



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
INSOLVENCY NOTICE NO. E068 OF 2020
IN THE MATTER OF THE INSOLVENCY ACT
AND
IN THE MATTER OF NAIROBI BUSINESS VENTURES LIMITED
NAIROBI BUSINESS VENTURES LIMITED APPLICANT
-VERSUS-
GREENHILLS INVESTMENT LIMITED RESPONDENT
RULING

1. The application before Court is dated 26/1/2021 and is brought under the *Insolvency Act 2015, Regulations 16,17(1), 6(c) and (d) of the Insolvency Regulations, 2016*.
2. Prayer nos. 1 to 5 of the Motion application are spent. The remaining prayer for determination is the one seeking to set aside the statutory demand for Kshs. 5,238,436.70 issued by the respondent to the applicant and published in the Daily Nation Newspaper on 22/12/2020.
3. The application is supported by the affidavit of **Vasu Abutola** sworn on even date. It is averred that the respondent served the applicant with a statutory demand notice under *Section 384 of the Insolvency Act* by way of advertisement published in the Daily Nation newspaper; that the statutory demand relates to an alleged debt of Kshs. 5,238,436.70 claimed by the respondent as rent and accrued interest.
4. The applicant contends that on 3/12/2018 and 17/12/2018, auctioneers instructed by the respondent proclaimed and attached its property over the same claim. That to date, the respondent has never given an account of the said attachment and sale; that the applicant's assets at the time of proclamation were valued at Kshs. 21,607,403/= on an alleged debt of Kshs. 3,529,247/=. It was therefore unclear how the current debt had accrued to Kshs. 5,238,436.70.
5. That it has a set-off or counterclaim for the proceeds of the attachment and sale of its goods. That the applicant is a public company under the Nairobi Stock Exchange and the publication of the notice has gravely affected its business and unless the prayers in the application are granted, the respondent may at any time file and advertise an insolvency petition based on the disputed debt which would have irreversible negative effects to its business.
6. In opposition, the respondent filed a replying affidavit sworn on 6/2/2021 by **Shabnam Yusuf** its legal officer. It was contended that the applicant has admitted that the statutory notice was served upon it on 22/12/2020. That in the circumstances, the application was filed out of the statutory period without leave of court and should therefore be struck out.
7. That the distress for rent referred to by the applicant was carried out lawfully and accounts thereof given; that the rental debt continues to grow and the applicant has always been made aware of the accrued debt.
8. The respondent further contends that the applicant is not sincere and its averments on its income are not true in that, in February 2018 the applicant had stated that its annual sales for six shops was Kshs. 8,000,000/-. It cannot therefore be true that it had a stock of approximately Kshs. 18,000,000/- in one shop in 2018 as alleged in its annexure 'VA3'. That when the proclamation and attachment were done in December 2018, the applicant's authorized agents were present and signed the proclamation notices and did not raise any issue with the attachment and sale.

