



REPUBLIC OF KENYA



Advocates v Japheth Savwa Asige t/a Asige Kaverenge & Anyanzwa Advocates (Insolvency Cause E017 of 2024) [2024] KEHC 15263 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
INSOLVENCY CAUSE E017 OF 2024
JK NG'ARNG'AR, J
DECEMBER 4, 2024**

BETWEEN

**JAPHETH SAVWA ASIGE T/A ASIGE KAVERENGE & ANYANZWA
ADVOCATES APPLICANT**

AND

**JAPHETH SAVWA ASIGE T/A ASIGE KAVERENGE & ANYANZWA
ADVOCATES CREDITOR**

RULING

1. The Applicant/Debtor filed an application dated 13th September 2024 seeking to set aside the statutory demand dated 21st August 2024 by the Creditor/Respondent. The application is based on grounds on its face and supported by the annexed affidavit of the Applicant that the Statutory Demand dated 21st August 2024 came into possession of the Debtor/Applicant on 12th September 2024 after having been discharged from Premier Hospital where the Debtor/Applicant underwent an operation. That the Applicant has paid Kshs. 5,000,000 in compliance with the decree made in Mombasa High Court Civil Case No. 272 of 2004 (O.S). That the Applicant is disputing the validity of the Statutory Demand because no such amount is owing as demanded or at all, and that the Statutory Demand is made mala fides and is contrary to the object of the [Insolvency Act](#).
2. The application was opposed by a Replying Affidavit sworn on 1st October 2024 by Eunice W. Njeru, counsel for the Creditor/Respondent whom they had been acting for in the suit where the debt, the subject matter of *this suit*, arose to wit *Mombasa High Court, Civil Case No. 279 of 2004 (OS) – Leisure Lodges Limited v Japheth S. Asige and S.O. Anyanzwa T/A Asige Kaverenge & Anyanzwa Advocates*. That the firm represented the Creditor/Respondent in the Court of Appeal where the judgment of the High Court was challenged and the appeal was dismissed with costs on 13th May 2022. That the Creditor/Respondent is the Decree Holder pursuant to the ruling and order given on 12th October 2018 which decree has not been satisfied to date. That pursuant to the ruling and order dated 12th



- October 2018, the Debtor/Applicant was ordered to pay the Creditor/Decree Holder the amount of Kshs. 5,000,000 together with costs and interest at commercial rates from 15th February 2001 when the money was paid until payment in full.
3. The Creditor/Respondent averred that the firm appealed to them to waive the cost of the suit and of the appeal in the belief that the Debtor/Applicant would pay the amount owed without delay. That they accepted to waive the costs and the firm wrote to court to that effect. That however, from 13th May 2022 when the appeal was dismissed to date, the Debtor/Applicant made sporadic payments and has not shown any willingness to pay the amount owed in full despite demands. That the Creditor/Respondent has made numerous attempts to execute the decree against the Debtor/Applicant but they have not found any attachable property of the Debtor/Applicant hence the necessity of instituting the insolvency proceedings herein.
 4. The Creditor/Respondent further stated that the Debtor/Applicant has not paid the amount of Kshs. 14,658,500 which was still owing as of September 2024 and has not made any arrangements to pay. That the Debtor/Applicant has not demonstrated any reasonable justification for this court to set aside the Statutory Demand and the Creditor/Respondent therefore urged the court to dismiss the application dated 13th September 2024 which was filed out of time with costs to the Creditor/Respondent.
 5. The Debtor/Applicant filed a Further Affidavit sworn on 31st October 2024 that the Creditor/Respondent was represented by the firm of E.W. Njeru & Company Advocates over 20 years ago and it is not disclosed whether the firm of Wanja & Kibe Advocates are now authorized and represent them. That the order attached to the ruling marked as Exhibit 'EWN 1' was extracted and executed ex parte without the knowledge or any reference to the Respondents as required under the Rules of the Civil Procedure. That the Debtor/Applicant has paid in full Kshs. 5,000,000 to the firm of Wanja & Kibe Advocates and which though is denied by Eunice w. Njeru is however acknowledged as shown in the Debtor/Applicant's account exhibited and marked 'EWN' dated 17th October 2024 attached to the Affidavit sworn by the same Eunice W. Njeru Advocate. The Debtor/Applicant further stated that except for the letter dated 11th March 2024 shown as exhibit marked 'EWN 2', he is unaware of any warrants and/or application for execution which allegedly were made and not served upon him nor filed in court. That no decree has ever been served upon him by the Creditor/Respondent or at all and the allegations that he failed to pay are not true.
 6. The Debtor/Applicant averred that the Statutory Demand dated at Nairobi on 21st August 2024 filed herein by M/s Wanja & Kibe Advocates is made against him personally as opposed to the judgment and order which was made against Japheth S. Asige and S. O. Anyanzwa t/a Asige Keverenge & Anyanzwa Advocate. That no order or decree by the court has been shown to have issued against him personally. That no claim to pay Kshs. 16,800,000 to the Creditor/Respondent has ever been made against him as stated in the Statutory Demand dated 21st August 2024 and that M/s Wanja and Kibe are not the Judgment/Decree Holder in the Originating Summons as disclosed in the Statutory Demand. That the Statutory Demand alleged Kshs. 16,800,000 has not been paid yet at paragraph 14 of Eunice W. Njeru's affidavit, Kshs. 14,650,000 is claimed demonstrating that the Statutory Demand made is guess work and mere conjecture.
 7. The Debtor/Applicant avers that by way of Counterclaim, it is within his knowledge that the then interim liquidators of the Creditor/Respondent namely Hezekiah W. Gichohi and George M. Kimeu who remitted to the firm of Asige Kaverenge & Anyanzwa Advocates Kshs. 5,000,000 as their fees during the management of the Creditor/Respondent while in interim liquidation, were owed Kshs. 95,499,871 which the interim liquidators claimed in Milimani Commercial Court, Civil Suit No. 611



