



REPUBLIC OF KENYA



**Definite Assurance Company Limited v Middle East Bank (Kenya) Limited (Insolvency Notice E110 of 2025) [2025] KEHC 14819 (KLR) (Commercial and Tax) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY NOTICE E110 OF 2025**

**F GIKONYO, J**

**OCTOBER 16, 2025**

**BETWEEN**

**DEFINITE ASSURANCE COMPANY LIMITED ..... APPLICANT**

**AND**

**MIDDLE EAST BANK (KENYA) LIMITED ..... RESPONDENT**

**RULING**

1. Stemming from the application dated 14<sup>th</sup> July 2025; whether the statutory demand dated 18<sup>th</sup> June 2025 ought to be set aside.
2. The said application dated 14<sup>th</sup> July 2025 seeks the setting aside of the statutory demand notice forming the basis of these proceedings. The applicant also seeks a declaration that the invocation of insolvency proceedings by the respondent bank in the circumstances of this case is improper, premature, malicious, defective and an abuse of the court process.
3. The application is based on the grounds set out in the application and the supporting affidavit sworn by the applicant's director, Patrick Ndirangu Kibuthu on 14<sup>th</sup> July 2025.
4. The background is that in 2023, the applicant, an insurance company, entered into an agreement through which the bank advanced KShs. 450,000,000/- to facilitate licensing. The facility was secured by, inter alia, a cash deposit of Kshs. 450,000,000/- under lien and guarantees from the applicant's shareholders.
5. On 25<sup>th</sup> June 2024, the bank transferred the sum of KShs. 450,000,000/- from applicant's escrow account No. 1003088000099 into the applicant's main loan servicing account.



## Grounds

6. The applicant presented three grounds on which the statutory demand should be set aside, as follows: -
  1. the amount demanded is based on disputed and unexplained computations made after full settlement of the facility;
  2. the bank holds some security in respect of the debt claimed by the demand; and
  3. Other grounds.
7. The applicant asserted that the KShs. 42,566,617.61 demanded emanated from post-settlement interest entries, which began from a balance of KShs. 20,769,341.62. It faulted the bank for imposing unlawful interest rates between June 2024 and June 2025 and for revision of interest rates without giving it notice as required.
8. The applicant also faulted the bank for issuing the statutory demand prematurely, without exhausting or attempting to realize any part of the substantial securities that it holds.

## Response

9. The respondent filed a replying affidavit sworn by its Manager, Credit, Elizabeth Ong'are on 23<sup>rd</sup> July 2025. The core contentions are: -
  1. There is no substantial dispute regarding the amount claimed through the statutory demand as the company admitted the debt through a letter dated 21<sup>st</sup> June 2024;
  2. The primary security was the cash deposit under lien and the guarantees did not provide substantive security.
  3. Based on the evidence of claimed total assets of KES 763,219,701.20, the applicant should not have any difficulty in paying the amount which it has admitted owing in writing.
10. The respondent asserted that once the cash deposit was appropriated on 25<sup>th</sup> June 2024 in payment of the principal amount and accrued interest at 9% per annum, the balance of Kshs. 20,769,467.62 was subject to the bank's normal interest payable from time to time on temporary overdrafts.
11. The respondent further asserted that under the facility agreement, the applicant was required to pay facility fees and arrangement fees each at 1.5% of the principal amount, plus 20% excise duty thereon, totaling KES 16.2 million. The total balance due after the offset, inclusive of fees, was KES 36,969,468.30.
12. Under the letter of offer, the initial interest was 9% per annum, later varied to base rate plus a margin of 3% per annum, which by 30<sup>th</sup> June 2025 had accumulated to KES 6,304,021.56. If calculated at the original 9% rate, the interest would still amount to KES 2,156,812.93, confirming continued default.

## Analysis and Determination

13. Regulation 17(6) of the Insolvency Regulations provides that the court may set aside a statutory demand on the following grounds: -
  - “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.”

