



REPUBLIC OF KENYA



**D Manji Construction Limited v Associated Construction
Company (K) Limited (Commercial Insolvency E182 of 2022)
[2025] KEHC 13624 (KLR) (Commercial and Tax) (26 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL INSOLVENCY E182 OF 2022**

MN MWANGI, J

SEPTEMBER 26, 2025

IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015

AND

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

BETWEEN

D MANJI CONSTRUCTION LIMITED CREDITOR

AND

ASSOCIATED CONSTRUCTION COMPANY (K) LIMITED DEBTOR

RULING

1. The debtor/applicant filed a Notice of Motion application dated 14th February 2024 pursuant to the provisions of Article 159 of the Constitution of Kenya, 2010, Sections 384 & 692 of the Insolvency Act, Regulations 16 & 17 of the Insolvency Regulations and all enabling provisions of the law. The debtor seeks an order to set aside the statutory demand dated 9th December 2022 and served on 17th December 2022.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Nanak Singh Bansal, a Director of the debtor company. He challenged the statutory demand issued by the creditor on 9th December 2022 and served on 17th December 2022 over an alleged unpaid balance of the decretal sum in HCCOMM Misc No. 378 of 2017. He averred that the creditor has threatened liquidation proceedings and advertisement despite already securing garnishee orders against the debtor's funds held by the Kenya Urban Roads Authority.



3. In view of the foregoing, Mr. Bansal asserted that the proposed insolvency proceedings are malicious, premature, and intended to pressure or extort the debtor, given that the creditor's debt is being recovered through existing garnishee proceedings. He contended that the debtor is a solvent going concern, capable of meeting its financial obligations, and has already made significant payments toward settling the decretal sum. He averred that the legal threshold under Section 384(1) of the *Insolvency Act* for deeming a company insolvent has not been met, as no execution process has been returned unsatisfied.
4. In opposition to the application, the creditor filed a Notice of Preliminary Objection dated 15th February 2024 raising the following objection –
 - i. That the application dated 14th February 2024 is statutorily time-barred as it has been filed outside the 21 days allowed for setting aside a statutory demand under Regulation 16(1) of the *Insolvency Regulations*, Act No. 18 of 2015.
5. The creditor also filed a replying affidavit sworn on 4th March 2024 by Mr. Dipak Patel, a Director of the creditor company. Mr. Patel averred that the debtor does not dispute the debt of Kshs.27,735,167.00 arising from a valid Arbitration Award, which was adopted as a Court decree in HCCOMM Misc No. 378 of 2017. Further, that the statutory demand dated 9th December 2022 remains unpaid and undisputed. He contended that the application dated 14th February 2024 is a deliberate attempt to delay or frustrate lawful debt recovery. Mr. Patel stated that the parties herein had previously agreed to a Consent Order on how the decretal sum would be settled, but the debtor has only made partial payments totaling Kshs.55,190,000/=, leaving a balance of Kshs.27,735,167.00 plus interest.
6. He asserted that despite repeated demands, the debtor has shown no willingness to pay, causing the creditor to initiate execution proceedings, including warrants for sale of property, and later issued a statutory demand after failed attempts at amicable resolution. Mr. Patel clarified that the garnishee proceedings referred to by the debtor were withdrawn by consent on 11th July 2023. He maintained that the threshold under Section 384(1) of the *Insolvency Act* has been met, as execution attempts have not yielded full payment, and that post-dated cheques offered by the debtor were rejected as insincere and untimely. Mr. Patel averred that the instant liquidation proceedings are justified, lawful, and necessary to prevent further loss, especially since the funds are needed to pay sub-contractors.
7. The debtor also filed a Notice of Motion application dated 11th March 2024 under the provisions of Article 159 of the *Constitution* of Kenya 2010, Sections 384 & 692 of the *Insolvency Act*, Regulations 16 & 17 of the *Insolvency Regulations* and all enabling provisions of the law. The debtor prays for orders to strike out the liquidation petition dated 1st March 2024.
8. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Nanak Singh Bansal, a Director of the debtor company. Mr. Bansal averred that the instant liquidation petition was filed in bad faith and it is intended to maliciously pressure the debtor despite ongoing debt recovery efforts through garnishee proceedings. He further averred that in the event that this petition is advertised, it would cause severe reputational and financial harm to the debtor, potentially crippling its operations. He stated that this petition is premature and unlawful, as it was filed while an earlier application to set aside the statutory demand was still pending. He deposed that the creditor was formally notified of an automatic stay under Regulation 16(2) of the *Insolvency Regulations*, but it chose to ignore it.
9. Mr. Bansal averred that the garnishee proceedings through which the creditor already secured partial payments have neither been shown to be unsuccessful nor has the creditor demonstrated that execution has been returned unsatisfied as per the provisions of Section 384(1) of the *Insolvency Act*. He further



