

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**INSOLVENCY CAUSE NO. E124 OF 2023**

**ABSA BANK KENYA PLC (formerly)**

**BARCLAYS BANK OF KENYA LIMITED.....**  
**PETITIONER**

**VERSUS**

**RAHAB**  
**WACHIRA.....DEBTOR/APPLICANT**

**MUKAMI**

**RULING**

1. This Ruling is in respect of the Debtor/Applicant's Application by way of a Notice of Motion dated 29<sup>th</sup> September, 2023.
2. The Applicant filed the Notice of Motion dated 29<sup>th</sup> September 2023 seeking orders that the statutory demand dated 13<sup>th</sup> September 2023 be set aside and the costs of the Application be provided for.
3. The Application was supported by the Affidavit of **Rahab Mukami Wachira**. She averred that they were served with a statutory demand dated 13.09.2023 seeking payment of Kshs. 6,496,742.50 pursuant to an *ex parte* judgment in **Milimani CMCC No. 289 of 2018 Barclay Bank of Kenya**

**Limited -vs- Dodi Autotech (Kenya) Limited; James Maingi Kimani and Rahab Mukami Wachira.** They dispute the debt, arguing that the judgment was obtained irregularly since neither they nor their co-defendants were served with summons or suit documents. An application to set aside the judgment has already been filed, supported by evidence that the process server's affidavits of service are contradictory and based on falsehoods.

4. The Applicant further contended that the statutory demand is irregular and unjustified as it arises from an impugned judgment, and that enforcing it would subject them to unfair insolvency proceedings without being heard. They maintain they have a valid defence with triable issues and urge the court to exercise its discretion under **Section 17(2)(d) of the Insolvency Act** and related regulations to set aside the statutory demand in the interests of justice.
5. In response, vide the Replying Affidavit of **Samuel Njuguna** sworn on 29<sup>th</sup> July 2024, the Respondent stated that on several instances the Debtor had acknowledged the debt, and based on the history of this matter, the Lower Court

declined to issue any interim orders for stay of execution. It is therefore absurd that the Debtor/Applicant is now purporting to claim that they were not served with summons and Notice of Entry of judgment. He emphasized that this amounts to abuse of the Court process and contempt of court.

### **Issues for determination**

6. Having carefully considered the parties submissions, the Application and the response therewith there is only one issue for the Court's determination;

*a) Whether the statutory demand ought to be set aside.*

### **Analysis**

7. **Regulation 17 (6) of the Insolvency Regulations** lists the grounds upon which a Court is to grant an application to set aside a Statutory Notice. The same provides: -

***“The court may grant the application if-***

***a) The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debts specified in the statutory demand;***

**b) The debt is disputed on grounds which appear to the court to be substantial;**

**c) It appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or**

**d) The court is satisfied, on other grounds, that the demand ought to be set aside.”**

8. It was the Applicant's submission that her application is anchored on the grounds that the subject statutory demand was/is substantively and procedurally defective and invalid since the alleged debt was/is truly disputed and, consequently, that the statutory demand amount to an abuse of the court process meant to put unjustified pressure upon the Applicant to pay a debt which was/is *bona fide* disputed.

9. In contrast, the Respondent argued that the Applicant has not given any genuine grounds for setting aside the statutory demand. Given the history of the matter at the lower court, the Applicant has never denied being indebted

to the Respondent. Therefore, it is evident that the Debtor is unable to pay her debts.

10. The Court has taken notice of the documents availed by the Respondent whereby the admission of the debt is evident (demand letter dated 11<sup>th</sup> July 2017, Affidavits by James Maingi Kimani, the 2<sup>nd</sup> Defendant and husband of the Applicant).
11. The power of a Court to set aside a Statutory Demand is a discretionary power and one which must be exercised only in the most deserving of cases. **(See Spire Bank Limited -Vs- Nanak Singh Bansal [2020] eKLR).**
12. However, it is equally important to acknowledge that the Applicant has a right to be heard. Therefore, it is the Court's considered view that, based on ground (d), it will be prudent to set aside the statutory demand to await the determination of the Lower Court on the Application dated 29<sup>th</sup> September 2023 in **Milimani CMCC No. 289 of 2018 Barclay Bank of Kenya Limited -vs- Dodi Autotech (Kenya) Limited; James Maingi Kimani and Rahab Mukami Wachira.** Indeed, a determination of that

Application will determine the trajectory of the demand made by the Petitioner. If the exparte Judgement is set aside, then there will be justification for the statutory demand. If the exparte Judgement is sustained, the Petitioner can bring forth a fresh demand. What finally persuades the Court is the protection of a party's right to be heard and to due process. As matters stand, there is no evidence placed before the Court as to the outcome of that application to set aside the exparte judgement, whose existence is not denied by the Petitioner. If the Debtor is delaying in prosecuting that application, the Petitioner should be able to move the Court for necessary orders. The Court needs not say more. As matters now stand, that Decree obtained exparte is challenged through the same proceedings wherein it was obtained.

13. The Statutory demand dated 13<sup>th</sup> September 2023 is hereby set aside.
14. As to costs, this Court has the discretion as to how to award the costs. Ordinarily costs follow the event. In this

case and looking at all the factors of this case, the fair order is that there will be no orders as to costs.

**Determination**

15. The Debtor/Applicant's Application by way of a Notice of Motion dated 29<sup>th</sup> September, 2023 is allowed in the following terms;

*a) THAT the statutory demand dated 13.09.2023 be and is hereby set aside.*

*b) THAT there be no orders as to costs.*

16. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS  
09<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**NJOROGE BENJAMIN K.  
JUDGE**

In the presence of;

Mr. Kimani for the Petitioner/Respondent.

Mr. Maina for the Debtor/Applicant.

Mr. Peter Wabwire - Court Assistant.