### **Disputed debt?**

- 14. The major ground presented by the applicant is that the debt is disputed on substantial grounds. It is not disputed that in 2023, the bank advanced the applicant a secured facility of Kshs. 450,000,000/-.
- 15. It is clear and not disputed that after the bank transferred Kshs. 450,000,000/- from the applicants escrow account, on 25th June 2024, the outstanding balance was Kshs. 20,769,341.62.
- 16. The bank issued the statutory demand dated 18th June 2025 claiming Kshs. 42,566,617.61.
- 17. The applicant contended that the amount demanded is based on disputed and unexplained computations made after full settlement of the facility.
- 18. The applicant's gravamen here is that from June 2024 to June 2025, the bank imposed unlawful rates of interest and revised the rates of interest without notice as required under the offer letter.
- 19. On the other hand, the bank argued that once the cash deposit was appropriated, the remaining balance was subject to the bank's normal rates of interest payable from time to time on temporary overdrafts.
- 20. The bank exhibited a copy of a letter dated June 21st 2024, from the company, stating as follows: -

“We regret wish to bring to your attention a delay in acquiring our operating License from IRA due to unavoidable circumstances le. government regulations and requirement clearance which we have now sorted, this has necessitated unforeseen start of operations that we had projected Originally scheduled for commissioning as at End of March 2024 on addendum attached, please see details of the status.

In regard to the above, we kindly request a six-month extension, extending the current deadline from June 21" 2024, to December 21st, 2024. This extension is vital to facilitate the timely clearance of the short-term loan and fees associated with Definite assurance Company limited.

- 1. Kes 470,305,478.70: short-term loan
- 2. Kes 18,200,000 fees”

- 21. The bank also exhibited a copy of the letter dated 25th June 2025 issued to the company, in the following terms: -

“We refer to your letter dated 21st June 2024 where you requested for a 6-month extension of your short-term loan maturity date from 21 June 2024 to 21st December 2024.

We write to advise that, unfortunately, the Bank is unable to honor your request for the extension. Consequently, in line with the terms of the Facility Documents, we shall proceed



to immediately offset the outstanding balances and charges as outlined below against the cash security held by the Bank:

Term Loan balance of Kes. 470,769,468.30/=

3% facility & arrangement fee of Kes. 13,500,000/-

20% excise duty on facility & arrangement fee of Kes. 2,700,000/=

We note that there shall be a projected shortfall of KES 36,969,468.30 which is in excess of the cash security held by the Bank. Kindly make arrangements to fund your account with this amount together with any accrued interest as soon as possible but not later than 7 (seven) days from the date of this letter.”

22. From the foregoing, I am not satisfied that the debt is disputed on bona fide substantial grounds. The first ground therefore fails.  
Does the bank hold some security in respect of the debt claimed by the demand?
23. On security, the applicant took issue with the bank for issuing the statutory demand without exhausting or attempting to realize any part of the substantial securities that it holds.
24. However, the bank asserted that the only tangible security for this loan was the deposit under lien of KES 450 million already appropriated and that the guarantees provided did not provide any substantive security as all the guarantors had paid up capital of KES 100,000/- or less.
25. I did not sight any other substantial security held by the bank in the list of securities provided by the applicant.
26. Therefore, I am not satisfied that the bank holds security in respect of and sufficient to pay the debt claimed in the demand. The second ground also fails.

### **Other grounds**

27. The applicant urged the court to set aside the statutory demand based on section 432 of the *Insolvency Act* which provides that the Court may decline to make a liquidation order if it considers that some other remedy is available.
28. The court may set aside a statutory demand on other grounds. The applicant exhibited its statement of financial position to show that it is solvent as it has total assets of KES 763,219,701.20 as of 30th June 2025.
29. The bank countered that based on the financial position, the applicant should not have any difficulty settling the undisputed amount owed.
30. The applicant underlined that it has been in operation for only seven (7) months since receiving its license on 11th December 2024 and is still in the process of establishing its presence in the market. It also highlighted that the nature of the insurance business involves long tail liabilities, where premiums are received upfront but claims and obligations often materialize gradually over time.
31. The applicant further asserted that as at July 2025, it was not insolvent within the meaning of Section 384 of the *Insolvency Act*, 2015; that it continues to meet its obligations, maintain regulatory capital and grow its premium income and that the debt, if any, is a small fraction its operational capital and does not warrant the extreme remedy of liquidation.