averred that the creditor has not provided a certificate of compliance from the Official Receiver, thus rendering the instant petition defective. Mr. Bansal maintained that the debtor is a solvent operational company having made further payments over and above Kshs.55,000,000/=. He prayed for an order for reconciliation of accounts to determine the actual balance.

10. In opposition to the debtor's application, the creditor filed a replying affidavit sworn on 24th May 2024 by Mr. Dipak Patel, a Director of the creditor company. He reiterated that the debt of Kshs.70,570,844.03 awarded in its favour through an Arbitral Award dated 3rd August 2016, remains outstanding with a balance of Kshs.30,317,109.00 inclusive of interest. He averred that the said Award carried an interest rate of 18% per annum, later compounded monthly by a Consent Order dated 14th August 2019. Mr. Patel outlined various efforts made to recover the subject debt including negotiations, execution via warrants of sale, and the statutory demand issued on 9th December 2022.
11. He asserted that the debtor's failure to respond to the said statutory demand within the mandatory 21-days' period renders the application to set aside the statutory demand defective and time-barred. Mr. Patel stated that the creditor has fully complied with the *Insolvency Act* and Regulations, including filing of the required verifying affidavit as provided for under Regulation 77B of the *Insolvency Regulations*. He cited Section 384 of the *Insolvency Act* and contended that the debtor is not a going concern, as the statutory demand remains unsatisfied and the debt is largely unpaid. In addition, that the debtor admits to partial payment, confirming inability to fully settle the debt.
12. In a rejoinder, the debtor filed a supplementary affidavit sworn on 10th September 2024 by Mr. Nanak Singh Bansal, a Director of the debtor company. He contended that the debt arising from HCCOMM Misc No. 378 of 2017 has been substantially paid, with total payments amounting to Kshs.65,062,000/= to the creditor, and Kshs.3,620,000/= to Auctioneers, against a judgment sum of Kshs.54,128,084.97 and interest, hence the need for account reconciliation. Mr. Bansal averred that since a Consent Order dated 14th August 2019 set the total payable amount at Kshs.70,570,844.03 including interest, the debtor has fully paid the judgment sum having paid over Kshs.65,000,000/=. He maintained that the debtor remains a going concern, is financially stable, and able to pay its debts.
13. Mr. Bansal contended that the debtor disputes the outstanding balance figures provided by the creditor, citing inconsistencies. He asserted that the statutory demand is not based on a liquidated or undisputed debt, thus it cannot be the basis for insolvency proceedings. He averred that Regulation 16(1) of the *Insolvency Regulations* does not apply to corporate insolvency, and in any event, the 21-day window is not mandatory. He stated that the delay in filing an application for setting aside the statutory demand dated 9th December 2022 was due to ongoing negotiations, a belief that garnishee execution was resolving the debt and continued payments being made.
14. The applications herein and the Notice of Preliminary Objection were canvassed by way of written submissions. The debtor's submissions were filed on 12th September 2024 by the law firm of CM Advocates LLP, while the creditor's submissions were filed by the law firm of Nyiha, Mukoma & Company Advocates on 30th September 2024.
15. Ms. Kendi, learned Counsel for the debtor submitted that Rule 16(1) of the *Insolvency Regulations* only applies to personal bankruptcy, not corporate insolvency. She contended that the creditor's Preliminary Objection based on the claim that the application for setting aside the statutory demand dated 9th December 2022 was filed outside the 21-day period is misplaced. She relied on the case of *Benson Mulevu Mulwa & 59 others v Invesco Assurance Co. Limited & another* [2020] eKLR, and argued that there is no express statutory deadline for setting aside a statutory demand in corporate insolvency, and Courts have held that such applications are subject to the Court's discretion. Counsel referred to the case of *Peter Munga v African Seed Investment Fund LLC* [2017] eKLR and contended