- of 2007. The Debtor/Applicant urged the court to allow the application and vacate and set aside the Statutory Demand dated 12th August 2024 against him with costs.
8. The application was canvassed by way of written submissions. The Debtor/Applicant filed submissions dated 20th November 2024 while the Creditor/Respondent filed submissions dated 5th November 2020.
 9. I have considered the application dated 13th September 2024, Affidavits thereto and submissions by the parties. The issues for determination are: -
 - a. Whether the application was filed out of time
 - b. Whether the Statutory Demand should be set aside
 10. On the first issue, the Debtor/Applicant submitted that a Statutory Demand was issued against him seeking for payment of Kshs. 16,800,000 pursuant to a judgment obtained in Mombasa High Court Civil Case No. 27 of 2004 (OS). That the Debtor/Applicant came into possession of the Statutory Demand on 12th September 2024 and filed the application herein on 13th September 2024 within the prescribed time of 21 days.
 11. Section 16 (1) (a) of the [Insolvency Regulations](#), 2016 provides as follows: -
 1. The debtor may, apply to the Court for an order to set aside the statutory demand within twenty-one days from the date of the service on the debtor of the statutory demand
 12. Upon perusal of evidence on record, this court confirms that the Statutory Demand is dated 21st August 2024 and the same was served upon the Debtor/Applicant on 23rd August 2024. This court is satisfied that the application was filed within the prescribed time frame. The Creditor/Respondent's argument therefore lacks basis.
 13. On whether the Statutory Demand should be set aside, it is not in dispute that the ruling and order given on 12th October 2018 required the Debtor/Applicant to pay the Creditor/Respondent an amount of Kshs. 5,000,000 together with costs and interests. It is also not in dispute that the Creditor/Respondent agreed to waive the costs.
 14. The Creditor/Respondent states that the Debtor/Applicant has not paid the amount of Kshs. 14,658,500 which was still owing as of September 2024. That the Debtor/Applicant has made sporadic payments and has not showed any willingness to pay the amount owed in full despite demands.
 15. Regulation 17(6) of the [Insolvency Regulations](#), 2016 sets out the grounds upon which the Court can set aside a statutory demand as follows: -
 - 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.



16. The Court in *Flower City Limited v Polytanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) set out the parameters to be established by a debtor to warrant the setting aside of a statutory demand as follows: -

“ 11. The rationale for applications of this nature is to enable the debtor to satisfy the court that he genuinely disputes the debt. Simply put, a debtor must demonstrate the existence of a genuine dispute. Though it may not be possible to provide a closed list of the elements of a genuine dispute, the applicant must:

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- i. Show a plausible contention requiring investigation;
- ii. Be bona fide, genuine and real;
- iii. Be in good faith and show a prima facie plausibility;
- (iv) Truly exist in fact, and contain a serious question to be tried;
- iv. Be something more than mere bluster or mere assertion;
- v. Be a claim that may have some substance;
- vi. Have a sufficient degree of cogency to be arguable;
- vii. Have objective existence; and
- (ix) Have sufficient factual particularity.

12.A genuine dispute therefore should not: -

- a. Be spurious, hypothetical, illusory or misconceived;
- b. Be plainly vexatious or frivolous;
- c. Be so devoid of substance that no further investigation is warranted;
- d. Be merely spurious claim, bluster or assertion; and
- e. Be merely fanciful or futile.”

17. The Debtor/Applicant has furnished this court with evidence of payment and this court is satisfied that the same is sufficient to warrant the setting aside of the Statutory Demand.

18. In consideration of the above, I find that the Debtor/Applicant has demonstrated reasonable grounds for disputing the debt. The application dated 13th September 2024 is therefore allowed. No orders as to costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF DECEMBER 2024

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Mr. Asige Advocate for the Debtor/Applicant

Mr. Kibe Advocate for the Creditor/Respondent



