



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

INSOLVENCY NOTICE NO. E031 OF 2020

CORAM: D. S. MAJANJA J.

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

LIBYAN ARAB AFRICAN INVESTMENTS COMPANY KENYA LIMITED

BETWEEN

LIBYAN ARAB AFRICAN INVESTMENTS COMPANY KENYA LIMITED.....APPLICANT

AND

MATCH ELECTICALS COMPANY LIMITED.....RESPONDENT

RULING

1. The Applicant has approached the court by the Notice of Motion dated 27th January 2021 made under **section 384** of the **Insolvency Act, 2015** (“the **Insolvency Act**”) seeking, inter alia, to set aside a Statutory Notice dated 6th January 2021 issued by the Respondent demanding KES. 87,643,950.00 on account of the contract dated 19th December 2012 for the facelift works at **LAICO Regency Hotel, Nairobi (LAICO)** (“the Contract”). The application is supported by the affidavits sworn by Jamal Ahmed, the Applicant’s manager, on 27th January 2021 and 23rd April 2021 respectively.

2. The Respondent opposes the application by filing a replying affidavit sworn by its Managing Director, Christopher Maina Theuri, on 18th February 2021 together with a Notice of Preliminary Objection dated 4th March 2021. The parties have also filed written submissions in support of their respective positions and arguments.

3. Before I deal with the substance of the application, let me set out some matters that are common ground and which are in fact matters of record from other court proceedings involving the parties. A dispute arose between the parties to the Contract which was subsequently referred to arbitration. In the course of the proceedings before the Arbitral Tribunal, the Applicant raised a preliminary objection by contending that it was not a signatory to the Contract hence the claim against it could not be sustained and that the Tribunal did not have jurisdiction to resolve the matter.

4. The Arbitrator heard arguments on the objection and delivered the Award on the following terms:

*72. The upshot of the above is that **Libyan Arab African Investments Company Ltd** was not a party to the contract for the facelift of **Laico Regency Hotel- Nairobi, Kenya** between **Laico Regency Hotel- Nairobi (Laico)** and **Match Electricals Ltd**. Consequently, **Libyan Arab African Investments Company Ltd** was not a signatory or a party to the Arbitration Agreement contained in paragraph 45 of the said contract.*

*73. I have, therefore, come to the determination that I do not have jurisdiction to hear and determine the dispute between **Match Electricals Ltd** and **Libyan Arab African Investments Company Ltd**. I, therefore, uphold the Respondent's Preliminary Objection dated 14th September 2020.*

74. The jurisdiction of an Arbitrator on issues of costs is not the same as that of a Judge although the principles applicable are similar. Arbitration is a Party driven process. The parties are free to agree what costs and expenses of the arbitration are recoverable under Section 32B (1) of the Arbitration Act 1995. The parties have not so agreed under Section 32B (1) of the Arbitration Act 1995, what arbitration costs and expenses are recoverable. In these circumstances I have discretion under Section 32(B) of the Arbitration Act 1995 to award costs on such basis as I think fit. However, as such discretion may not be arbitrary, I am guided by the legal principle that costs follow the event. I do not deviate from this principle and determine and decide that Claimant shall bear the costs of the Arbitration and my decision thereon is FINAL

75. I further order that the costs of the arbitration shall be borne by the Claimant and paid to the Respondent who is the successful party, as I see nothing that can cause me to deviate from the rule that costs follow the event. My decision hereon is FINAL.

76. Applying my discretion under Section 32(B) of the Arbitration Act 1995, and considering the current Advocates Remuneration Order as a guide, I assess the Costs payable to the Respondent by the Claimant as Kshs. 3,626,912.90 to be paid within the next Thirty (30) days. Failing payment such Costs shall accrue interest at Court rates from the date of this Ruling.

