



**Oxyplus Intrenationa Limited v Redavia Kenya Asset Limited (Insolvency Cause E087 of 2024)
[2024] KEHC 15779 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E087 OF 2024**

**BM MUSYOKI, J
DECEMBER 13, 2024**

BETWEEN

OXYPLUS INTRENATIONA LIMITED APPLICANT

AND

REDAVIA KENYA ASSET LIMITED RESPONDENT

RULING

1. The applicant has vide a notice of motion dated May 15, 2024 asked this court to grant the following orders;
 1. The statutory demand dated 30th April 2024 be set aside.
 2. The costs be provided for.
2. The statutory demand the applicant seeks to have set aside is dated 30th April 2024. In the demand, the respondent was requiring the applicant to pay a sum of USD 40,843.60 which sum was said to be owing as premium arrears for a solar plant leased to the applicant.
3. The applicant has based the application on the grounds that the debt is disputed and not owing. The grounds raised by the applicant can be crystalized to argument that the leased solar plant did not serve the purpose for which it was leased which was to reduce the applicant's electricity power bills. The application is supported by affidavit of Panna Chauhan.
4. The applicant avers that it entered into the leasing agreement with the appellant and has in proof of the same attached an undated and unsigned agreement as its exhibit PC-2. According to the applicant, the respondent started billing it for a constant fee of USD 1,719 even before the plant was commissioned which it questioned but the issue was not resolved or given attention by the respondent. It adds that



the respondent continued billing it despite there being dispute on the efficiency and efficacy of the solar plant.

5. The applicant argues that the inefficiency of the plant was evidenced by the fact that its electricity consumption, going by the bills it continued receiving from Kenya Power & Lighting Company, was still high meaning that it was not saving on energy consumption thereby negating the purpose for which it leased the plant. In proof of its position on this claim, the applicant has attached correspondence between the parties and a summary of its electricity consumption between June 2022 and March 2024. According to the applicant, its failure to pay the premium is not out of inability to pay its debts but due to unresponsive behaviour of the respondent on issues raised by the applicant.
6. In reply to the application, one Mr. Victor Senkomo an engineer working with the respondent swore a replying affidavit dated 18th June 2024. The deponent accuses the applicant of non-disclosure of material facts and giving misleading information to this court. The respondent has produced what it refers to the true lease agreement signed by the parties on 20-05-2021. He depones that the bills sent to the respondent were as per the agreement as the commissioning of the plant was to be done in phases in which the respondent gave discounts pending full commissioning. The respondent has produced what it refers to commercial operations notices dated 30-12-2021, 23-02-2022, 17-05-2022 and 25-05-2022 which are all shown to have been signed by both parties. The deponent adds that the amount demanded is due and avers that the applicant had been paying the bills always in arrears. He has also exhibited evidence that the applicant issued some cheques which were unpaid. He has also exhibited a copy of instructions of the applicant asking the respondent not to deposit some other cheque because its account did not have sufficient funds. According to the respondent, the comparison of power consumption by the applicant shows that the same was much low during the time when the plant was in use meaning that the plant helped the applicant to save on energy bills.
7. I have gone through the pleadings of the parties and submissions. The applicant's submissions are dated 17th September 2024 while the respondent's submissions are dated 6-10-2024. The appellant submits that on account of numerous unresolved concerns coupled with the consistent high electricity bills and lack of positive response from the respondents, the debt claimed is highly disputed and, in the circumstances, substantial enough to justify setting aside of the statutory demand.
8. What I gather from the stand taken by the applicant is that the respondent is demanding more than what is due to it even though the applicant has not told the court what is correctly and rightly due to the respondent. Regulation 17(6) of the Insolvency Regulations which provides for setting aside of a statutory demands states as follows;
 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.



