



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY PETITION NO. E171 OF 2020

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND

IN THE MATTER OF EAST AFRICAN CABLES LIMITED

BETWEEN

EAST AFRICA CABLES LIMITED.....APPLICANT

AND

SBM BANK (K) LIMITED.....PETITIONER/RESPONDENT

RULING

The Petition

1. This case is founded on the creditor's petition dated 9th December 2019 filed under the *Insolvency Act, 2015* ("the Act"). The petitioner is a bank and its case is that on various dates; 28th January 2014, 26th March 2014, 11th June 2014, 18th March 2015, 7th April 2015, 22nd May 2015 and 25th June 2015, it issued to the applicant ("the Company") various facilities repayable as specified in the respective letters of offer. It states that as at 26th July 2019, the Company owed it Kshs. 298,859,693.90 and despite demand, the Company has failed to satisfy the debt.

2. The petitioner stated that on 31st July 2019, through its advocates, it served on the Company a demand in writing requiring it to pay the monies due to it. That the Company neglected to pay or satisfy the amount demanded after more than 21 days elapsed after service of the demand. Consequently, the petitioner avers that the Company is insolvent and that it is just and equitable that it be liquidated. It therefore prays for the Company be liquidated, the official receiver be appointed as a provisional liquidator and costs of the petition be paid out of the assets of the Company.

The Application

3. Following advertisement and service of the petition, the Company presented the Notice of Motion dated 3rd February 2020 seeking, amongst others, an order to strike out the petition primarily on the ground that the petition is fatally defective as it does not comply with the mandatory provisions of **Regulations 6** and **19** of the *Insolvency (Amendment) 2018* ("the Regulations").

4. The grounds of the application are set out in face of the motion, the supporting affidavit of Paul Muigai, the Chief Executive of the Company, sworn on 3rd February 2020 and the submissions of its counsel, Mr Nyaanga. The Company complains that the petition is defective based on several grounds. First, that the statutory demand served on the Company was not endorsed by the Deputy Registrar of the High Court in contravention of **Regulations 6** of the *Regulations*. Second, that the petitioner failed to comply with the mandatory provisions of **Regulation 19** of the *Regulations* which requires that the petition be in Form 32C set out in the First Schedule. Third, that the petition was not accompanied by the following documents set out in the First Schedule to the *Regulations*; a verifying affidavit in Form 32D, a statutory demand in Form 32E if the reason is indebtedness and a statement of financial position in Form 32.

5. The Company also contends that the petition cannot be sustained as the debt upon which it is founded is disputed and that the petition was lodged irregularly and in bad faith as it was advertised before it was served thereby causing the Company immense harm to its operations and reputation. It also states the petition is an abuse of the court process and should be struck out because the debt should be pursued through the

ordinary court process and that there exist alternative remedies available to the petitioner as the petition for liquidation ought to be presented as a last resort.

Petitioner's response

6. The petitioner opposed the application through the replying affidavit of Kevin Kimani, its legal officer, sworn on 7th February 2020 and submissions by its counsel, Mr Akello. Mr Kimani reiterated the contents of the petition which I have set out above. He deponed that as the Company was unable to pay its debts, it issued a statutory demand which complied with the provisions of **section 484** of the **Act** and which was duly served and acknowledged by the Company. That the Company responded to the demand by its letter dated 22nd August 2019 in which it did not dispute the debt but indicated that the payment of the debt may not be feasible in light the Company's debt capacity.

7. The petitioner's position is that under **section 696** of the **Act**, no insolvency proceedings may be invalidated or set aside because of a defect in the proceedings. Counsel added that the **Regulations** cannot supersede the express provisions of **section 696** of the **Act** and the issues raised by Company are technical in nature and the court should deal with the substance of the matter in accordance with **Article 159(2)** of the Constitution.

8. The creditors appearing in this petition did not support the position taken by the petitioner.

Determination

9. The issue for determination is whether the petition is fatally defective for want of compliance with **Regulations 6** and **9** of the **Regulations** and whether there are valid grounds for presentation of the petition.

10. As this point I wish to point out that the **Insolvency (Amendment) Regulations, 2018** enacted by **Legal Notice No. 7 of 2018** amended the **Insolvency Regulations, 2016 (L.N. No. 47 of 2016)** ("the **Regulations, 2016**") by introducing the regulations now relied upon by the Company in its application.

Validity of Petition

11. **Regulation 6** of the **Regulations** amended **Regulation 15** of **Regulations, 2016** by adding **sub-regulations 4, 5** and **6** thereto. **Regulation 15** of the **Regulations, 2016** falls under **Part V** titled, "**PERSONAL BANKRUPTCY**" and the side note reads, "**Creditor may apply for bankruptcy order in respect of debtor**". It provides as follows:

15. (1) For the purposes of section 17 of the Act, the procedure Creditor may apply for complying with or setting aside a demand is as provided under for bankruptcy order in respect of debtor. Regulations 16 and 17.

