



**Kesando Limited v Mobitech Technologies Limited (Insolvency Notice E190 of 2024)
[2025] KEHC 15487 (KLR) (Commercial and Tax) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E190 OF 2024**

F GIKONYO, J

OCTOBER 30, 2025

BETWEEN

KESANDO LIMITED PETITIONER

AND

MOBITECH TECHNOLOGIES LIMITED RESPONDENT

RULING

Setting aside statutory demand

1. The debtor filed the notice of motion dated 11.3.2025 seeking; a) extension of time to set aside the statutory demand dated 9.9.2024; and b) that the statutory demand be set aside and any further proceedings against it be stayed.
2. The application is supported by the affidavits sworn by Charles Mutai on 11.3.2025 and 6.5.2025 and written submissions dated 10.6.2025.
3. The grounds are that; a) the statutory time for challenging the notice lapsed, but the delay was because its email and domain service were not accessible or in use until February 2025; and b) the debt is disputed.
4. The respondent opposed the application through a replying affidavit sworn by its director, James Drummond McNab on 25.4.2025 and written submissions dated 15.6.2025.
5. The respondent's main arguments are that the statutory demand was properly issued through the applicant's email which was functional and in use and that the debt is genuine, undisputed and based on a long-standing business relationship.



Analysis and Determination

6. I have considered the application, the rival affidavits, written submissions and authorities.
7. The first issue is; whether the applicant deserves extension of time to challenge the statutory demand.
8. A statutory demand should be challenged within 21 days from the date it is issued. Regulation 16 (1) of the Insolvency Regulations
9. The statutory demand is dated 9.9.2024. The application under consideration is dated 11.3.2025. The delay is about 6 months and 2 days. The delay may appear to be inordinate.
10. The applicant's explanation for the delay is that it had temporarily ceased its operations following the suspension of services by Safaricom PLC. That therefore, the email through which the demand was served via its domain was not accessible and was not in use until February 2025.
11. The respondent asserted that the demand sent through the email was successfully delivered as it did not bounce back, indicating that the email was active and functional.
12. The applicant did not provide any evidence to show that its domain or email service was suspended.
13. On the other hand, the respondent did not produce a copy of the email delivery receipt to prove service of the statutory demand.
14. See BOD County Referral Hospital Kitale & Another v DN (Suing through her next friend & Grandmother SK) Civil Appeal E043 of 2023) [2025] KEHC 5344 (KLR) (30 April 2025) (Judgment) where the court held that it is that delivery receipt which the law calls upon a sender to annex to an affidavit of service as evidence of service through electronic mail.
15. Therefore, the court finds that the explanation for the delay is plausible.
16. Further, the court finds that no prejudice would be occasioned upon the respondent if the applicant is allowed the extension of time. If any, it would be ameliorated by costs.
17. Therefore, I allow the prayer seeking extension of time to challenge the statutory demand.
18. The second issue is the substantive request; whether the statutory demand dated 9.9.2024 ought to be set aside.
19. The applicant argued that the debt is disputed. For a statutory demand to be set aside, the debt must be disputed on substantial grounds. See Regulation 17 (6) of the Insolvency Regulations
20. Substantial dispute was explained to be: -

“...the kind of dispute that in an ordinary civil case will amount to a bonafide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.” Re: Global Tours and Travels Limited [2001] EA 195
21. The burden of proof is upon the applicant to demonstrate that the debt is disputed on substantial grounds. Flower City Limited v Polytanks & Containers Kenya Limited (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) (Ruling)



