



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**THE INSOLVENCY ACT**

**INSOLVENCY NOTICE NO. 019 OF 2018**

**INVESCO ASSURANCE COMPANY LTD.....DEBTOR/APPLICANT**

**AND**

**NYAMIRA LUXURY EXPRESS LTD.....INSURED/CREDITOR**

**THE GUARDIAN COACH LTD.....INSURED/CREDITOR**

**JERAN GENERAL CONTRACTORS LTD.....INSURED/CREDITOR**

**RULING**

The Applicant herein by Certificate of Urgency Application dated 24<sup>th</sup> December 2018, filed in court on 27<sup>th</sup> December 2018, sought the application be certified urgent for reasons;

1. The Creditors intend to proceed with filing an Insolvency Petition in consequence to the lapse of the twenty one (21) days provided for in the statutory demand and advertise the same in accordance with the Insolvency Regulations, 2016, inviting other Creditors to join the Petition against the Debtor currently;
2. If the Creditors are allowed to proceed with their conduct unrestrained and advertise the petition in the media, the Debtor will be highly prejudiced as its Creditors may, in all probability, seek to recover their debts as quickly as possible, thus bringing the company to its knees;
3. The Creditors have filed and served the statutory demand prematurely which is an abuse of the court process. The court decree was given on 29<sup>th</sup> October 2019, issued on 26<sup>th</sup> November 2018 and the statutory demand filed on 6<sup>th</sup> December, 2018 the Debtor was therefore not given a chance to satisfy the decree as the statutory demand was filed less than a month after the decree.

The Applicant sought orders that the Court grants orders restraining the Creditors herein from proceeding with the intended petition and advertising the intended Insolvency petition.

The statutory demand be set aside and/or vacated as the debtor is willing to enter into a settlement plan with the Creditors upon an audit and correct amounts owed determined.

The Applicant deponed that the debtor is not mandated to pay over Ksh 3,000,000/- per claim in tandem with **Section 5 (b) (iv) of Insurance Motor Vehicles Third Party Risks).**

Secondly, some of the Creditors' decretal sum does not meet the bankruptcy level of Ksh 250,000/- as per **Regulation 3 of Insolvency Regulations 2016.**

**SUPPLEMENTARY AFFIDAVIT**

A Supplementary Affidavit dated 25th January 2019, sworn by Kennedy Abicha the Chief Executive Officer of the Debtor/Applicant Company, further supported the Application. He averred that as stated in the Notice of Motion application dated 24<sup>th</sup> December 2018, the Respondents/Creditors herein had filed the statutory demand prematurely without giving the applicant the chance to satisfy the decree. The court decree was granted on the 29<sup>th</sup> October 2018, issued on the 26<sup>th</sup> November 2018 while the statutory demand was filed on 6<sup>th</sup>

December.

That in response to allegation of inability of the Applicant to pay the decretal sums and meet its financial obligations, the Respondents having rushed to file the statutory demand could not claim that the Applicant was unable to settle its financial or contractual obligations as they did not give the Applicant the opportunity to settle the decree. The Statutory demand was filed less than a month after the decree was issued.

That further, the statutory demand had not specified the amounts owed to some of the Creditors in the Statutory demand making it difficult for the Applicant to know with clarity the amount being claimed by the respondents making the statutory demand defective.

He averred that the Debtor/Applicant had made various strides in settling the decretal sum and had recently made a total payments of Ksh 754,185 (seven hundred and fifty four thousand, one hundred and eighty five) n part settlement of the debt.

That the defendant had arrived to the conclusion of insolvency of the Applicant and inability to conduct insurance business and uphold attendant obligations within the meaning and contemplation of the provisions of **Insurance Act, CAP 487** and Insurance (Motor Vehicle Third Party Risks) **CAP 405** prematurely and wrongfully as they had not given the Applicant the opportunity to pay the decretal sum having rushed to file the Statutory demand.