(2) The creditor's application for bankruptcy order shall be in form of a petition in Form 3 set out in the First Schedule and shall be accompanied by the following documents— verifying affidavit which shall be in Form 4 set out in the First Schedule; proof of the debt which shall be in Form 5 set out in the First Schedule; and the application for appointment of trustee which shall be Form 9 of the First schedule.

(3) The petition shall be preceded by a statutory demand and shall be in Form 6 set out in the First Schedule.

(4) The statutory demand in subregulation (3) shall be endorsed by the Deputy Registrar of the High Court before it is served on the debtor.

(5) The statutory demand specified in subregulation (3) shall be served on the debtor at least 21 days before the filing of the petition.

(6) The service of the statutory demand shall be in accordance with the Civil Procedure Rules, 2010. [Emphasis mine]

12. The introductory part of **Regulation 15** above refers to **section 17** of the **Act** which is to be found in **PART III – BANKRUPTCY OF NATURAL PERSONS**. **Section 17** of the **Act** provides for persons entitled to make a bankruptcy petition. The reason I have set out the aforesaid provisions it to show that **Regulation 15** relied on by the Company does not apply to insolvency but to bankruptcy of natural person hence the application in so far as it applies to the issue of the statutory demand lacks merit. I shall however return to this matter later in this ruling.

13. I now turn to the second objection to the petition grounded on non-compliance with **Regulation 19** of the **Regulations**. It introduced **Regulation 77B** to the **Regulations, 2016** and which states as follows:

77B (1) For the purposes of section 425 of the Act an application for liquidation shall be-

(a) by way of a petition in Form 32C as set out in the First Schedule; and

(b) Accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.

(2) The petition for liquidation shall be accompanied by the following documents –

(a) a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and

(b) A statement of financial position in Form 32 as set out in the First Schedule where necessary.

14. The question for consideration is whether the petition is in the form required and accompanied by a verifying affidavit and whether it was accompanied by the statutory demand in the Form 32E. I do not think a statement of financial position in Form 32 is required to accompany the petition by a creditor as a creditor would not be in a position to know the financial status of a company and provide the details required in Form 32. It applies to a petition by the company for voluntary liquidation which in those circumstances is required to disclose its financial position under **Regulation 77A** of the **Regulations, 2016**.

15. Counsel for the Company relied on the decision of Nzioka J., in **Re Sucasa at Mombasa Road Limited ML HC IP No. 9 of 2018 [2019] eKLR** who held that compliance with the aforesaid provisions was mandatory and concluded that:

44. In view of the aforesaid, the court finds that, in the absence of proof that the statutory demand was served before the filing of the Petition herein, the Petitioner has not complied with the mandatory requirements of; Regulation 77B(2)(a) of the Insolvency Act (Amendment) Regulation 2016 as amended in 2018.

16. Counsel further submitted that mandatory requirements of the law cannot be ignored by the parties or the court. He maintained that **Article 159(2) (d)** of the Constitution which directs the court to deal with matters without undue regard to procedural technicalities or the overriding objective of litigation which requires the court to deal with cases in a just, expeditious, proportionate and affordable manner could not aid the petitioner. He submitted that rules and procedures were necessary ensure the adjudication process did not result in chaos and confusion that would undermine the law and jeopardize the ends of justice. Counsel relied on several cases including **Universal Hardware Limited v African Safari Club Limited [2013] eKLR**, **Nicholas Kiptoo Arap Korir Salat v IEBC and 8 Others [2013] eKLR**, **Ramji Devji Vekaria v Joseph Oyula [2011] eKLR** and **Hunker Trading Company Ltd v Elf Oil Kenya Limited [2010] eKLR**.

17. The petitioner's case was that any non-compliance with the regulations could be excused by reason of **section 696** of the **Act** which states as follows:

696 (1) A proceeding under this Act may not be invalidated or set aside for a defect in a step that is required to be taken as part of, or in connection with, the proceeding, unless a person is detrimentally affected by the defect.

(2) The Court may order the defect to be corrected, and may order the proceeding to continue, on such terms as it considers appropriate in the interests of everyone who has an interest in the proceeding.

(3) In this section, "defect" includes a misdescription, misnomer or omission.

18. Counsel for the petitioner also relied on the decision in **Re: Kipsigis Stores Limited ML HC IP No. 14 of 2016 [2017] eKLR** to submit that the court should look at the substance of the matter if no injustice or prejudice is caused. In that case, Onguto J., held as follows in resolving the issue whether the statutory notice complied with the **Regulations**:

[40] 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 no 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.