5. After the Award was published, the Respondent filed an application; **HC COMM. ARB No. E003 of 2021** seeking to set aside the Award while the Applicant filed an application; **HC MISC. No. E017 of 2021** seeking to enforce the Award. I consolidated both applications and after hearing the matter issued a ruling dated 21st May 2021 wherein I made the following orders:

a. The proceedings herein are amended to read LIBYAN ARAB AFRICAN INVESTMENTS COMPANY KENYA LIMITED instead of LIBYAN ARAB a. AFRICA INVESTMENTS COMPANY LIMITED as the 1st Respondent.

b. The application dated 5th February 2021 in HC COMM. ARB No. E003 of 2021 be and is hereby struck out.

c. The application dated 18th December 2020 in HC MISC. No. E017 of 2021 be and is hereby allowed on terms that the Award dated 8th October 2020 published by Anthony Milimu Lubulellah be and is hereby recognised and adopted as a judgment of this court and leave is granted to the 1st Respondent to enforce it as a decree of this court.

d. The Applicant shall bear the costs of both applications.

6. The Applicant now seeks to set aside the Statutory Demand. It contends that the debt claimed is disputed on substantial grounds for the reason that the claim on the basis of which it is made has already been determined through arbitration and that as a result of **HC MISC No. E017 of 2021**, it has obtained orders enforcing the Award. On its part, the Respondent has raised a Preliminary Objection on the competence of the application.

7. The Respondent argues that the Applicant's application is untenable as it does not identify the provisions of the law upon which it is anchored as **section 384** of the **Insolvency Act, 2015** relied on merely provides for the issue of a statutory notice in the circumstances set out thereunder. It submits that since the parties are limited liability companies, the applicable provisions in the **Insolvency Act** fall within the purview of **Part X** of the **Insolvency Regulations, 2016** ("the **Regulations**") and that the Applicant did not find any relevant provisions of the law to anchor its application as the setting aside of a statutory notice is exclusively limited to proceedings in respect of bankruptcy of natural persons and not to juridical persons or liquidation of companies.

8. The Respondent further submits that since **Regulation 77** and **78** of the **Regulations** which apply to liquidation of companies do not contain a corresponding provision for setting aside a statutory demand, this court does not have jurisdiction to entertain the application to set aside a statutory notice. It cited the case of **Rufus Ragui & Another v Vivo Energy Kenya Limited ML HC IN E068 of 2019 [2020] eKLR** to support this position.

9. The Respondent maintains that there is no legal exception to the service of a statutory notice or written demand upon a company and it is only after 21 days of service that the issue of solvency or insolvency can be interrogated based on the company's response or settlement of claim. Since there is no legal bar to filing and serving a written demand of the claim by a creditor to the company, it is only after the notice has been served and the 21-day period has expired that a party may contest the propriety or impropriety of the statutory notice. The Respondent thus submits that application is misconceived and premature in the circumstances of this case. The Respondent finds support for this position in **Invesco Assurance Company Ltd v Nyamira Luxury Express Ltd & 2 others ML HC IN 019 of 2018 [2020] eKLR**.

10. In opposition to the preliminary objection, the Applicant submits that its application is properly before the court. It points out that **Regulation 16(1)(a)** of the **Regulations** permits a person served with a statutory demand to apply to this court, within 21 days of service, to set it aside. Further, **Regulation 17(6)(b)** provides that this court may set aside the statutory demand if the applicant shows that the debt is disputed and that **section 692** of the **Insolvency Act** also allows a person to move to court and seek injunctive relief against a person who intends to or has contravened the **Act**. The Applicant contends that there is no dispute that **Regulations 16(1)(a)** and **17(6)(b)** apply to personal bankruptcy and that there are no express provisions for setting aside statutory demands issued on companies but that the position taken by the Respondent that in the absence of an express provision, this court lacks jurisdiction to set aside the statutory demand is legally untenable. It submits that the court has inherent jurisdiction to set aside a statutory demand which is not well founded and insists that the grounds for setting aside a statutory demand set out in **Regulation 17(6)** also applies to demands issued to companies. The Applicant relies on **DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others ML HC IN E006 of 2020 [2020] eKLR** and **Invesco Assurance Company Limited v Dama Charo Nzai & 57 others MLND HC IC No. 1 of 2018 [2019] eKLR** in support of this position.