9. It is contended that if the applicant is liquid and solid as it claims, it would have paid rent due in time. That the applicant had earlier issued the respondent with cheques which bounced upon presentation. That the fact that the applicant has movable and immovable assets is not a ground for setting aside the statutory notice. There was no proof of any counterclaim, set-off or cross-demand which equals or exceeds the amount specified in the statutory demand.
10. In the supplementary affidavit of **Vasu Abutola** sworn on 22/2/2021, the applicant denied being a current tenant of the respondent. That its tenancy terminated in December 2018 when it was forcefully evicted and its goods attached to recover the disputed rent. That the application had not been filed out of time since there is the excluded period between 21/12/2020 and 13/1/2021 under the law. That the respondent should not have continued to bill it after December 2018.
11. The Court has considered the record, the averments, annexures and submissions of the parties. The first issue is whether the application was filed within time.
12. The statutory demand is dated 22/12/2020 while the application was filed on 27/1/2021. **Under regulations 16(1) of the Insolvency Regulations**, the debtor may apply to court for an order to set aside a statutory demand within 21 days from the date of service on the debtor. If the demand has been advertised in a newspaper, from the date of the advertisement.
13. The applicant sought refuge under **Order 50 Rule 4 of the Civil Procedure Rules**. That provision excludes the period between 21st December and 13th January in any given year in computing time under the rules. The reason why the rules exclude that period is that traditionally, this Court goes on vacation during that period of festivities. The legislature foresaw that during that period, very little court business, if any could be undertaken.
14. In this regard, I hold that the excluded period under **Order 50 of the Civil Procedure Rules** extends to filing or delivery of pleadings in Court. The present application is a pleading and therefore the excluded period applied to it. Accordingly, the application was filed within time.
15. The second issue for determination is whether there is a debt owed to the respondent to justify the issuance of the Statutory Demand.
16. Under the Insolvency Act, a statutory demand is defined as *a demand for payment of a debt*. The applicant has sought to have the statutory demand published in the Daily Nation on 22/12/2020 set aside on grounds that the debt claimed by the respondent does not exist. On the other hand, the respondent asserts that the applicant is indebted to it on account of unpaid rent which has accrued.
17. The dispute herein originates from a landlord-tenant relationship between the applicant and respondent. The applicant rented out **shop number 133 located on Nairobi Block 91/418** from the respondent. A dispute as to the payment of rent arose. The applicant claims that it was a tenant of the respondent until December 2018 when it was forcefully evicted from the premises. The respondent denies this and asserts that the applicant was not evicted as the lease remained in force until August 2020 when it expired. The respondent claimed that it only distressed for rent.
18. The applicant produced the proclamations from Gallant Worldwide Investments Auctioneers as 'VA-2' dated 3/12/2018 and 17/12/2018, respectively. The proclamations show a schedule of the moveable items that were distrained. These are said to have been sold by the auctioneer and no account thereof was rendered.
19. The respondents response thereto was to produce annexure 'SY1' which is a statement of accounts as of August 2020. The same indicated that a sum of Kshs. 580,000/- was recovered from the auction sale and credited to the applicants' rent account.
20. The question that begs is, was the amount allegedly recovered from the sale communicated to the applicant in time or at all? There is no evidence to show that the respondent informed the applicant what had been recovered earlier than either August, 2020 a period of over 18 months, or even later. As a result, the applicant was not given an opportunity to either challenge the account or accept the same.
21. The applicant produced a valuation of its stocks which it alleged was valued in millions as at the date of proclamation. The respondent doubted the valuation report but did not offer any valuation in rebuttal. It should be recalled that the respondent sold the applicants' assets in or about January, 2019. It must have known the exact amount that was recovered then. It is expected that in the event there was shortfall, the respondent would have immediately demanded payment for the balance. This it never did.
22. There is no evidence to show that there was any demand made on the applicant after the sale of its assets. If there was any shortfall, why was the balance not demanded immediately thereafter? The only demand made on record is one dated 4/8/2020, It was for Kshs. 3,537,012/- and not Kshs. 5,238,436/70. That demand was made 18 months after the sale of the applicant's assets.
23. On record, there is also a statement of account dated 31/8/2020. It shows that the total outstanding was Kshs. 6,859,186/50 as at that date. What is the correct amount due? A mere entry in a statement of account is not evidence of the actual amount realized from an auction sale. Much is needed to prove that fact. There is no evidence from the auctioneer to show when the sale was conducted, the amount recovered or the amount remitted to the respondent. The burden laid with the respondent and it failed to discharge it.
24. The applicant alleged and insisted that it was evicted from the premises in December, 2018. The respondent retorted that the lease agreement lapsed in August 2020. The lease agreement was not produced. There was no averment that the premises Shop No. 133 was in the occupation of the applicant or remained unoccupied until the alleged August, 2020.
25. While the respondent had the right to distrain for rent and recover any arrears thereon, it had a corresponding duty to account for the amount recovered. Having not accounted for the same, the applicant was entitled to assume that the entire rent due had been liquidated.

Indeed, the applicant believes that it is the respondent who owes it from the proceeds of the sale of its assets.

26. In Xplic Insurance Company Limited v Musyimi Paul Maingi t/a Maingi Musyimi & Associates Advocates & another [2020], Majanja J held: -

“Although the application was brought under Regulations 16 and 17 of the Regulations, I am of the view that the court still retains inherent jurisdiction to strike out a statutory demand that is not well founded and amounts to an abuse of the court process notwithstanding that a specific provision does not exist in the Rules. The factors underlined in Regulation 17(5) of the Regulations governing the exercise of discretion to strike out a statutory demand in case of bankruptcy are equally relevant in the case of a Company. The court may set aside the demand or adjourn the application as it deems fit. If it is proved that the debt is disputed on grounds which appear to the court substantial, the court may allow the application”.

27. In Kipsigis Stores Limited ML HC IP No. 14 of 2016 [2017] Eklr, the court observed that: -

“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 a 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 not injustice flows from the consequences of non-compliance, then it would serve no purpose to set aside a statutory demand and to cause the statutory demand to be served again at cost”.

28. The Court is of the view that in the circumstances of this case, the debt is properly disputed and the statutory demand or the threatened insolvency proceedings are only meant to cajole the applicant into settling a disputed debt.

29. Accordingly, the application is meritorious and is hereby allowed as prayed.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 13th day of May, 2021.

A. MABEYA, FCI arb

JUDGE