19. Counsel for the petitioner urged the court to aim at sustaining the petition rather than terminating it by summary dismissal or by procedural technicalities. He cited **Microsoft Corporation v Mitsumi Computer Garage Limited [2001] 2 EA 460** to support the proposition that any deviation from or lapses in procedure, format or form of any legal instrument should not be treated as nullifying legal instruments.

20. I have studied the petition and I am satisfied that it complies with the Form 32C. Although it is not accompanied by a verifying affidavit, it is accompanied by a "supporting affidavit" setting out the facts in the petition supported by documents in support of the averments. Admittedly the supporting is not in the form set out in Form 32 but I do not think this fatal to the petition.

21. The purpose of the verifying affidavit is to verify on oath the contents of the petition. Form 32D contains one paragraph stating that, "The several statements in the said petition are within my own knowledge and true." The supporting affidavit on the other hand, sets out the facts of the petition and concludes at paragraph 10 that, "What is deponed is true to the best of my knowledge, information and belief." I therefore find and hold that in substance the contents of the petition are verified on oath. Further, I find and hold that the Company does not suffer any prejudice.

22. I now turn to consider whether the petition is accompanied by a statutory demand in Form 32E. It is not in dispute that the petitioner delivered and the Company received a demand dated 31st July 2019 issued pursuant to **section 384(1)(a)** of the **Act** demanding KShs. 298,859,693.90 due and owing as to 26th July 2019 to be paid within 21 days of the date of the notice. The notice was signed by the petitioner's advocates.

23. The legal basis for a statutory demand is to be found in **section 384(1)(a)** of the **Act** which sets out the essential ingredients of a written demand. The provision states as follows:

384. (1) For the purposes of this Part, a company is unable to pay its debts—

(a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;

24. There is a catena of decisions from our courts holding that non-compliance with the form of the statutory demand is not fatal as long as all the statutory elements are set out in the demand (see **Re: Kipsigis Stores Limited (Supra)**). In **Re: Sucasa at Mombasa Road (Supra)**, the learned judge quoted with the approval **Halsbury's Laws of England (4th Ed, Vol 7(2)) para. 1446** on the ingredients of a statutory notice:

The statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf. The statutory demand must state the amount of the debt and consideration for it or if no consideration the way if (debt) arises ... The statutory demand must include an explanation to the Company of the following matters: (a) Purpose of demand and fact that if demand is not complied with, proceedings may be initiated for winding up; (b) time for compliance with notice if consequential is to be avoided and (c) methods of compliance open to the Company.

25. In **Re: Kipsigis Stores Limited (Supra)**, the learned judge, as I have quoted at para. 18 above, came to the conclusion that the statutory notice was not invalid if there was substantial compliance with the requirements of the law. This is the same position taken **Re: F. M. Macharia (K) Limited [2017] eKLR**. I am aware that the phraseology of **Regulation 77B** of the **Regulations, 2016** is that compliance with Form 32E is mandatory but in view of the decisions I have cited, I find that the statutory demand issued by the petitioner dated 31st July 2019 substantially complies with the Form 32E and it sets out all the ingredients as required by **section 384(1)(a)** of the **Act**.

26. The point of departure is that the statutory demand issued by the petitioner was not endorsed by the Deputy Registrar of the Court as is shown in Form 32C. It is evident that unlike **Regulation 6** of the **Regulations** which introduced an amendment to **Regulation 15** of the **Regulations, 2016** to provide that the "The Statutory Demand shall be endorsed by the Deputy Registrar of the High Court before it is served on the debtor", **Regulation 77B** of the **Regulations, 2016** is silent on the issue of endorsement. As I have stated elsewhere, the former provision is in relation to bankruptcy and not insolvency of a company. Though the requirement for endorsement appears in Form 32E, such requirement is not imposed by **Regulation 77B** of **Regulations, 2016** which applicable to this case. Nothing would have been easier than for the rule maker, to impose a requirement for endorsement in **Regulation 77B** aforesaid if it was indeed necessary. I therefore find and hold that failure to endorse the statutory demand by the Deputy Registrar does not invalidate the demand issued by the petitioner.

27. The totality of my findings is that the petition is correct in substance and is validly before the court hence I decline to strike it out on the grounds proffered by the Company in the notice of motion dated 3rd February 2020.

Disputed debt

28. The Company also contests the petition on the ground that debt claimed by the petitioner is disputed. In **Universal Hardware Limited v African Safari Club Limited (Supra)**, Makhandia JA., giving the lead judgment of the Court of Appeal, summarized the position regarding striking out a petition on account of a disputed debt. He observed that:

The principle as I understand it is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.