### **REPLYING AFFIDAVIT**

The application was opposed vide Replying Affidavit dated 16<sup>th</sup> January 2019, sworn by Julius Mokaya Ong'era, Managing Director of the Creditors/Respondents. He deponed that the Notice of Motion application was premised on misapprehension of the law and contractual imperatives binding the Applicant to the Respondents contractually and as per the court order issued and subsisting in **Kisii High Court Civil Case No. 17 of 2017.**

That the Respondent is/was the insurer of the Creditors at all material times and in matters pertinent to the **Insolvency Notice No. E 019 of 2018.**

That the Creditors/Respondents effectually and timeously performed/discharged their obligations to the Debtor yet the Debtor had failed/ was unable to adhere to its financial obligations to Third Parties, the Respondents herein.

That the Debtor/Applicant has vide affidavit of Kennedy Abicha dated 24<sup>th</sup> December 2018 and filed in court on 27<sup>th</sup> December 2018 admitted indebtedness to the Respondents/Third Parties and offered to make a proposal to pay which proposal was not forthcoming and that the attendant state of affairs irresistibly confirmed inability on the part of the Applicant to meet financial obligations as and when they fell due.

That the Application to set aside the Statutory Demand is incompetent and flies against the legal requirements under **Regulation 16 of the Insolvency Regulations 2016.**

### **DEBTORS/APPLICANTS WRITTEN SUBMISSIONS**

The Debtor/Applicant submitted as follows;

**Regulation 16 of the Insolvency Regulations, 2016** allows the debtor to apply to court for an order to set aside the statutory demand. It provides thus;

#### ***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.***

**Regulation 17 (6) of the Insolvency Regulations, 2016** goes further to list the grounds under which the court shall grant the application and states thus;

#### ***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 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.*

As stated in ***Peter Muunga –vs- Africa Seed Investment Fund LLC [2017]***; the grounds for setting aside the statutory demand are not limited by statute. The judge went further to interpret **sub section (d)** as giving the court a special discretion. It stated further that;

***“It is certainly not possible to foresee all the instances which may properly fall under paragraph (d) of Regulation 7. My view is that, when asked to set aside a demand on any other ground other than the grounds stated under paragraphs (a), (b) and (c), the question then becomes whether the applicant-debtor can show a substantial reason akin to the reasons under the preceding three paragraphs.”***

#### **RESPONDENTS WRITTEN SUBMISSION**

The Respondents submitted that, the burden of proving the ability to pay is incumbent upon the Debtor/Applicant herein. The Respondent argued that the Statutory Demand placed an obligation on the Debtor to discharge the burden on ability to pay. Indeed, **Section 107 of the Evidence Act** is instructive.

The Respondent further submitted that, besides **Section 2 of the Insolvency Act No. 18 f 2015**, defines a debt as “an obligation or liability of a person to pay money or money’s worth to another person; and includes (except where the context otherwise provides)

*a) A liability under written law*

*b) A liability for breach of trust*

*c) A liability arising from an obligation to make restitution*

***“debtor” means a person who owes a debt. It is on eth strength of the above legal parameters that the Respondents herein served a Statutory Demand dated 5<sup>th</sup> December 2018 on the applicant.”***

The Respondent referred to the Decree court issued in **Kisii High Court Civil Case No. 17 of 2012** attached to the Statutory Demand; the said Decree is borne of a consent judgment entered into before Hon. David Majanja J. The said Decree is the first document attached to the Statutory Demand served on the Applicant on the 7<sup>th</sup> December 2018. The said Decree was preceded by a consent order of the court given on the 14<sup>th</sup> March 2018 by the Hon. J. R. Karanja J and issued on 15<sup>th</sup> March 2018. The said order confirms admission on the part of the Applicant that it was/is bound to protect and ensure performance of contractual obligations to the 1<sup>st</sup> Respondent in detail. The Applicant clearly has no justification to seek the discretion of the court having failed to adhere to the court orders and judgment obtained by consent of the parties in respect of the same matter constituting the subject of the Statutory Demand.

#### **DETERMINATION**

**The Court considered the application, pleadings and submissions filed as ordered before the previous Trial Court LJ Ngetich on 25<sup>th</sup> March 2018.**

The Applicant’s grounds for setting aside the statutory notice are on the following grounds;

- a) It was served prematurely and is an abuse of the Court process and waste of resources;
- b) The Debtor/Applicant made partial payments and is at the final stages of preparing a payment plan
- c) The various claims do not meet the prescribed bankruptcy level of Ksh 250,000/-
- d) The various claims do not indicate the specific amount to be settled as required by **Section 384 of Insolvency Act and Regulations 16 & 17 of Insolvency Regulations**
- e) The statutory demand is intended to pressurize the debtor to settle the disputed debts and if allowed to proceed the debtor and public will be prejudiced
- f) The Applicant is able and willing to pay the debts upon an audit being conducted, correct amounts owed determined and a payment plan entered between the parties.

