



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO.E034 OF 2019

SUCCESS ELECTRONIC AND TRANSFORMER MANUFACTURER LIMITED.....PETITIONER

VERSUS

KILEWAH ELECTRO HARD & ELECTRONICS LIMITED.....RESPONDENT

RULING

1. Through a liquidation petition filed on 12th September 2019, the petitioner/creditor sought to liquidate the respondent/Debtor/company on account of an alleged outstanding debt of USD 248,100 arising out of an agreement for the supply of 1430 NIKKON LEDXION Luminaire described as 125W KO9121 NIKKON 5433(hereinafter “ **the consignment**”).

2. Through an application dated 23rd October 2019, the company seeks the following orders;

1) That the Statutory Demand issued by the Petitioner/Respondent against the Respondent/Applicant under Section 384 of the Insolvency Act No. 18 of 2015 and Regulation 77B(2) of the Insolvency Regulations, 2016 dated 27th June 2019 be and is hereby struck out or set aside.

2) That the honourable court be and is hereby pleased to issue a declaration that, the Statutory Demand issued under Section 384 of the Insolvency Act No. 18 of 2015 and Regulation 77B (2) of the Insolvency Regulations, 2016 dated 27th June 2019 against the Respondent/Applicant is a nullity and against the provisions of the Insolvency Act No. 18 of 2015 for lack of a Creditor-Debtor Relationship.

3) That the Liquidation Petition dated 2nd September 2019 and filed in court on the 12th September 2019 arising out of the Statutory Demand issued under Section 384 of the Insolvency Act No. 18 of 2015 and Regulation 77B(2) of the Insolvency Regulations, 2016 dated 27th June 2019 be struck out for being an abuse of the court process.

4) That the liquidation Petition dated 2nd September 2019 and filed in court on the 12th September 2019 arising out of the Statutory Demand issued under Section 384 of the Insolvency Act No. 18 of 2015 and Regulation 77B (2) of the Insolvency Regulations, 2016 dated 27th June 2019 be struck out for being in violation of Regulation 77B (2) of the Insolvency (amendment) Regulations 2018.

5) Those costs of the struck-out petition be awarded to the respondent/applicant.

3. The application is supported by the affidavit of the Company’s Director **George Kimani Kariuki** and is premised on the grounds that:-

a) That the alleged debt does not exist and is not admitted and there does not exist a Creditor-Debtor relationship which is mandatory under the Insolvency Act No. 18 of 2015 rendering the current proceedings fundamentally defective and irregular.

b) That the alleged and purportedly served Statutory Demand Notice that gave rise to the said petition was never served on the Respondent/Applicant or its directors and even if it was served, which is denied, it is a nullity as there is no debt due to the petitioner/respondent from the Respondent/Applicant.

c) That the respondent/Applicant herein stands to suffer irreparable financial and reputation damage if the petitioner/respondent

is allowed to prosecute the fictitious and illegal insolvency proceedings based on a spurious and fictitious debt which the respondent/applicant is unaware of nor admitted.

d) That respondent/applicant is a solvent entity currently enjoying high credit ratings both at private and public view and currently undertaking several government jobs won through competitive tendering processes after undergoing thorough scrutiny and enjoying the support of the local banking/financial institutions.

e) That the respondent/applicant has never ordered nor received any goods from the petitioner and no evidence has been tendered/adduced by the petitioner/respondent of how the transaction took place to warrant the current action and institution of the insolvency proceedings against the respondent/applicant and the entire proceedings commenced by issuing of the Statutory Demand violate the rights of the respondent/applicant and the Insolvency Act No. 18 of 2015 as there is no creditor-debtor relationship.

f) The petitioner/respondent is a competitor and was once a partner with the applicant and the respondent/applicant contends that, the petition is tainted with malice and is part of the dirty tricks being employed by the petitioner/respondent to drive the respondent/applicant out of the business.

4. The petitioner opposed the application through the grounds of opposition dated 6th November 2019 wherein its sets out the following grounds:

1. The dispute between the petitioner and the respondent is primarily based on a debt for the amount of USD 248,100 (the outstanding amount) which remains due, owing and payable to the petitioner.

2. The respondent is guilty of unreasonable delay having been duly served with a statutory demand on 27th June 2019 (the statutory demand).

