



REPUBLIC OF KENYA



KENYA LAW
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**Smruti Builders Company Limited v Southside Suites Limited (Insolvency Cause E055 of 2024)
[2024] KEHC 15722 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E055 OF 2024
BM MUSYOKI, J
DECEMBER 13, 2024**

BETWEEN

SMRUTI BUILDERS COMPANY LIMITED CREDITOR

AND

SOUTHSIDE SUITES LIMITED DEBTOR

RULING

1. This matter came before this court on 9-10-2024 for hearing of the debtor's application dated 20-03-2024. On the said date, Mr. Shah appeared for the creditor while there was no appearance for the debtor. The parties had filed their written submissions and the court reserved the matter for ruling on the said application for 13-12-2024. While the court was in the process of writing the ruling, the debtor filed an application dated 15-11-2024 seeking the following orders;
2.
 - a. This application be certified as urgent and service be dispensed with in the first instance.
 - b. That this Honourable Court be pleased to arrest its ruling in the current suit slated for 13th December 2024 pending hearing and determination of this application.
 - c. That this Honourable Court be pleased to refer this matter to court annexed mediation.
 - d. This Honourable Court be pleased to issue further and better orders as shall meet the ends of justice.
 - e. The costs of this application be provided for.
3. The application was supported by an affidavit of Paul Chapa Onduso dated 15th November 2024. The debtor's plea is based on the fact that there is a pending suit in this matter the same being Commercial



suit number E053 of 2024 which the applicant claims involves the same subject matter as in this suit. The applicant states that it filed in the commercial suit an application dated 23rd May 2024 seeking to consolidate this cause with the said commercial suit. The debtor is silent on the outcome of the application but avers that the commercial suit has been referred to mediation and according to it, that is a ground for referring this cause to mediation.

4. The respondent has opposed the application through a replying affidavit sworn by one Devendra Keshra Rabadia on 20th November 2024. The deponent tells the court that the two matters are completely different as the commercial suit seeks an injunction to restrain the creditor from encroaching or evicting the debtor from flats on L.R. number 209/3773. He adds that the application for consolidation of the two matters was declined by Honourable Justice Visram on 12th August 2024.
5. I have had an occasion to look at the pleadings in the commercial suit and I discern therefrom that the two matters are different as this cause is an insolvency proceedings emanating from a statutory demand while the commercial suit involves the parties' rights over L.R. Number 209/3773. Upon issuance of the statutory demand, the debtor filed application dated 20-03-2024 seeking to set aside the demand. This is the application which was coming for ruling on 13-12-2024.
6. The conditions for setting aside statutory demand are in my opinion different from the cause of action in the commercial suit. I agree with the creditor that the issue of whether Kshs 10,000,000.00 is due to the applicant as undisputed debt is the subject of the application dated 20-03-2024. If the creditor is of the view that the statutory demand was not justified or merited, it should ventilate its position in the application dated 20-03-2024.
7. The debtor has not told the court whether Honourable Justice Visram declined or granted its application for consolidation of the two causes. That notwithstanding, I believe that if there was an order for consolidation, the debtor would have exhibited the same and indeed this application would not have been necessary since the commercial matter has already been referred to mediation.
8. The effect of delaying this matter by virtue of existence of the commercial suit will be tantamount to circumventing the order of Justice Visram in which he declined to consolidate the two matters. Further, I find that the issue of indebtedness to the tune of Kshs 10,000,000.00 is different from what is being litigated over in the commercial suit. It is also my view that in the prevailing circumstances, this court cannot force the creditor to go for mediation. Parties are however at liberty to engage in negotiations on settlement if they so wish.
9. In view of the above, it is my finding that the application dated 15-11-2024 lacks merit and the same is dismissed with costs to the creditor.
10. Due to the interruption in writing the ruling for the application dated 20-03-2024 by the current application, this court was not able to complete the ruling as earlier planned. The said ruling shall be delivered on a date to be fixed after the delivery of this ruling.

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. Shah for the creditor and Mr. P.C Onduso for the debtor.