- that even if the provisions of Rule 16(1) of the [Insolvency Regulations](#) were applicable, it is not couched in mandatory terms, meaning that failure to file the application within 21 days is not fatal, and does not automatically bar the application.
16. Ms. Kendi cited the provisions of Regulation 17(6) of the [Insolvency Regulations](#) and the case of [Jabavu Village Limited v Credit Bank PLC](#) (Insolvency Notice E179 of 2022) [2023] KEHC 25142 (KLR), and asserted that solvency does not require liquid cash, as long as a debtor can meet its obligations through available assets or security. She submitted that the debtor satisfied the statutory demand by providing the creditor with security in the form of funds owed to it by the Kenya Urban Roads Authority, enabling garnishee proceedings, thereby demonstrating its solvency and ability to pay debts. She argued that the creditor's decision to abandon the garnishee proceedings which were never returned unsatisfied should not be held against the debtor.
 17. Counsel contended that the amounts claimed by the creditor are disputed on substantial grounds. She stated that the creditor has at one point claimed that the outstanding sum is Kshs.27,735,167.00 and at a different time claimed it to be Kshs.30,317,109.00, thus demonstrating a genuine and substantive dispute over the debt. Ms Kendi relied on the case of [Sawand Care Products Ltd v Nestle Kenya Limited](#) [2019] eKLR and submitted that the debtor has demonstrated both solvency and good faith, having made further payments toward the debt even after the issuance of the statutory demand, with the last payment having been made in March 2024. Counsel asserted that the debtor has made out a case to warrant the issuance of an order to set aside the statutory demand dated 9th December 2022.
 18. She relied on the Court of Appeal case of [Brahmbhatt v Dynamics Engineering Ltd](#) [1986] KLR 133 and submitted that the liquidation petition in this matter was filed in bad faith and not on legitimate grounds, as it was lodged while the application to set aside the statutory demand was still pending. She referred to the case of [Prime Steel Engineering Co. Ltd v Toddy Civil Engineering Co. Ltd](#) [2020] eKLR, and contended that the creditor's insolvency petition is bound to fail as the debtor has made genuine efforts to secure the unpaid interest and has continued making payments even after the creditor abandoned garnishee proceedings without explanation, thus demonstrating that the debtor is solvent, and it is capable of meeting its obligations. Ms Kendi referred to the decision in [Utility Group Kenya Limited v Uplands Premium Dairies & Foods Limited](#) [2021] eKLR, and argued that since the debtor has paid more than what the creditor acknowledges, including full payment of the judgment sum, the amount claimed by the creditor is disputed on substantial grounds.
 19. Mrs. Olembo, learned Counsel for the creditor relied on the case of [Kenya Afrotech Limited v Swissport Kenya Limited](#) (Insolvency Cause E006 of 2021) [2023] KEHC 18535 (KLR), and submitted that despite the absence of express provisions on company insolvency, Courts have consistently applied principles from personal bankruptcy to corporate insolvency matters. She submitted that Regulation 17 of the [Insolvency Regulations](#) must be applied in light of the requirements in Regulation 16. Counsel cited the case of [Nyoka Nathaniel v Xplico Insurance Co Ltd](#) [2022] eKLR, and argued that the creditor's Preliminary Objection dated 15th February 2024 is valid as the debtor's application to set aside the statutory demand was filed outside the 21-day statutory period.
 20. Mrs. Olembo contended that the debtor has not met the threshold for setting aside the statutory demand dated 9th December 2022. She argued that the debtor has no counterclaim and the alleged dispute over the debt is unfounded since a Consent Order dated 14th August 2019 provides for 18% monthly compounded interest on any unpaid balance. She claimed that the amount reflects this agreed interest and any variation does not invalidate the demand. Additionally, Counsel contended that the creditor holds no security for the debt as required under Regulation 17(6) of the [Insolvency Regulations](#) and the debtor has acknowledged that it has not yet fully settled the debt. In urging the



Court to consider the broader context and substance over technicalities as no injustice would arise from disallowing the application to set aside the statutory demand, Mrs. Olembo cited the case of *Kipsigis Stores Limited* ML HCIP No. 14 of 2016 [2017] eKLR.

