



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY CAUSE NO. ICE 013 OF 2019

CIVICON LIMITED.....APPLICANT

VERSUS

SLINGSHOT LIMITED.....RESPONDENT

RULING

1. The **Notice of Motion** dated **5th September 2019** is filed by **CIVICON LIMITED** (*CIVICON*). It is to have the statutory notice under Insolvency Act issued ostensibly by **SLINGSHOT LIMITED** (Slingshot) set aside.

2. The thrust of the Notice of Motion is that Civicon is not indebted to Slingshot for the amount demanded Ksh 7,404,665. Civicon further contends that it had a meeting with slingshot's officials where slingshot was unable to verify the debt. Civicon stated that a letter dated 31st October 2017, where it would seem Civicon admitted the debt, was not signed by its officers and was therefore a forgery and its origin was unknown.

3. Although Slingshot, by its response attached emails, its statement of account and correspondence it is clear that the debt claimed by it cannot be verified with the clarity that a liquidation process requires. Moreover slingshot has relied on letter written on without prejudice basis. Further the only letter where Civicon would seem to have admitted the debt is denied to be genuine. Indeed the signatory of that letter is not identified by name or rank within Civicon. I therefore make a finding that the debt is disputed. In the cause **MATIC GENERAL CONTRACTORS LIMITED VERSUS THE KENYA POWER AND LIGHTING COMPANY LIMITED (2001) LLR 4837 (CAK)** the Court stated that:

“It is thoroughly settled now that, on a petition to wind up, no order can be made until the debt is proved, where there is a bonafide dispute, as to its existence. But if a man will present a petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bonafide disputed, and also when he knows that the Company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court, under those circumstances, would be, not to suspend the petition, but absolutely dismiss it, with costs. And my opinion is, that this Court ought not, and I think will not at all events, I will not until I am controlled by higher authority permit the procedure under the winding up Act to be made the vehicle of oppression.”

4. In my view Slingshot should have filed a normal civil claim against civicon in view of the above short comings.

5. But perhaps of greater concern to this court is the statutory notice served on Civicon and how this cause was initiated.

6. Slingshot filed a statutory notice for the signature by the Deputy Registrar of this court and indeed and irregularly the Deputy Registrar did sign it. It does seem that that is the statutory notice served on Civicon. That is how this action was initiated. There is no petition for liquidation filed. The question then is who was confirming the demanded debt, was it the Deputy Registrar or the creditor, slingshot. It does seem that Slingshot started the liquidation process the wrong way round. The first step as per section 384 of Insolvency Act was for the creditor, not anyone else, to serve on the company, civicon, with 21 day notice demanding the debt. It is only after that notice once served in required manner that Slingshot could file a petition of liquidation of the company. Section 384 provides:

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; (emphasis added)

7. It is important to note the part of that section, I have highlighted, to understand what ought to be done by a creditor even before coming to court. It is only after the company, such as Civicon, fails to pay as demanded and in case there is no dispute of the debt that a liquidation petition can be filed. Not otherwise. There are two cases which highlight that process.

8. The first case is in **re Kipsigis Stores Limited (2017) eKLR** where it was stated:

“34. There is no doubt and it needs no repeating that the liquidation of a Company is a serious and draconian step which dictates that all the procedural prerequisite steps are complied with, and substantively for that matter: see Kenya Cashewnuts Ltd –v- National Cereals & Produce Board [2002] 1 KLR 652 and also Cruisair Ltd –v- CMC Aviation Ltd (No. 2) [1978] KLR 131. Where therefore an invalid statutory demand is served upon the debtor, the liquidation Petition if filed will be a still-born.

35. In **In Re F.M. Macharia (K) Ltd [2017] eKLR**, the court with approval cited **Halsbury’s Laws of England 4th Ed Vol 7(2) para 1446** which outlines the ingredients of a valid statutory demand. The paragraph reads as follows:

“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” (footnotes omitted).”

9. The second case is **Blueline Properties Limited v Mayfair Insurance Company Limited (2019) eKLR**:

“38. Before concluding my discussion I need to address the submission of Mayfair that the statutory notice served upon it by Blueline’s Advocate was null and void. Mayfair relied on Section 384 (1) (a) of the Insolvency Act and submitted that the Statutory Notice should have been issued by Blueline. That Section provides:

“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.”

39. That Section requires the Statutory Notice to be issued by a creditor. A creditor is defined under section 2 of that Act as:

“includes a person entitled to enforce a final judgment or final order.”

40. That definition does not include an agent, such as an advocate. A creditor on the facts before Court would be Blueline, not its advocate. It follows, as rightly submitted on behalf of Mayfair, that the Statutory Notice issued to Mayfair did not meet the threshold set out in Section 384 (1) (a) of Insolvency Act. Blueline was therefore not entitled to rely on the Statutory Notice issued by its advocate to seek liquidation of Mayfair. It follows that without that Statutory Notice Blueline is unable to prove that Mayfair is unable to pay its debts.”

10. In view of the short coming set out above it is clear that the statutory notice signed by the Deputy Registrar, and not Slingshot must and will be set aside and struck out.

CONCLUSION

11. In the end in respect to the Notice of Motion dated 5th September the court does hereby set aside and does strike out the statutory notice, dated 18th August 2019, signed by the Deputy Registrar of this court. Civicon is granted costs of that Notice of Motion.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15th March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

MARY KASANGO

JUDGE