



**Africa Foresight Group Limited v Lipa Later Limited (Insolvency Notice E022 of 2023)
[2024] KEHC 15641 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E022 OF 2023**

JWW MONG'ARE, J

DECEMBER 6, 2024

BETWEEN

AFRICA FORESIGHT GROUP LIMITED CREDITOR

AND

LIPA LATER LIMITED DEBTOR

RULING

1. What is before this court for determination is the Debtor's Notice of Motion application dated 25/4/2023 filed pursuant to order 40 rule 2 of the Civil Procedure Rules, regulation 16(1) (a) and 17(6) of the Insolvency Regulations 2016 and section 384 of the *Insolvency Act* 2015. The Debtor seeks an order to set aside the Statutory Demand dated 21/2/2021.
2. The application is supported by the affidavit of MARK WANGAI and is based on the grounds that by a Statutory Demand dated 21/2/2023, the Creditor sought the payment of USD 13,516.00 failing to which it would commence liquidation proceedings against the Debtor; that vide an engagement letter dated 25/4/2022, the Debtor retained the Creditor to prepare a report that would establish it as a leader in the buy-now-pay-later space in Africa but argues that however the Creditor failed to adhere to the terms of the engagement letter.
3. The Debtor averred that due to the Creditor's renegeing on the terms of the engagement letter, it sought a refund of the said sums and argued that the report provided by the Creditor was substandard and not fit for purpose as per the terms of the contract set out in the Engagement letter and therefore the Creditor was not entitled to any payment or at all.
4. The Debtor asserted that it is a solvent entity which is able to pay its debts and the only reason it had failed to pay the demanded debt was because the same was disputed. It argued that therefore the Statutory demand as issued was premature.



5. In opposition to the application, the Creditor filed grounds of opposition dated 3/5/2023 and a replying affidavit sworn on 22/5/2023 by YASMIN KUMI, its Chief Executive Officer.
6. The Creditor asserted that the application lacks merit as the Debtor had failed to demonstrate that it was not truly indebted to the Creditor and that there were no genuine grounds for disputing the existence of the debt owed to the Creditor.
7. The Creditor's case was that the Debtor failed to honour its contractual obligations and delayed the completion of the report; that after completion of the project, it issued a fee note to the Debtor seeking payment of USD 13,516 however the Debtor failed to pay the amount and that the parties explored settlement discussions on various dates in which the Debtor admitted the debt and made various settlement proposals to pay the outstanding balance of USD 13,516.

Analysis and determination

8. The Debtor and Creditor filed written submissions dated 8/3/2024 and 14/9/2024 respectively. The court has analysed and considered the same together with the pleadings and annexures filed by the parties.
9. Arising from the pleadings filed herein, the court notes that the sole issue for determination is whether the court should set aside the statutory demand dated 21/2/2021.
10. A background of this matter is that the parties herein entered into an agreement, through an engagement letter dated 25/4/2022, whereby the Debtor engaged the Creditor to develop a report that would establish the Debtor as a leader in the Buy-Now-Pay-Later space in Africa. A copy of the engagement letter is produced as an annexure in the Creditor's replying affidavit.
11. Vide a statutory demand dated 21/2/2023, the Creditor demanded the sum of USD 13,516.00 from the Debtor as the amount due from the engagement letter dated 24/4/2022.
12. Through the instant application, the Debtor prays to have the Statutory Demand set aside on the basis that the Creditor is not entitled to any payment under the engagement letter it breached its terms.
13. On the other hand, the Creditor also claimed that the Debtor failed to honour its contractual obligations under the engagement letter for various reasons which led it to delay in the completion of the report.
14. Regulation 16 of the Insolvency Regulations 2016 states:
 - “ 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. If the demand has been advertised in a newspaper, from the date of the advertisement's appearance, whichever is earlier.”
15. Regulation 17(6) of the Insolvency Regulations 2016 provides the circumstances where the court may grant the application to set aside a statutory demand:

“ 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 the grounds, that the demand ought to be set aside.”

16. In *Flower City Limited v Polytanks & Containers Kenya Limited (Insolvency Cause 033 of 2020)* [2021] KEHC 34 (KLR), Mativo J (as he then was) held:

“A reading of the above provision leaves no doubt that the existence of a genuine dispute regarding the debt is a sufficient ground for the court to set aside a Statutory Demand. The policy underlying this provision is that the Statutory Demand procedure should not be used to coerce a person to pay a disputed amount. Put differently, the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. The court must be satisfied that there is a claim that may have some substance. Talking about a claim that has substance, it is important to mention that it is often possible to discern the spurious, and to identify mere bluster or assertion. A dispute that has substance should have a sufficient objective and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile.

10. 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.’

...

15. The principles of law discernible from decisional law are clear that if a Debtor has a genuine and substantial grounds for disputing the debt, this court should not allow the Statutory Demand to stand but should instead dismiss it so that the parties can determine any dispute in a civil court. The Debtor bears the onus of proof to demonstrate that there are genuine and substantial grounds for disputing the debt. The true test is: - is there a bona fide dispute? Meaning; Is there a real dispute? That is, a real and not fanciful or insubstantial dispute about the debt. Alternatively, the test can be defined as: Is the debt disputed upon substantial grounds? The true question is, and always is: Is there a substantial dispute as to the debt upon which the Statutory Demand is allegedly founded? Something more than mere assertion is required because if that were not so then anyone could merely say he did not owe a debt.”



17. In the case of Universal Hardware Limited v African Safari Club Limited,^{the} Court of Appeal summarised the position regarding striking out a petition on account of a disputed debt as follows: -

“The principle as I understand it 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.”

Guided by the authorities above, it is my considered view that the court will only set aside a Statutory Demand if the Debtor has illustrated to the court that the debt is genuinely disputed or that it has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand.

18. In this case, the parties pursued a settlement for the payment of the amounts demanded whereby the Debtor acknowledged being indebted to the Creditor and made proposals to pay the outstanding balance of USD 13,516/-. This is evidenced by the email correspondence between the parties as produced in the Creditor’s replying affidavit as ‘YK-1’ at pages 29 and 39-41.
19. In the emails between the parties, the Debtor did not deny its indebtedness to the Creditor. In one of the emails, the Debtor requested the Creditor to re-send the invoice in order for the payment to be processed.
20. It is therefore clear to me that the amount demanded in the statutory demand is in fact not disputed and the Debtor is estopped from claiming so having admitted to the debt.
21. The upshot of the foregoing is that the Debtor’s instant application to set aside the Statutory Demand lacks merit and substance. The said Application is therefore dismissed with costs granted to the Creditor.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI VIRTUALLY this 6TH DAY of DECEMBER 2024

J. W. W. MONGARE

JUDGE

In The Presence Of

Mr. Otiende for the Creditor.

Mr. Kisinga for the Debtor/Applicant.

Amos- Court Assistant

