

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY CAUSE NO. E152 OF 2024

PROGRESSIVE CREDIT LIMITED.....
CREDITOR/RESPONDENT

VERSUS

DANIEL KURIA
NJUGUNA.....DEBTOR/APPLICANT

RULING

1. This Ruling is in respect of the Application dated 16th August, 2024.

Background Facts

2. The Debtor filed an application dated 16th August 2024 seeking to set aside the statutory demand dated 30th July 2024.

3. The Application was supported by the Affidavit of **Daniel Kuria Njuguna** who denied owing the sum of Kshs.37,352,331.83 as noted in the Statutory Demand. The Applicant also denied being unable to pay the Respondent its rightful debt.

4. The Applicant also pointed out that the debt herein is a subject of Appeal in **Kajiado MISC Application E001 of 2024** and the same is pending judicial determination.
5. In response, the Creditor filed the Replying Affidavit sworn on 24th January 2025. The Respondent stated that the Debtor is disputing owing the Creditor the amount stated in the statutory demand, however he has not made any attempt to show that there are genuine and substantial grounds for disputing the amount demanded. The debt owed is from a judgment passed against the Debtor and the same is not disputed.
6. Further, in response to the averment by the Debtor that he has challenged the judgment giving rise to the debt at the Kajiado High Court, the Respondent stated that what was filed by the Debtor was an application seeking leave to appeal out of time and not an appeal. The said application was dismissed by the Court on 18th September 2024.

Issues For Determination

7. The Court has considered the application filed, the response and the written submissions and frames only one issue for determination.

a) Whether the statutory demand should be set aside.

Analysis

8. It was the Applicant's submission that the purported statutory notice issued on 30th July 2024 falls short of the mandatory requirements of **Section 17(3) of the Insolvency Act** as read with **Regulation 15 of the Insolvency Regulations** hence the same is a prime candidate of setting aside.

9. **Section 17(3)** provides;

3) For the purposes of subsection (2)(c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—
(a) the applicant creditor to whom the debt is owed has served on the debtor a demand requiring the debtor to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least twenty—one days have elapsed since the demand was served, and the demand

has been neither complied with nor set aside in accordance with the insolvency regulations; or (b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part.

10. In contrast, the Respondent submitted that the Debtor is truly and justly indebted to the creditor to the extent stated in the statutory demand, and he has not met the threshold for setting aside the statutory demand.

11. Regulations 16 and 17 of the Insolvency Regulations provide grounds upon which the Court can set aside a statutory demand and the procedure to be followed. **Regulation 17(6)** on hearing of application to set aside statutory demand states:

“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 debt or 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.”*

12. Looking at the above grounds, it is evident that the Applicant does not dispute owing the Respondent. Moreover, the Applicant cited a pending appeal against the decision of the Trail Court. However, by his own words the Applicant stated that the debt herein is a subject of Appeal in Kajiado MISC Application E001 of 2024 and the same is pending determination. This leads to the conclusion that the matter is yet to be a subject of an Appeal.

13. The Applicant contended that the purported statutory demand herein will reveal that the said notice falls short of the provisions of **Section 17 (3)** and **Regulation 15** above for reasons that: The statutory notice has been issued by an advocate, the firm of **P.K Mbabu & Company Advocates** and not the creditor as envisaged under section **17(3) (a) of**

the Act and that the Statutory Demand issued by the Respondents was not endorsed by the Deputy Registrar.

14. With regarding the statutory notice has been issued by an advocate, the Court associates itself with the holding in the case of **DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others [2020] eKLR** where it stated;

“Further, section 2 of the Act does not require that the Statutory Demand be presented by the Creditor in person. It may be presented by an agent of the Creditor such as an advocate. This is a departure from section 220 of the Companies Act (Repealed) which provided that the notice prior to winding up of a company must be under the hand of the creditor. In this case, the Statutory Demand was presented by the Respondents’ advocates who are their agents.”

15. Further to the above, the issue regarding the endorsement by the Deputy Registrar on the statutory demand was settled by the Court in **Re: Kipsigis Stores Limited MLHC IP No. 14 of 2016 [2017] eKLR**, where it was held as follows:

“[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.”

16. In light of the above, the Court is not satisfied that there are sufficient grounds to set aside the statutory demand dated 30th July 2024.
17. As to costs the same ordinarily follow the event. There are no reasons advanced as to why the Respondent should not be awarded the costs of this application

Determination

18. The Debtor's Application date 16th August, 2024 is dismissed in entirety for lack of merits.
19. The costs of the Application are awarded to the Creditor/Respondent.

20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 09TH
DAY OF OCTOBER, 2025.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Mr. Muuo for the Creditor/ Respondent.

Miss Otieno for the Debtor/Applicant.

Mr. Peter Wabwire -Court Assistant