



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

INSOLVENCY CAUSE NO. 14 OF 2016

IN THE MATTER OF: KIPSIGIS STORES LIMITED

AND

IN THE MATTER OF: THE INSOLVENCY ACT, 2015

IN THE MATTER OF: THE COMPANIES ACT (CAP, 486),

LAWS OF KENYA (NOW REPEALED)

RULING

Introduction

1. The motion dated 23 February 2017 stems from a creditor's petition filed on 16 June 2016 (" the Petition") for the winding up of Kipsigis Stores Ltd ("the Company"). The Petition was filed following the issuance of a statutory demand dated 15 January 2016. The Petition was filed under the Insolvency Act 2015.
2. The motion seeks to strike out the Petition as well as the statutory demand. The Company says that both are incompetent, incurably defective, bad in law and an abuse of the court process. The Company also denies being indebted to the Petitioner.
3. The motion is contested.

Background facts and litigation history

4. The Petition dated 13 June 2016 was filed by a creditor Mea Ltd. The Petitioner claimed that the Company is justly and truly indebted to it in the sum of Kshs. 99,458,143.90 and had failed to honour a statutory demand (also " a statutory notice") to pay the equivalent within 21 days. The Petitioner added that the Company had no prospect of paying the debt.
5. After appearing before the court's Deputy Registrar on three occasions between 29 June 2016 and 3 October 2016 and confessing his inability to serve the Company with the Petition, the Petitioners counsel finally confirmed that the Petition had been served upon the Company and sought a hearing date. The Petition was then fixed for hearing on 24 February 2017. In the meantime, the Petitioner proceeded to advertise the Petition and the hearing thereof on 6 February 2017 in a local newspaper. The Petitioner through the advertisement also invited any interested supporting or opposing creditor(s) to attend the hearing.

6. A day before the hearing however, the Company filed the instant motion. Only two creditors Bamburi Cement Ltd and NIC Bank Ltd reacted to the advertisement and expressed interest in the proceedings. The motion was supported by the affidavit of one Alfred Kipkorir Mutai. It met with a detailed affidavit in opposition sworn by one Francis Munyu Muhoro on 21 March 2017.

The Company's case

7. According to the Company, the court lacks the requisite jurisdiction to entertain and determine the instant Petition as it is predicated upon a notice issued pursuant to Section 220(a) of the repealed Companies Act (Cap 486). Additionally, it is contended that the Petition was, pegged on the Companies (Winding-up) Rules as well as the Companies (High Court) Rules, which rules have been revoked. The Company contends that the statutory notice or demand could only have been issued under Section 384(1) of the Insolvency Act 2015 and not the repealed Companies Act. The Company also contends that the Petition was defective as it was filed in contravention of Regulation 10 of the Insolvency Regulations 2016. Additionally, the Company contends that both the statutory notice as well as the Petition and the hearing notice of the Petition had never been served upon the Company.

8. The Company finally disputed the debt of Kshs. 99,458,143.90 and denied being indebted to the Petitioner in the said amount or at all, whilst contending that the Petition was brought for a collateral purpose. In this respect, the Company contended that it had always settled all invoices rendered by the Petitioner for any goods supplied to the Company whilst adding that some of the goods were never supplied.

9. It was the Company's contention that the Petition is an abuse of the process and ought to be struck out.

The Petitioner's case

10. The Petitioner's case may be gleaned from the opposing affidavit of Francis Munyu Muhoro filed on 22 March 2017.

11. The Petitioner contends that the statutory demand as well as the Petition is pegged on an admitted debt which as at 8 September 2015 stood at Kshs. 91,246,003.60 exclusive of interest. The debt arose as a result of goods supplied and delivered on credit but ultimately not paid for by the Company despite various demands culminating in the statutory demand of 15 January 2016.

12. The Petitioner contends that the statutory demand was lawfully and properly issued under Section 220 of the Companies Act (Cap 486) (now repealed). The demand according to the Petitioner was served upon the Company at its offices in Sotik Township on 16 February 2016 but not heeded leading to the filing of the Petition. According to the Petitioner, the Petition was also served upon the Company through its director Alfred Kipkorir Mutai and also through registered mail "out of abundant caution". The Petitioner asserted that the Company and its directors have always been aware of the debt, statutory demand as well as of the Petition.