The Respondent/Creditors filed Statutory demand on 6<sup>th</sup> December 2018 against the debtor to settle in full judgments issued in favour of 3<sup>rd</sup> Parties/Claimants/Creditors in Civil Suits filed against the Debtor’s insureds and as ordered and decreed in **Kisii High Court Civil Case 17 of 2017**. This matter was filed as ***Nyamira Luxury Express Limited vs Invesco Assurance Company Ltd***; the decree was issued on 26<sup>th</sup> November 2018 for 33 cases listed in the application with judgments /decrees/orders from **Keroka SPM Court, Bomet CMCC Court, Nyando PMCC Court and Kisumu CMCC Court**.

These debts are due and payable by the Debtor/Applicant on behalf of its Insureds **Nyamira Luxury Express Ltd, the Guardian Coach Ltd and Jeran Contractors Ltd** jointly and severally as final judgments of the Courts.

The Insureds several vehicles/buses were attached seized and advertised for sale by various auctioneers in execution of judgments of the Court. The judgments were because of the Debtor/Insurer who defended the suits on behalf of the insured.

**Section 384 of Insolvency Act** provides that a Company is unable to pay its debts when;

*a) If a Creditor to whom the Company is indebted for Ksh 100,000/- 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 21 days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the Creditor;*

*b) If execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the Company is returned unsatisfied in whole or in part;*

*c) If it is proved to the satisfaction of the Court that the Company is unable to pay its debts as they fall due;*

*(2) A Company is also unable to pay its debts for purposes of this Part if it is proved to the satisfaction of the Court that the value of the Company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities)*

*(3) The Insolvency regulations may increase or reduce that amount specified in Subsection (1) (a).*

The import of **Section 384 of Insolvency Act** is that there is no legal exception to service of a statutory notice /written demand, which ought to be filed against a Company. It is only after 21 days of service that the issue of solvency or insolvency of the Company can be interrogated based on the Company's response or settlement of the claim.

Contrary to the submissions by the Applicant of the application of 24<sup>th</sup>/27<sup>th</sup> December 2018, there is no legal bar to filing and serving written demand of the debt by a Creditor to the Company; it is only after the Notice/demand is served 21 days thereafter, that the insolvency of the Company shall be considered and proved/ processed by the Court.

In the instant case , the issues raised to prevent/ pre-empt the service of statutory notice of 6<sup>th</sup> December 2018 are not legally appropriate at this stage and may/can only be canvassed after service of the Statutory notice/written demand. The issue of the notice being premature and abuse of Court process and waste of resources was not proved. The verification exercise of the claims is not a legal bar to issuance of the Notice. The preparation of payment package is one to be considered after the service of the Notice.

Furthermore, the debts arise out of Court judgments from various Courts against the Insureds of the Insurer /Debtor. These judgments remain valid orders of the Court as they are not set aside, varied, reviewed or appealed against to date. Secondly attached to the judgments are decrees annexed for execution and in some instances the Insured's vehicles have been attached and these have not been challenged.

The issue of verification of the claims as genuine and/or valid is secondary to settlement of the claims because, if that were the case, the debtor could have verified from Court records if these were *ex parte* or *interpartes* judgments and where found to be suspect relevant court proceedings would have been instituted to verify the *bonafide* claims.

Todate; 2-3 years later, the judgments and decrees have not been settled nor set aside; there is no proof of settlement of the claims.

#### **DISPOSITION**

**1. In the absence of any legal basis to stop/waive the advertisement and service of written demand/statutory notice, the Court dismisses the Application filed on 27<sup>th</sup> December 2018 and vacates interim orders to stop/prevent service of the Insolvency petition.**

**2. The application of 6<sup>th</sup> December 2018 is upheld and statutory demand be served to the Insurer Company.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 13<sup>TH</sup> FEBRUARY 2020.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**MS KIBET FOR THE APPLICANT**

**MS MOSE FOR THE CREDITOR**

**COURT ASSITANT: MR.TUPET**