9. I do agree with the respondent that the application herein can only fit in ground b and d. For the applicant to succeed in this application, it must therefore satisfy this court either that the debt is disputed in a substantial manner or give other convincing reasons that the demand should be set aside.
10. It is notable that the applicant raised concerns on the high consumption of electricity and not faults or performance of the solar plant. In other words, the applicant has not pointed out the malfunction of the solar plant. One would have expected the applicant to have also raised the issue of the consumption of electricity power with Kenya Power & Lighting Company if indeed there was any question about the usage. There was no audit of the plant to ascertain its performance yet the applicant continued using it and paying rent in arrears.
11. The above notwithstanding, I have examined the breakdown of consumption of electricity power exhibited by the applicant as annexure PC-5. From the said break down, it is indisputable that between June 2022 and December 2023, the applicant was consuming between 13,754 KWH and 52,895 KWH. Immediately after the solar plant was shut down in January 2024, the consumption shot up to between 68,963 and 82,429 between January 2024 and March 2024. This is the applicant's own document which resonates with the respondent's comparison charts produced as annexure 'VS7' in its replying affidavit. This evidence is contrary to the applicant's allegations that the electricity power consumption remained high even with the installation of the solar plant.
12. The applicant also submits that the amount charged by the respondent remained constant regardless of whether or not the solar plant was in operation. To counter this, the respondent has averred that the charges were as per the agreement between the parties. First, it was on pro rata basis until the plant was fully commissioned when it resorted to the contractual charge of USD 4,084.36 inclusive of VAT. I have read the terms of the agreement exhibited by the respondent which to me is the only reliable agreement as the one exhibited by the applicant is neither signed nor dated. In the said agreement, it is clear to me that the monthly premium payable for the leasing the plant was a flat rate of USD 3,521 which was not dependent on the use or idling of the plant. The amount of energy consumed from the plant cannot therefore be a determinant of whether there is substantial dispute between the parties.
13. The applicant claims that the debt is disputed because the respondent started billing it even before the full commissioning was done. I have gone through the replying affidavit and correspondence between the parties and I take position therefrom that the respondent was justified in billing before the full commissioning. There is evidence that after installation of the plant, the respondent was to commission it in phases. It is from the affidavits of both parties that at the time the respondent issued its first invoice, the applicant was already using the plant. The applicant has not convinced this court that the plant was not operational or it at any given time failed to function. The applicant has not denied using the plant during the billed period. If the first invoice were the issue, then the applicant would not have paid subsequent bills. The applicant only raised the issue of the first invoice upon service of the statutory demand. The correspondence the applicant has made reference to in a bid to show that there is a dispute do not raise any complaint about the respondent's first invoice but speak in general about consumption of electricity power even after the installation of the plant.
14. I would have been convinced that the applicant was genuine about the consumption if it had pointed out to me any efforts it made to identify where the problem of the high bills from Kenya Power & Lighting Company was coming from. The problem could as well have been from the electricity company. The respondent could not be expected to be in control of the billing by Kenya Power & Lighting Company. Blaming the respondent for the electricity power company's power bills is an escapist attempt to demonstrate a dispute where none exists.



15. In my view, for the applicant to succeed on this ground, he must be able to show that what he puts forward as a dispute is capable of passing the test of a viable, prima facie and plausible defence and not mere denials or general statement without substantiating its stand. In my analysis, the applicant's argument on this ground does not have any basis and I dismiss it. In *Tripple Nine Associates Limited v Nextgen Office Suites Limited (2021) KEHC 13350 (KLR)*, it was held that;

‘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. A court properly directing its mind to the law, authorities and facts presented before it is capable to discern whether a dispute is spurious, and to identify whether it is a 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.’

16. As a consequence of the above, I agree with the respondent that there is no substantial dispute on the debt. The respondent is attempting to create confusion in a clear and straight forward matter. The plant was installed and leased at an agreed premium which has not been paid in full. The applicant has not given a breakdown of what it deems as due to the respondent. It has not explained the issues it had with any of the invoices other than stating that the first bill of USD 1,719 was premature. Instead, it has given and raised general issues about the commissioning of the plant and consumption of electricity power which to me, do not raise a substantial dispute.
17. The other issues raised by the applicant in its submissions is that the agreement between the parties had an arbitration clause and as such this matter should not be litigated in court before the option of arbitration is exhausted. In reply to that, the respondent has submitted that there is no dispute capable of being referred to arbitration as this is a matter of simple recovery of undisputed debt. In my assessment, there is no dispute in this matter which is capable of being referred to arbitration.
18. A statutory demand opens door to proceedings of insolvency or bankruptcy against the debtor. I do not think that such proceedings can be subjected to arbitration by previous agreement of the parties. If I were to stay this matter and refer it to arbitration, the respondent will be engaging with an insolvent entity thereby defeating the purpose of insolvency proceedings. In the circumstances, this court cannot decline jurisdiction on insolvency matters on strength of existence of an arbitration clause. Even the nature of the arbitration clause suggests that insolvency of the respondent would result to termination of the agreement.
19. The conclusion of the above is that I find no merit in the application dated May 15, 2024 and the same is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Gekonge for the respondent for Mr. Miss Odwa for the applicant.