13. The Petitioner contends that it has complied with all relevant provisions of the law and further that the Petition was legitimately filed after the Company failed to settle an admitted debt.

Arguments in court

The Company submits

14. The Company's case was argued by Mr. C. Kiplangat.

15. Mr. Kiplangat stressed that the Company had not been served with a valid statutory demand or any demand at all upon which the petition could be premised. Counsel contended that the statutory demand was allegedly served on 16 February 2016 when the Companies Act (Cap 486) had been repealed yet the statutory demand referred to Section 220 of the Companies Act (Cap 486). Counsel asserted that the

notice ought to have been issued under Section 384 of the Insolvency Act, 2015. Counsel added that in any event the 'defective' notice had been served upon a clerk of the Company and not the Company itself or any of its directors.

16. Counsel then submitted that the Petition was also advertised to the prejudice of the Company yet the rules or regulations which permitted the advertisement were repealed through Legal Notice No. 1 of 2016. In these respects, counsel submitted that there was no room for creditors to be called to either support or oppose the Petition. Again, counsel pointed to the fact that the Petition was not served upon a director of the Company and that the alternate mode of service used also went through a wrong postal address namely "Box 547-20227 Sotik" instead of "Box 547-20406 Sotik".

The Petitioner replies

17. Mr. M.S.Kotonya urged the Petitioner's case.

18. Mr. Kotonya submitted that when the Petitioner issued the statutory notice on the 15 January 2016, the Companies Act (Cap 486) was still in force. Counsel stated that the statutory notice was valid and that there was sufficient proof, through the affidavit of service that service had also been properly effected at the Company's registered offices.

19. It was counsel's contention that the Petition was prompted by a genuine aim as the Company had failed to pay the amount demanded in the statutory notice. The Petition according to counsel had also been properly served as had been the case of service of the statutory notice. Counsel insisted that service by registered post was only effected after the Petitioner declined to formally acknowledge service. The letter forwarding the Petition was yet to be returned unclaimed, so insisted the Petitioner's counsel.

20. Counsel submitted further that the application to strike out the Petition was not grounded on any obvious and plain ground but rather on frivolous grounds, which included an allegation that the Petition had been unlawfully advertised yet no rule or law prohibited the advertisement.

21. For completeness, Mr. Kotonya concluded his submissions by stating that the Petitioner had ensured full compliance with the law and regulations in the issuance of a statutory demand, service of the demand, filing of the Petition and service of the Petition itself.

Discussion and Determination

22. The nub of the Company's motion is the contention by the Company that the Petitioner failed to take the appropriate steps prior to filing of the Petition.

23. Having listened carefully to the Company's as well as the Petitioner's counsel and having also read the affidavit in support of as well as in opposition to the application, I have been able to isolate the following issues. Was the Company served with a valid statutory demand? If so, has the Company made out a case for the setting aside of the statutory demand? If not, is there a valid competent Petition before the court? Finally, was the Petition served upon the Company? If not, what would be the effect of non-service?

24. There should exist little controversy if any that a statutory demand for insolvency purposes was served upon the Company. Whilst the Company contends that service was not effected, the Petitioner insists that the statutory demand was duly served upon the Company on 16 February 2016. An affidavit of service sworn by Hezron Getuma Onsongo on 19 February 2016 re-affirms the service of the notice upon a Mr. Zakayo, a clerk with the Company. The affidavit is detailed on how the service was effected following so much conversation and contact with the Company's director one Alfred Mutai. The affidavit of service was not contested with regard to the fact that the Company has its offices situated in Sotik Township and more particularly along Garage Road opposite Empire hotel.

25. The question of service of process or notices is a common- place quibble which comes up time and

again, in literally all litigious proceedings.

26. Both the Insolvency Act No. 18 of 2015 and the Companies Act (Cap 486)(now repealed) decree the service of a statutory demand by a creditor prior to the commencement of any insolvency proceedings.

27. Under section 424 of the Insolvency Act and section 219 of the Companies Act, a Company was susceptible to liquidation by the court, where amongst other factors, it was unable to pay its debts. Section 220 of the Companies Act, in so far as is relevant stipulated that:

“220. A Company shall be deemed to be unable to pay its debts.

a. If a creditor, on assignment or otherwise, to whom the Company is indebted in a sum exceeding...then due had 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. ...

c. ...