After analyzing several decisions including **Mann v Goldstein [1968] 2 All ER 769**, **Crusair Limited v CMC Aviation Ltd (No. 2) [1978] KLR 131** and **Re: Global Tours and Travels Limited [2001] 1 EA 195**, the learned Judge concluded that:

The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.

29. It is against the aforesaid principles that I shall now consider the matter in light of the correspondence furnished by the parties in their respective depositions. It appears from the letter dated 29th May 2018 from the petitioner to the Company referenced, "FINAL DEMAND TO REDEEM YOUR OUTSTANDING FACILITIES WITH CHASE BANK (K) LIMITED", the petitioner demanded Kshs. 312,667,271.67 which was due and owing as at 29th May 2018. It gave the Company seven days to settle the debt otherwise, it would apply to the court for liquidation. There appears to be further correspondence on the matter but which was not produced by the parties. The next response, disclosed in the depositions, is a letter dated 17th August 2018 from the Company addressed to the petitioner which stated in part as follows:

The bank provided a summary statement which makes it difficult for the company to determine how the balances have been derived. We dispute these balances and request you to provide us with a running statement showing all the transactions from inception to date and the interest rates used. We also dispute accrued interest amounts and therefore request you to provide us detailed interest calculations.

30. Apart from the letters I have referenced, the only other letter produced is the statutory demand dated 31st July 2019 giving rise to this petition. During the pendency of this petition, one of the Company's creditors, Ecobank Limited appointed a receiver over one of the Company's assets. The appointment of the receiver is the subject of **Milimani HC Misc. Civil Application No. E043 of 2020 (East African Cables PLC v Ecobank Kenya Limited)**. From the documents filed in that cause, the petitioner referred to the Company's letter dated 22nd August 2019 in which it informed Ecobank that the Company informed it that was committed to repaying the debt but was in the process of restructuring the debt and requested for indulgence as "full payment of the debt may not be feasible" if the workable solution could not be found to restructure the debt. The petitioner contended that from the evidence from that case, the Company was not only indebted to it but was also insolvent, hence the petition was properly before the court.

31. I also note after this petition was lodged, the Company took out an advert in the local newspapers dated 28th June 2020 in which it informed the public that it was undergoing a debt restructure plan and had completed restructure of 82% of its total banking facilities. It added that, "The Company has continued to engage all the lenders and has made significance (sic) progress to complete the remaining phase which includes the debt with SBM Bank Kenya Limited."

32. The Company's case that the petitioner's debt is disputed is based on its letter dated 17th August 2018 contesting the balances and interest set out in the statements forwarded to it by the petitioner. It is noteworthy that the letter was written almost a year before the statutory demand dated 31st July 2019 was served on the Company. The petitioner complied with **section 384(1)(a)** of **Act** by serving a demand. No response was forthcoming from the Company thereafter. The deposition of Paul Muigai, in support of the motion, does not which does set out or establish any grounds for disputing the debt. Since it is the Company which bears the burden of establishing that the debt is not bona fide and is disputed on valid grounds, I can only conclude that the Company does not dispute the debt due to the petitioner.

33. Counsel for the petitioner submitted that a petitioner ought to have filed this petition as a last resort as there were alternative remedies. In **Prideinn Hotels and Investments Limited v Tropicana Hotels Limited MSA CA Civil Appeal No. 98 of 2017 [2018] eKLR**, Visram JA., reading the majority judgment of the court, had this to say about the existence of alternative remedies;

[38] This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the Insolvency Act or the Companies Act which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the Insolvency Act which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.

34. I have come to this conclusion that based on the evidence provided at this stage, the debt is not disputed. I therefore decline to strike out the petition bearing in mind that even at the hearing of the petition, the court may yet come to a different conclusion given the powers of the court under **section 427(1)** of the **Act** in light of all other evidence regarding the Company.

Disposition

35. For reasons that I set out above, I dismiss the Notice of Motion dated 3rd February 2020 with costs to the petitioner.

DATED and DELIVERED at NAIROBI this 17th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Akello instructed by Robson Harris and Company Advocates for the petitioner.

Mr Nyaanga instructed by Nyaanga and Mugisha Advocates for the Company.

Ms Lubano instructed by Oraro and Company Advocates for the Ecobank Kenya Limited (Creditor).

Mr Ondieki. instructed by Hamilton Harrison and Mathews Advocates for Equity Bank (Kenya) Limited (Creditor).

Ms Mucheru instructed by Mucheru and Company Advocates for Shah Shamshi Limited (Creditor)