11. The Applicant thus contends that an application to set aside a statutory demand operates as an injunction as it bars the creditor from initiating liquidation proceedings therefore **section 692** of the **Insolvency Act** is of relevance. It contends that it is not correct to assert, as the Respondent does, that there is no express provision for setting aside a statutory demand. Further, **section 692** falls under **Part XI** of the **Act** which is titled "**LEGAL PROCEEDINGS UNDER THE ACT**" and a statutory demand is issued under **section 384** of the **Insolvency Act**

thus it follows that proceedings to challenge it are to be taken out under the **Act**.

12. Since it is common ground that **PART V** of the **Regulations** apply to personal bankruptcies and not liquidations or insolvencies of companies, does this mean that a company has no recourse when a statutory demand has been served upon it? I do not think so. I say so and repeat the court's holding in **DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others (Supra)** 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 **Regulations** and that the factors underlined in **Regulation 17(6)** 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 insolvency of a Company.

13. I further note that in the decision in **Rufus Ragui & another v Vivo Energy Kenya Limited (Supra)**, the court, even after holding that **Regulations 16** and **17** do not apply to company insolvency still went ahead to determine whether the applicant therein had satisfied the conditions provided by **Regulation 17(6)** of the **Regulations**. I am further guided by the decision of the Court of Appeal in **Mohamed Aden Abdi v Abdi Nuru Omar & 2 others KSM CA Civil Appeal No. 190 of 2006 [2007] eKLR** that failure by the Applicant to cite the appropriate provisions for the law on which its application is anchored is not fatal as the reliefs being sought by the Applicant are clear and leave no doubt as to what it is seeking and that the same is premised under **Regulations 16** and **17** of the **Regulations** (see also **Vulcan Equipment v School Equipment Production Unit & another NRB HC ACEC Case No. 27 of 2016 [2018] eKLR**). Striking out the Applicant's application for the reason that it has not cited the correct anchoring provision of the law will be against the principle of substantive justice as provided for by **Article 159(2)(d)** of the Constitution.

14. Even if the court declined to set aside the Statutory Demand for want of jurisdiction, if insolvency proceedings are commenced on that basis, the court still has jurisdiction to strike out a petition if it finds that the Statutory Demand is not warranted for any reason. Why would the court force parties to incur the costs and subject a company to deleterious effects of an insolvency petition against it when a defective notice can be dealt with at the earliest possible stage by striking it out. I therefore hold that the preliminary objection lacks merit and is therefore dismissed. It is to the substance of the application that I now turn.

15. The Applicant's application mainly seeks that the statutory demand dated 6th January 2021 to be set aside. Germane to this determination are **Regulations 16** and **17** of the **Regulations** which, although under the scheme of the **Insolvency Act** refer to the bankruptcy of natural persons, provide a good guide on the principles applicable where the court is called upon to exercise its inherent jurisdiction to strike out a statutory demand. They provide, in part, as follows:

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 or its first appearance, whichever is the earlier.

(2) Subject to any order of the Court under regulation 17 (7), time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the Court.

(3) The debtor's application shall be in Form 7 set out in the First Schedule and shall be supported by an affidavit, which shall be in Form 8 set out in the First Schedule.

(4) The affidavit referred to under paragraph (3) shall—

(a) specify the date on which the statutory demand came into the debtor's possession;

(b) state the grounds on which the debtor claims that it should be set aside; and

(c) annex a copy of the statutory demand.

17. Hearing of application to set aside statutory demand

(1) On receipt of an application under regulation 16, the Court may, if satisfied that no sufficient cause is shown for granting the statutory demand, dismiss the application without giving notice to the creditor.

(2) The time limited for compliance with the statutory demand shall commence from the date on which the application is dismissed.

(3) If the application is not dismissed under paragraph (1), the Court shall fix a date and venue for it to be heard, and shall give at least seven days' notice to—

(a) the debtor or, if the debtor's application was made by an advocate acting for him, to the advocate,

(b) the creditor; and

(c) any other person who is named in the statutory demand as the person whom the debtor may enter into communication with in reference to the statutory demand or, if more than one person is named, the first person to be named.

(4) Where the creditor responds to the application, the creditor shall serve the response upon the debtor and the Court at least three days before the date of hearing of the application.

(5) On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.

(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.