28. A reading of Sections 384 and 424(e) of the Insolvency Act would reveal that both have the same effect as Section 220(a) of the now repealed Companies Act. Section 384 of the Insolvency Act stipulates as follows:

384(1) For the purposes of this part (being Part VI- liquidation of companies) a Company is unable to pay its debts- if

a. 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. ...

c. ...

29. Clearly, under both the Companies Act (Cap 486) and the succeeding Insolvency statute, service of a statutory demand is a condition precedent to the commencement and success of a creditor’s Petition for liquidation by the court grounded on the Company’s inability to pay its debts: see also **Kenya Cashewnuts Ltd v National Cereals & Produce Board [2002]eKLR**.

30. As was stated by Maraga J (as he then was) in **In Re African Safari Club Ltd [2006]eKLR** there is no provision for service of the statutory demand (under Section 220 and now under Section 384 of the Insolvency Act) at any other place except at the registered office of the Company. Both the Companies Act (Cap 486) and the Insolvency Act do not specify that service be effected upon a director or officer of the Company it is enough if left at the Company’s registered offices.

31. In my view, it is a pure question of fact whether service has been effected. By service must be meant the obligation to do all that is reasonably practical to bring a statutory demand to the debtor’s attention. A Company may change its registered offices. A Company may actually principally conduct its business elsewhere. Where there are enough attempts to trace the Company’s registered offices, where all the steps do not lead to fruition, then the court ought to appreciate and acknowledge that service at a place other than the registered office will suffice. This will be satisfied on a balance of probabilities with the purpose being to ensure that spurious applications intended to merely delay proceedings are weeded out.

32. My view is that in the instant case, the Petitioner has on a balance demonstrated that the statutory demand was served upon the Company. The affidavit of service is detailed as to the steps the process server took. The Company has also admitted that its registered office are in Sotik Township along Garage Road. I am satisfied that the statutory demand was brought to the Company's attention on or about 16 February 2016, at its registered offices.

33. The Company next disputed the statutory demand. Mr. Kiplangat contended that the statutory demand was defective and thus invalid. Accordingly, the statutory demand even if served could not jump start the process of involuntary insolvency. The contention was largely based on the fact that the statutory demand made reference to Section 220 of the Companies Act (Cap 486) yet at the time of service the Companies Act had long been repealed. Mr. Kotonya's response on behalf of the Petitioner was that the involuntary insolvency process had been commenced earlier than the date of repeal and that it was a process that could not have been reversed. Mr. Kiplangat. However retorted that the Company could not find succor in provisions of Section 734 of the Insolvency Act.

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).”

36. The court in **In Re F.M. Macharia (K) Ltd** (supra) then appreciated that there is no prescribed form for a statutory demand and thus *“the question can only be one of substantial compliance and not just compliance. [As] substantial compliance is necessary for the simple reason that based upon the statutory demand, the Company may be liquidated.”*

37. A cursory glance at the now repealed Section 220 of the Companies Act as well as Section 384 of the Insolvency Act and the relevant Regulations 16 & 17 of the Insolvency Regulations (LN 47 of 2016), would reveal that a substantially compliant statutory demand is one that is dated, issued under the hand of the creditor, states the amount of debt, states purpose of notice (to commence liquidation process if there is non-compliance) and states also time for compliance as 21 days from date of service. There is no explicit requirement that the notice should state under which Section of the Act it has been issue. It is also apparent, and I hold the view, that even where the statutory demand is not fully compliant it should not be fatal to the insolvency proceedings.

38. In **In Re a Debtor (No. 1 of 1987) [1989] 2 All ER 46** the court which was reflecting on a 1986 statutory provision which was in pari materia Section 220 of the Companies Act and Section 384 of the Insolvency Act stated as follows:

“Under the 1986 Act, a statutory demand which is not complied with founds the consequence that the debtor is regarded as being unable to pay the debt in question, or if the debt is not immediately payable as having no reasonable prospects of being able to pay the debt when it becomes due. The consequence in turn founds the ability of the creditor to present a bankruptcy

petition because under Section 268(1) in the absence of an unsatisfied return to execution or other process, a debtors inability to pay the debt in question is established if, but only if, the appropriate statutory demand has been served and not complied with.

