



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION E272 OF 2019

IN THE MATTER OF: INSOLVENCY ACT, NO. 18 OF 2015

IN THE MATTER OF: INSOLVENCY REGULATIONS, 2016

AND

IN THE MATTER OF: THE APPLICATION TO SET ASIDE

STATUTORY DEMAND

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LTD.....DEBTOR/APPLICANT

VERSUS

EPCO BUILDERS LIMITED.CREDITOR/RESPONDENT

RULING

1. Once Nairobi Insolvency Petition No. 7 of 2019 was filed, then these proceedings commenced as a miscellaneous application were no longer tenable.
2. By an amended Application which is dated 17th July 2019 the Applicant seeks four substantive prayers being:-
 3. **This Honourable Court be pleased and do hereby issue an order restraining the purported Creditor/Respondent herein from proceedings to file the purported intended petition and advertising the intended Insolvency Petition.**
 4. **A declaration be issue that Nairobi Insolvency Petition No. 07 of 2019 is null and void *ab initio*, and hence be struck out and/or dismissed with costs to the Applicant.**
 5. **The Honourable Court be pleased and do hereby grant an order of mandatory injunction compelling the Respondent to recall the malicious advertisement of the purported illegal Insolvency Petition, Nairobi Insolvency Petition No. 07 of 2019, published in the Daily Nation Newspaper of 8th July 2018 at page 44 and publish an apology in the same manner in which it published the malicious advertisement of the purported insolvency petition.**
3. A short chronology of events demonstrates the difficulty which the Applicant faces. Earlier, on 1st July 2019, the Applicant filed a Notice of Motion herein seeking two main orders:-
 2. **The statutory demand from the Respondent dated 7th June 2019 and served upon the Applicant on 12th June 2019 be set aside.**
 3. **This Honourable Court be pleased and do hereby issue an order restraining the purported Creditor/Respondent herein from proceeding to file the purported intended petition and advertising the intended Insolvency Petition.**
4. The Motion was served on the Respondent on 3rd July 2019 and on 5th July 2019, the Respondent filed Nairobi Insolvency Petition No. 7

of 2019. This is a Petition in which the Respondent seeks an insolvency order against the Applicant. The filing of the Petition was before the Applicant had obtained any orders herein much less prosecuted his application. This forced the Applicant to amend his application as to now framed.

5. Undoubtedly, it is within the right of the Applicant to challenge the propriety and validity of the statutory notice and subsequent insolvency proceedings, but once the insolvency proceedings had been filed then the challenge had to be mounted within the insolvency cause. Examples are not lacking that this is the approach (See in Re Genghis Capital Limited [2019] eKLR and in Re Kipsigis Stores Limited [2017] eKLR which, incidentally, are authorities in the Applicant's bundle).

6. As there was no order restraining the Respondent from filing the Petition, then it would be an abuse of court process to use satellite proceedings to impugn and challenge the main cause.

7. For that reason, I uphold the Preliminary Objection by the Respondent and strike out not only the application of 17th July 2019 but these entire proceedings. They are no longer efficacious. However, as the proceedings were filed before the insolvency cause was filed and would, at commencement, be a proper way of challenging the validity of the statutory notice, I order that each side bears its own costs.

Dated, Signed and Delivered in Court at Nairobi this 18th Day of October 2019

F. TUIYOTT

JUDGE

PRESENT:

Muga for Applicant

Okwatch for Respondent

Court Assistant: Nixon