32. Additionally, the applicant urged the court to consider the role of insurance sector in the economy, the instability in the sector, statutory obligations and public functions of insurance companies.
33. I am aware that, a statutory demand issued under section 384 of the *Companies Act* is a precursor to liquidation petition. Nonetheless, jurisprudence is still settling on the subject.
34. Some courts have held that liquidation should not be used to pressure a company to pay its debts. *Matic General Contractors Limited v Kenya Power and Lighting Company Limited* [2001] eKLR
35. Other courts have held that a creditor is entitled to bring a liquidation petition on ground of inability to pay debts and that there is no provision under the *Insolvency Act* or *Companies Act* that stipulates that liquidation of a company should be as a last resort. *Mombasa Civil Appeal No. 98 of 2017 Pride Inn Hotels & Investments Limited v Tropical Hotels Limited* [2018] eKLR
36. Amidst the mixed approaches, it is not lost to the court that abuses have occurred where parties invoke the insolvency regime as a mere debt-collection tool, or to injure or cripple an otherwise viable business, or to wade off competition. Hence, the approach of the insolvency law and rescue plans in the company law to offer opportunity to viable companies and businesses to continue as going concerns whilst paying their debts.
37. In addition, it bears repeating that a court may decline liquidation where the court forms the opinion that; a) some other remedy is available to the applicants; and b) the applicant is acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy. S.427 of the *Insolvency Act*.
38. The bank acceded that the company should have no difficulty in settling the debts based on its statement of financial position showing that it has total assets that exceed the debt.
39. I do note also that the applicant is an insurance company and that it only obtained its license in December 2024. Similarly, I note that six months prior, the applicant requested the bank for more time to settle the outstanding debt due to delays in obtaining the license.
40. The bank first issued the statutory demand on 11th April 2025.
41. It bears repeating that, after the bank transferred Kshs. 450,000,000/- from the applicants escrow account on 25th June 2024, the outstanding balance was Kshs. 20,769,341.62.
42. The court has not been told that the applicant has, in good faith, made any payments towards offsetting the undisputed amount. There is, however, evidence of attempted negotiations on the undisputed amount but which were instantly declined by the Bank.
43. As already stated, one of the objects of insolvency laws is to move away from the infamous ‘kiss of death’ of companies or businesses which are otherwise viable but also ensuring that the company pays its debts. The bank acknowledges the debtor should have no difficulties paying the debt given its disclosed assets. In insolvency, assets of the company are relevant consideration. I will therefore, determine the application in the peculiar circumstances of the case.
44. I am aware a statutory notice is a precursor to liquidation and may be a basis for a liquidation order. Section 384 & 424 (1) of the *Insolvency Act*.
45. But, in line with the constitutional command in article 159(2)(c) of *the Constitution*, the judiciary should promote alternative dispute resolution as a way of enhancing access to justice. This case is one where parties should be given an opportunity to settle the matter amicably. On that basis, I am prepared to exercise discretion in favour of the applicant and will issue specific orders and directions thereto.



## **Disposal**

46. In the interest of justice and the need to keep companies afloat to not only save the business, but also source of livelihood for employees, among other things, the application dated 14<sup>th</sup> July 2025 is disposed of as below:

- a. The statutory notice is stayed for 90 days.
- b. The debtor company to pay the undisputed amount which it has admitted within 60 days.
- c. Parties to agree on the rate of interest applicable and interest accrued on the undisputed amount and it be paid before the 90 days lapse.

SUBPARA d.

No orders as to costs.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 16<sup>TH</sup> DAY OF OCTOBER, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of:

Ismail for Onyambu for Respondent

Gakaria for Applicant

CA Kinyua