21. She submitted that the filing of the liquidation petition was a justified and reasonable step in the debt recovery process after other recovery efforts failed. She referred to the provisions of Section 384 of the *Insolvency Act* and maintained that the debtor is insolvent. Mrs. Olembo relied on the case of *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* [2018] eKLR, and submitted that insolvency proceedings are a valid recovery mechanism and not limited to being a measure of last resort. She stated that the creditor has rightfully filed the liquidation petition dated 1st March 2024, based on a valid statutory demand. She outlined prior debt recovery efforts, including enforcing an Arbitral Award through Court, obtaining warrants for sale of property, and negotiating a Consent Order and asserted that the debtor has no valid basis to oppose this petition and is merely attempting to frustrate lawful debt recovery.

Analysis and Determination.

22. I have considered the applications filed herein, the grounds in support of each application, and the affidavits filed in support thereof. I have also considered the replying affidavits filed by the creditor, as well as its Notice of Preliminary Objection. I have also taken into account the submissions by Counsel for the parties. The issues that arise for determination are –
- i. Whether the creditor’s Preliminary Objection should be sustained;
 - ii. Whether the statutory demand dated 9th December 2022 should be set aside; and
 - iii. Whether the liquidation petition dated 1st March 2024 should be struck out.

Whether the Creditor’s Preliminary Objection Should be Sustained.

23. It is now well settled that in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, but it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
24. What constitutes a valid Preliminary Objection was addressed by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 as hereunder -

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to Arbitration.

25. In the said case, Sir Charles Newbold P., stated thus-

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but



unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.

26. The creditor herein challenged the debtor's application seeking to set aside the statutory demand dated 9th December 2022 on grounds that the application was filed outside the timeline provided for under Regulation 16(1)(a) of the *Insolvency Regulations* which provides that -

The debtor may, apply to the Court for an order to set aside the statutory demand -

- a. within twenty-one days from the date of the service on the debtor of the statutory demand; or
- b. if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier. (Emphasis added).

27. In response, the debtor argued that the creditor's Preliminary Objection lacks merit, asserting that Regulation 16 of the *Insolvency Regulations* pertains specifically to natural persons and not companies, as it falls under Part V of the *Regulations*. The debtor however conceded to the fact that when considering whether to set aside a statutory demand served on a company, Courts rely on the provisions of Regulation 17, which though also under Part V, is applied by analogy in corporate insolvency matters.

28. A review of the *Insolvency Regulations* reveals that Part V, which contains Regulations 16 and 17 pertains specifically to personal bankruptcy, while Part X governs the liquidation of companies. Notably, aside from Regulation 77B(2) which mandates that a liquidation petition against a company must be accompanied by a statutory demand, Part X does not include provisions for setting aside a statutory demand. As a result, Courts have routinely turned to *Regulations* 16 & 17 under Part V for guidance when addressing applications seeking to set aside statutory demands in the context of corporate insolvency.

29. Upon perusal of the authorities relied on by the debtor and the creditor in support of their respective positions, this Court notes that they are all decisions of the High Court and as such, carry only persuasive value and are not binding to this Court. This Court finds it somewhat contradictory for the debtor to contend that Regulation 16 does not apply to corporate insolvency, and in the same breath state that Regulation 17 does. This Court therefore takes the considered view that given the absence of any express provisions in Part X of the *Insolvency Regulations* for setting aside a statutory demand, both Regulations 16 and 17 of the *Insolvency Regulations* are applicable when determining applications to set aside a statutory demand in corporate insolvency matters.

30. Regulation 16(1)(a) of the *Insolvency Regulations* provides that a debtor may apply to the Court for an order to set aside a statutory demand within twenty-one days from the date of the service on the debtor. In this case, the statutory demand dated 9th December 2022 was served on the debtor on 17th December 2022, while the application to set aside the said statutory demand was filed on 14th February 2024. This means that the said application was filed approximately two years after service of the demand, which is way beyond the timeline of 21 days, rendering the application for setting aside the statutory demand time barred.

31. I am as such persuaded that the creditor's Notice of Preliminary Objection dated 15th February 2024 is merited. In the premise, I shall not belabour on the issue of whether or not the statutory demand dated 9th December 2022 should be set aside, as there is no competent application before me seeking determination of the said issue. The said application is hereby struck out.



