded by the respondent.
10. It was further submitted that the petitioner having filed a separate suit in Insolvency Notice No E019 of 2021, the proper channel to challenge the statutory demand ought to have been in the said Insolvency Cause and not the instant suit. That the respondent had complied with legal process in insolvency proceedings and the format laid out in the regulations.
11. I have considered the application the response filed thereto and the submissions by Learned Counsel. The issue for determination is whether the petition dated 2/9/2022 should be struck out.
12. The applicant challenged the competency of the petition on the ground that the statutory demand dated 15/4/2021 was signed by the deputy registrar which was contrary to the provisions of section 384(1)(a) of the Act. The applicant argued that the deputy registrar was not a creditor or authorized by the creditor and could not therefore be permitted to sign a statutory demand. Additionally, it was contended that the petitioner could not rely on the statutory demand signed, dated and issued by the deputy registrar to initiate the proceedings.
13. In its rebuttal, the respondent observed that in view of regulation 77B(2) of the [Insolvency regulations 2016](#), the statutory demand should be in form 32E which states that the statutory demand should be endorsed by the deputy registrar.
14. Section 384(1)(a) of the [Insolvency Act](#) stipulates as follows: -
 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;
15. Regulation 77B which was introduced by the [Insolvency \(Amendment\) Regulations, 2018](#) provides: -



- 77B (2) The petition for liquidation shall be accompanied by the following documents –
- a) a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and
 - b) A statement of financial position in Form 32 as set out in the First Schedule where necessary.”
16. The question raised is whether section 384(1)(a) explicitly requires the statutory demand to be signed by the creditor, and whether the form of the statutory demand as outlined in Regulation 77B implies or requires such a signature.
17. *In Re Kipsigis Stores Limited* IP No 14 of 2016 (2017) eKLR Onguto J stated thus: -
- “Clearly, an application to set aside or vacate a statutory notice on the basis of invalidity should be looked at in the light of the full circumstances of the case, the notice should not be set aside on the basis of mere technicality. Rather regard should be had to all the circumstances including but not limited to whether the debt is owed as well as whether the overriding objective would be defeated by setting aside the notice. If no injustice follows from the consequences of non-compliance, then it would serve no purpose to set aside a statutory demand.”
18. *In the matter of Paleab Stores Limited* [2021] eKLR, the court observed that: -
- “Having looked at the Statutory Demand, I am satisfied that it complied with Section 384 of the Act and Regulation 77B (2)(a) of Regulations, 2016 as I have set out above and the said form needs to be signed by a Registrar/Deputy Registrar.”
19. Section 384(1)(a) of the *Insolvency Act* is the formal test for solvency. It states that a debt must be owed to the creditor and the written demand served by the creditor to the debtor which demand must be met within 21 days. It does not specifically state that the statutory demand must be signed by the creditor, but of course, such a demand must be signed by a person authorized to make a demand on behalf of the creditor.
20. On the other hand, Regulation 77B outlines the specific requirements for the form and content of a statutory demand. It states that the statutory demand ought to be in form 32E which should be endorsed by the deputy registrar. The same is not to be signed by the deputy registrar, the latter is only required to endorse the same.
21. The meaning of ‘endorse’ is; to countersign or resigning or approving. It doesn’t mean signing. It presupposes that the demand would have been properly signed by the creditor or on its behalf before the deputy registrar endorses the same. If it is signed by the deputy registrar alone, on what basis would the Court be making a demand on a debtor on behalf of a creditor. My view is, the requirement for endorsement is to certify the demand has been duly made and lodged with the Court. Period.
22. The foundation of a petition is a valid demand that has not been met within 21 days. If no valid demand has been made, the petition cannot stand. In the present case, the statutory demand was made by the deputy registrar. It was not endorsed but was duly signed by the deputy registrar which makes it invalid and incurably defective. To my mind that is not a technicality but it goes to the heart of the Insolvency proceeding. It is the very primary pleading that commences the proceeding.



23. In this regard, I find and hold that the statutory demand having purported to have been issued by the deputy registrar of this Court, the same is unsigned, its invalid and incurably defective and cannot stand. That is not a technicality but a substantive defect.

24. Accordingly, I find the application to be meritorious and I allow the same as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI ARB

JUDGE