When therefore the rules provide as does rule 6.5 (4)(d) for the court to have a residual discretion to set aside a statutory demand, the circumstances which normally will be required before a court can be satisfied that the demand 'ought' to be set aside are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The courts intervention is called for to prevent that injustice" (emphasis)

39. The court in ***In Re a Debtor (No. 1 of 1987)*** [Supra] was faced with an application that the statutory notice was not in the prescribed form and showed incorrectly calculated sum as the debt outstanding. The court viewed the defects as mere technicalities and refused to set aside the statutory demand as the justice of the case did not dictate so.

40. Clearly, an application to set aside or vacate a statutory notice on the basis of invalidity should be looked at in the light of the full circumstances of the case. The notice should not be set aside on the basis of a mere technicality. Rather regard should be had to all the circumstances including but not limited to whether the debt is owed as well as whether the overriding objective would be defeated by setting aside the notice. If no injustice flows from the consequences of non-compliance, then it would serve no purpose to set aside a statutory demand and to cause the statutory demand to be served again at cost.

41. *In Casu*, the statutory demand duly executed by the Petitioner was issued on 15 January 2016. That was a couple of days prior to the repeal of Part VI of the Companies Act as to winding up of companies. The Petitioner's agent non-the-less served the notice on 16 February 2016. The affidavit of service sworn by the agent who served the statutory notice states that the agent had received the notice on 15 January 2016.

42. I hold the view, that as at 15 January 2016 the non-voluntary insolvency process had already commenced and thus the transitional provisions of both the Companies Act 2015 and the Insolvency Act 2015 protected this past event of the notice having referred to Section 220 of the Companies Act.

43. I also hold the view that in any event, even if service was effected after the commencement of the Insolvency Act, the reference to Section 220 of the Companies Act was a technical error on the demand which should not defeat it. No substantial injustice or prejudice has been shown to have been occasioned to the Company as may not be remedied by the court.

44. Thirdly, the circumstances of the case would also dictate that the reference to Section 220 be ignored. There is foremost no requirement that any statutory Section be specifically referred to in the statutory demand. The debt does not appear to be substantially in dispute. There is affidavit evidence duly documented that the Company admitted its indebtedness to the Petitioner in September 2015. It was not suggested that any payment has been made. It was also not suggested that the admission was retrieved from the Company after any coercion, duress, collusion or fraud. I am constrained not to look beyond the admission of debt and hold that the debt is not in dispute as to raise any triable issue.

45. I find that the statutory demand is valid and has been served, for the purposes of the instant insolvency proceedings and decline to set the same aside as I am not convinced that the Company has established any ground to set it aside. No clear residual ground has also been established to invite my favourable discretion.

46. It now brings me to the Petition.

47. The Petition was filed on 16 June 2016. It was then allegedly served by registered mail besides service upon a secretary to the Company's director earlier on 25 October 2016.

48. The Company contested the Petition for not being in tandem with the provisions of Regulation 10 of

the Insolvency Regulations. I think this contention was misconceived. Regulation 10 refers to applications and not Petitions.

49. The Company also contested the service. I believe the Company is on proper footing on this ground. The service does not seem to have been proper. The Petition was first inserted under a door somewhere in a building in the Karen suburbs of Nairobi. Then it was served upon a secretary. Then it was posted. It is clear the Petitioner was desperate to effect service but floundered. Even in the service through registered mail the Petitioner faulted when the postal address was incorrectly captured. The postal address used of P.O. "Box 547-20227 Sotik" was the incorrect one.

50. This led the Company to complain about the advertisement in the newspapers of the Petition. While there is no rule, regulation or law prohibiting the advertisement of an insolvency petition, it is perhaps more appropriate to reflect on the reason behind advertisements. It is simply to bring on board any other interested creditor. And where it involves a Company that has effectively ceased trading no prejudice can really be claimed. In the instant case, I can identify no prejudice occasioned by the advertisement. The Company did not also point at any.

Conclusion

51. I conclude by summarizing my findings.

52. The statutory demand dated 15 January 2016 is valid notwithstanding the reference to Section 220 of the Companies Act (now repealed) for the reason that it was issued prior to the repeal of the Companies Act and further that the technical error has occasioned no injustice or prejudice to the Company. I also find that the notice was served upon the Company.

53. The Petition was however not served with the consequence that the Petitioner has to formally effect service again either through counsel on record or at the Company's registered offices.

Disposal

54. I dismiss the application but with no order as to costs.

Dated, signed and delivered at Nairobi this 12th day of May, 2017.

J.L.ONGUTO

JUDGE