



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**INSOLVENCY PETITION NO. 17 OF 2017**  
**IN THE MATTER OF INSOLVENCY ACT, 2015**  
**AND**  
**IN THE MATTER OF KAVIAN KENYA LIMITED**  
**RULING**

1. Kevian Kenya Limited (**the Company**) faces the possibility of Liquidation for an alleged debt of Kshs 2, 799,625.26 said to be owed to Hipora Business East Africa Limited (**the Petitioner**).

2. The Petitioner and the Company entered into various Contracts in which the Petitioner deployed system controllers and double checkers at the Company's different branches. The monthly service charges were Kshs 52,000/- for a system controller and Kshs 42,500/- for a double checker. The Petitioner asserts that a debt of Kshs 2,799,625.26 accumulated as a result of default as at 15<sup>th</sup> April 2017.

3. As a forerunner to these proceedings the Petitioner's Counsel issued two demands of 5<sup>th</sup> May 2017 and that of 31<sup>st</sup> May 2017. The latter was the Statutory Demand contemplated and required by section 384 of The Insolvency Act ( No. 18 of 2015) which reads:-

*“(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).”*

4. The Company disputes the debt and this Court is asked to find that there is a bona fide dispute in respect hereof and liquidation of the Company is not appropriate. This argument is presented in a Notice of Motion date 20<sup>th</sup> December 2017, in which the Company has sought the striking out of the Petition.

5. These liquidation proceedings are premised on the ground that the Company is unable to pay its debts and is brought under the provisions of Section 384 (1) of The Insolvency Act. The Law however is that the liquidation jurisdiction of a Court cannot be properly invoked when a debt is disputed. The dispute, however, must be on substantial grounds otherwise any Petition can be resisted by a Company simply setting up an argument that the debt is disputed.

6. In an Affidavit sworn on 20<sup>th</sup> December 2017, Mr. Kimani Rugendo who is the Managing Director of the Company deposes that on the night of 7<sup>th</sup> January 2017, its warehouse at Ramani, Thika was broken into under the watch of security guards who was working in cahoots with thieves as well as one of the Petitioner's staff members. That amongst the persons who participated in the theft was an official of the

Petitioner who unlawfully used the Petitioner's stamp impression for purposes of removing the goods. The Company alleges a loss ascertained at Kshs. 19,710 306/- which it claims from the Petitioner.

7. The Company has shown a copy of a letter dated 25<sup>th</sup> May 2017 which is said to be in a response to the Statutory Demand. In it is raised the Claim arising from the theft.

8. The Petitioner does not make much of the Application and states that the claim is raised as an afterthought. Attached to the affidavit of John Wanjohi sworn on 8<sup>th</sup> February 2018 is a trail of email communications in which the Company appears to admit the claim. The Petitioner also says that the letter of 25<sup>th</sup> May 2017 was never sent out. This is the letter purportedly responding to the Statutory Demand.

9. It has always being the position that a Courts jurisdiction to dismiss an action as being an abuse of process is one to be sparingly exercised and to be used in exceptional and clearest of cases. And in Yaya Towers Ltd -vs- Trade Bank Limited (in Liquidation) [2000] eKLR Judge Lalcha J A stated:-

*“If the Defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini-trial upon affidavits”.*

At this stage of the proceedings the affidavit evidence has not been tested by way of cross-examination. For this reason this Court will not involve itself in a minute and detailed examination of the averments as to facts contained in the affidavits.

10. It is plain and obvious to this Court that if the debt is disputed then the Petition is unlikely to succeed and there would be no need to allow it to proceed to further hearing.

11. While on 10<sup>th</sup> January 2017, the Company raised the issue of the theft, it did not seem to insist that it will not settle its bills before the petitioner compensates it. That is, the settlement of the outstanding Bills were not preconditioned on resolution of the theft incident. On 28<sup>th</sup> February 2017, at 10.47 am the company emails the Petitioner as follows in respect to the overdue account:

*Janke,*

*Thanks for your email below.*

*I fully agree that the account overdue. You will agree that before the incidence, we have been paying well. As soon as we resolve the issue, we will agree the way forward. About your MD meeting our MD, you can go through the secretary to the MD.*

In reply to this email, the petitioner asks;

*Justus,*

*Please specify the particular issue that is pending to be resolved”*

In the emails that follow this, the Company does not point out or specify the outstanding issue.

12. It would therefore not be frivolous when the Petitioner argues that the Company has merely set up a dispute so as to defeat or stall the Petition. I would have to find that it is not plain to me that there is a dispute and there is need for cross-examination of witnesses on the circumstances giving raise to the communications exchanged between them and the circumstances then pertaining.

13. It is only fair that this Petition proceeds to hearing. The Notice of Motion dated 20<sup>th</sup> December 2017 is therefore dismissed with costs

**Dated, Signed and Delivered in Court at Nairobi this 9<sup>th</sup> day of November 2018.**

**F. TUIYOTT**

**JUDGE**

**Present:-**

**Musyoka for the Company**

**Simiyu h/b Anyona for the Petitioner**

**Nixon - Court Assistant**