16. The Respondent had submitted that it is only after 21 days of service that the issue of solvency or insolvency can be interrogated and the propriety or impropriety of the statutory notice can be contested. I find this argument to be inconsistent with the wording of **Regulation 16(1)(a)** above which provides that the application to set aside “may” be made “within” 21 days after service of the statutory demand. The use of the word “within” means that an applicant can apply to set aside the statutory demand even before the lapse of 21 days and further, the use of the word “may” implies that this requirement is couched in discretionary rather than mandatory terms. The court in **Peter Munga v African Seed Investment Fund LLC HC ML IC No. 2 of 2016 [2017] eKLR** took a similar position and it is thus my finding that the Applicant’s application is not premature as has been contended by the Respondent.

17. The Applicant’s application is founded on the primary ground that the alleged debt forming the basis of the statutory demand is disputed on substantial grounds that the claim on the basis of which the statutory demand has already been determined through arbitration and that the Applicant denies acknowledging any debt to the Respondent.

18. The Respondent denies that the sum of KES. 87,643,950.00 contained in the statutory demand was subject of the alleged arbitral proceedings as that arbitration was between different parties altogether being the Respondent and an entity describing itself as *Libyan Arab African Investments Company Limited*. Further, that the arbitral tribunal did not deal with the substance of the claim before it as its decision was based on a mere technicality on the misjoinder of parties and not on the merits of the substance before the tribunal.

19. In response, the Applicant states that its correct name is *Libyan Arab African Investments Company Kenya Limited* as evidenced by its Certificate of Incorporation and that it has been referred to as *Libyan Arab African Investments Company Limited* in some papers in error. The Applicant contends that the statement of claim and the preliminary objection filed before the arbitrator and which gave rise to **HC Misc. No. E017 of 2020** and **ARB No. E003 of 2021** set out the correct name and that the Respondent filed a further affidavit, sworn on 22nd March 2021, in **HC Misc. No E017 of 2021** producing a letter to show that *Libyan Arab African Investments Company Limited* does not exist and cannot now say it had an arbitration with that entity.

20. I had the advantage of the determining the same issue when it came up before the court in **HC Misc. No. E017 of 2020** and **ARB No. E003 of 2021**. As stated by the Applicant, the Respondent was adamant in those proceedings that the entity *Libyan Arab Africa Investments Company Limited* was a non-existent entity and urged the court to find as such. As I stated in my previous decision which I reiterate, is that *Libyan Arab Africa Investments Company Limited* is a misdescription and based on the documents and proceedings between the parties, Applicant’s correct name is *Libyan Arab African Investments Company Kenya Limited* and that for all intents and purposes, the court proceedings were between the Respondent and the Applicant, *Libyan Arab African Investments Company Kenya Limited* hence it was entitled to costs of the arbitral proceedings that were struck out.

21. As I understand, the Arbitrator only declined jurisdiction to entertain the proceedings because the parties before him were not parties to the Contract. The Arbitrator did not say nor was he called upon to state that there was no dispute between the Applicant and Respondent. The Contract subject of the dispute has an arbitration clause which mandates the parties; that is the Applicant and Respondent to proceed to arbitration in the event of a disagreement. The fact that the Respondent invoked the arbitration clause albeit against what the arbitrator considered a non-existent party does not negate the fact that there is exists a dispute which has not been resolved in the manner contemplated by the parties under the Contract. This means that dispute resolution mechanism between the parties cannot be short-circuited by issuing a statutory demand under the **Insolvency Act**. By invoking the arbitration clause in the first instance, the Respondent recognised that there was a dispute that ought to have been resolved by arbitration. Although it proceeded against the wrong party, it is now estopped from denying that a dispute exists between the parties to the Contract under which its demand is based. Since the debt is disputed on substantial grounds, it then follows that the Statutory Demand dated 6th January 2021 cannot stand. It must be set aside.

22. For the foregoing reasons, I allow the Applicant’s Notice of Motion dated 27th January 2021 and set aside the Statutory Demand dated 6th January 2021 issued to the Applicant. The Respondent shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 5th day of JULY 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Kimani, SC with him Mr Adano and Mr Owiti instructed by Wetangula, Adan and Company Advocates for the Applicant.

Ms Mbirwe instructed by A.G.N. Kamau Advocates for the Respondent.