Whether the Liquidation Petition Dated 1st March 2024 Should be Struck Out.

32. The debtor's position is that the instant liquidation petition was filed in bad faith and that it is meant to exert undue pressure on the debtor, despite ongoing recovery efforts through garnishee proceedings. The debtor maintains that the petition is premature and unlawful, as it was filed while an application to set aside the statutory demand was still pending. Furthermore, the creditor has not shown that the garnishee proceedings failed or that execution efforts were unsuccessful as required under Section 384(1) of the *Insolvency Act*. The debtor also claims that the petition is defective for lacking a certificate of compliance from the Official Receiver.
33. The creditor on the other hand maintained that a balance of Kshs.30,317,109.00 remains unpaid from the original Award of Kshs.70,570,844.03. It detailed its recovery efforts, including negotiations, execution, and issuance of a statutory demand. The creditor asserted full compliance with the *Insolvency Act* and *Regulations*, including filing a verifying affidavit under Regulation 77B. It argued that the debtor is not a going concern, as the statutory demand remains unsatisfied and only partial payments have been made, confirming the debtor's inability to fully settle the debt.
34. Courts have generally held the view that pleadings should not be struck out unless there is a clear and unmistakable case of abuse of the Court process. In the case of *Jitendra Brahmabbatt v Dynamics Engineering Ltd* [1986] KECA 83 (KLR), the Court of Appeal articulated this position as follows –
- In an application to strike out a winding up petition, the Court should consider whether on evidence, it is a plain and obvious case for striking out and whether the petition was bound to fail.
35. Furthermore, in the oft cited case of *Yaya Towers Ltd v Trade Bank Ltd (In Liquidation)* [2020] eKLR, the Court held that -
- A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success, unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial.
36. Upon reviewing the grounds in support of the application to strike out the creditor's liquidation petition dated 1st March 2024 it is apparent that apart from the contention that the petition was filed while an application to set aside the statutory demand was still pending and the allegation that it lacks a certificate of compliance from the Official Receiver, the remaining grounds would be more appropriately addressed during the substantive hearing of the petition. That will give both parties an opportunity to present evidence to support their respective positions. This approach is particularly warranted given that the statutory demand has not been set aside.
37. The issue of whether the petition was filed while an application to set aside the statutory demand was pending is of little consequence in light of this Court's finding that the debtor's application to set aside the statutory demand dated 9th December 2022 was filed out of time, and is therefore time-barred.
38. The debtor asserted that the creditor's liquidation petition is fatally defective for want of a certificate of compliance from the Official Receiver. Regulation 77B of the *Insolvency Regulations* provides for liquidation by Court. It states that –
1. For the purposes of section 425 of the *Act* an application for liquidation shall be –
 - a. by way of a petition in Form 32C as set out in the First Schedule; and



- b. accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.
2. The petition for liquidation shall be accompanied by the following documents -
- a. a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and
- b. a statement of financial position in Form 32 as set out in the First Schedule where necessary. (Emphasis added).
39. From the foregoing, provisions it is evident that Regulation 77B(2) of the *Insolvency Regulations* is couched in mandatory terms. A review of the creditor's liquidation petition reveals that although it satisfies the requirements of Regulation 77B(1) & 77B(2)(a), it fails to comply with Regulation 77B(2) (b) as it was not accompanied by a statement of financial position. Consequently, the petition is fatally defective.
40. In the end, this Court finds that the creditor's Notice of Preliminary Objection dated 15th February 2024 and the debtor's application dated 11th March 2024 are merited. For this reason, I make the following orders -
- i. The creditor's Notice of Preliminary Objection dated 15th February 2024 is hereby sustained;
- ii. The debtor's Notice of Motion application dated 14th February 2024 is hereby struck out;
- iii. The application dated 11th March 2024 is hereby allowed;
- iv. The liquidation petition dated 1st March 2024 is hereby struck out; and
- v. Each party shall bear its own costs as each party has lost and won in different ways.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI, THROUGH MICROSOFT TEAMS ONLINE PLATFORM, ON THIS 26TH DAY OF SEPTEMBER 2025.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mary Munjogu holding brief for Ms Kendi for the Debtor

Ms Olembo for the Creditor

Ms B. Wokabi – Court Assistant.