3. The respondent has admitted that the outstanding amount is due to the petitioner.

4. The respondent has failed to demonstrate reasonable grounds to enable this honourable court strike out the Statutory Demand and stay the liquidation proceedings.

5. The petitioner stands to be severely prejudiced if the application is allowed to the extent that there will be further delay to the conclusion of this longstanding dispute and to the extent the respondent does not have reasonable grounds to warrant that the Statutory Demand be struck out as well as that there be a stay of the liquidation proceedings.

5. The petitioner further opposed the application through the replying and supplementary affidavit of **TAN WEI NENG** sworn on 7th November and 17th December 2019 respectively. He avers that the petitioner entered into a contractual arrangement with the petitioner for the supply of the consignment as shown in their annexure “**TWN1**” in which the company was to pay the outstanding sum of USD 248,100.

6. He states that the company received the consignment sometime in 2017 but has refused to settle the outstanding sum thereby precipitating the service of the statutory demand dated 27th June 2019. He further states that through an email dated 5th December 2017 (annexure “**TWN3**”) the company’s representative informed the petitioner’s representative that it was likely to settle the outstanding sum. It is the petitioner’s case that there exists a debt and a debtor/creditor relationship between the parties herein.

7. Parties filed written submissions to the applicant which I have considered. The main issue for determination is whether the applicant has made out a case for the striking out of the instant liquidation petition. In determining this issue, the court will consider if there exists a debtor/creditor relationship between the petitioner and the company and whether the statutory demand was served on the company.

Debtor/Creditor Relationship

8. Section 384 of the Insolvency Act No. 18 of 2015, provides that:

“(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;

(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; or

(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 the 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 the amount specified in subsection (1)(a)."

9. In the present case, the Company denied the existence of Debtor/Creditor relationship between it and the petitioner. The Company argued that there was no valid supply agreement between it and the petitioner and further that there was no acknowledgment of debt or correspondence between it and the petitioner over the alleged debt. The Company took issue with the copy of the alleged agreement dated 18th May 2017 (annexure "TWN1") and argued that it was executed by another company, **Hyperteck Electrical Services Ltd** and signed by one **Mr. Gathogo Mwangi** cited as the said company's Chief Executive Officer. It was the Company's case that **Hyperteck Electrical Services Ltd** is a different legal entity and that the said **Mr. Gathogo** and **Hyperteck Services** are not the Company's agents. In sum, the Company denied the claim that it received any consignment from the petitioner.

10. On its part, the petitioner attached copies of Delivery Order/Bill of Lading to the supplementary affidavit to show that the Company was the consignee and the petitioner as the shipper/exporter. The petitioner also attached a copy of a letter dated 3rd July 2017 to the supplementary affidavit to show that the Company wrote to **Gulf Badr Group Kenya Ltd** giving authorization to its clearance agents, **Vasterguard Limited**.

11. The Company however denied that it ever authorized the clearance agents or ordered for the consignment as alleged by the petitioner. The Company accused the petitioner of forgery of its signatures in the letter dated 3rd July 2017 and of the official stamp.

12. My finding is that the documentary evidence tendered by the petitioner points to the fact that there exists a nexus or Debtor/Creditor relationship between the petitioner and the Company such that the drastic measure of striking out of the petition may not be warranted at this stage of the proceedings. I also note that even though the Company accused the petitioner of forgery of its signatures and official stamp, no material was placed before this court to show that such forgery was actually committed by the petitioner.

13. Courts have taken the position that they will not strike out pleadings except in circumstances where there is plain and obvious reason for such striking out. For instance in *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa* Civil Appeal No. 54 of 1999 the Court held:

"The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

14. In the present case, I find that the petitioner has demonstrated that it has a prima facie case against the Company and that the justice in this case would require that the petition proceeds for hearing on its merits.

Service of the Demand Notice.

15. I find that the petitioner demonstrated, through annexure "TWN3" to the supplementary affidavit, that service of the demand notice was effected on the Company on 28th June 2019. This fact of service was not controverted by the Company. I am therefore satisfied that the demand notice was served on the Company.

16. In conclusion and having regard to the findings that I have made in this ruling, I find that the application dated 23rd October 2019 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the petition.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Akal for Kuyo for petitioner

Court Assistant: Silvia