22. The applicant's case is that the parties entered into a service level agreement dated 16.3.2023 whereby it would provide short codes through its SMS API for sending contents to its subscribed users.
23. The salient terms of the agreement were that the respondent would not set out unsolicited SMSs to the Kenyan public through their SMS API account. The applicant would provide a channel through which users who no longer wished to receive messages could unsubscribe. If the respondent would not comply with the terms of the Telecommunication service provider it would bear the costs of fines or penalties. Parties agreed to indemnify each other from costs, damages and expenses incurred due to such non-compliance.
24. The applicant claimed that the respondent breached the terms of the agreement by repeatedly spamming users leading to suspension of its services in October 2023 for purposes of conducting investigations. Consequently, it could not provide services to other clients and had to refund them, leading to huge financial loss of about Kshs. 15,000,000/- recoverable from the respondent.
25. The applicant also stated that payments from Safaricom were withheld including invoiced payments belonging to the respondent.
26. The applicant disputed the Kshs. 20,954,489.43/- demanded, claiming that the amount paid by Safaricom on behalf of the respondent is Kshs. 3,000,000/- for July and August 2023. It asserted that the Kshs. 3,000,000/- is being held by it pending the outcome of investigations for the purpose of payment of fines and penalties that may be imposed due to the respondent's actions.
27. The applicant postulated that the filing of the petition is calculated to evade its responsibility under the service level agreement to indemnify it.
28. The respondent denied the applicant's claims. It asserted that it is the applicant that misused its dedicated short codes by running additional, undisclosed services through them. The applicant routed traffic that was not authorized or known to the respondent, creating price points that did not match any of the respondent's services.
29. The respondent stated that it did not have any control over the use of the SMS API, which remained solely with the applicant. It faulted the applicant for failure to produce evidence or investigation report from Safaricom.
30. The respondent asserted that the Kshs. 20,954,489.43/- demanded is based on traffic and revenue from dedicated short codes. It contended that any revenue generated from the short codes dedicated to it whether for its services or unauthorized services should be fully accounted for. It also contended that it is entitled to reimbursement for all short code related fees paid and claims a 90: 10 revenue split based on industry standard norms.
31. The respondent faulted the debtor for failing to provide a reconciliation or account of the Kshs. 3,000,000/-. It also faulted the applicant for not providing evidence of the Kshs. 15,000,000/- alleged losses.
32. The respondent added that the application is an afterthought intended to frustrate legitimate insolvency proceedings and avoid accountability.
33. In brief rejoinder, the applicant stated that it has filed MCOMMSU/E467/2025 Mobitech Technologies Limited v Safaricom PLC (formerly known as Safaricom Ltd). The total amount received was Kshs. 3,644,057/- for the period under consideration. Kshs. 3,080,868/- (incorrectly captured as Kshs. 3,000,000/- in the supporting affidavit) was paid to the respondent after a deduction of 5%



withholding tax by Safaricom, Kshs. 34,000/- deducted for short code maintenance and 10% payable to it)

34. The applicant asserted that the amount payable is based on computations by Safaricom PLC, not what the respondent demands. It also asserted that the evidence of loss is on record.
35. The role of the insolvency court is circumscribed to establishing that there is proof of a debt which a debtor is unable to pay or that there are circumstances for setting aside the statutory demand. It is not the role of the insolvency court to go into an inquiry into evidentiary issues.
36. In *N.K. Brothers Limited v Royal Ngao Holdings Limited* [2023] KEHC 26370 (KLR) the court stated that: -

“5. ..In my understanding, the role of an insolvency court is not to get into an enquiry on evidence that should be tabled before a civil court, but to ascertain that indeed there is proof of a debt which a debtor is unable to pay or that there are circumstances for setting aside the statutory demand.

6. I therefore fully agree with the view expressed by the Court (Mativo, J as he then was) in *Flower City Limited V Poly tanks & Containers Kenya Limited*, [2021] KEHC 34 (KLR) that:

“The function of the bankruptcy court, on the hearing of an application brought under regulation 17(6) is not to conduct a full hearing of the putative claim. Rather, it is simply to determine whether the claim in question, after having regard to “all the circumstances”, raises a “genuine triable issue.”

37. The respondent produced its computations showing how it arrived at the amount demanded.
38. The applicant produced evidence that its account was suspended in October 2023 based on complaints from customers from the short code 22136 and its misuse. It also produced evidence of the suit filed against Safaricom PLC, demands from its customers and computations by Safaricom for August 2023 totaling Kshs. 3,644,057/-.
39. From the pleadings, evidence and submissions, it is apparent that there are several issues for determination regarding the breach of contract, whether the respondent is entitled to the amount demanded as computed by it; who was responsible for the misuse of the short codes.
40. The recapitulation of each party’s claim is not to enter into a plenary inquiry or trial of contested facts, but to demonstrate that these are matters which requires full evaluation through a trial before it could be stated that there is a clear debt for which a statutory demand under the insolvency law could issue.
41. I am of a considered view, these are matters that are best resolved through a civil action, not an insolvency petition as they require more than affidavit evidence.

Conclusion

42. In conclusion, the court finds that the applicant has demonstrated reasonable grounds for disputing the debt.
43. Accordingly, the application dated 11.3.2025 is allowed to the extent that: the challenge is deemed to be duly filed; and the statutory demand notice is set aside. The court cannot, however, issue an injunction against future proceedings against the company under the insolvency law as such lawful proceedings may be undertaken upon a competent statutory demand notice.



DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF OCTOBER, 2025.

F. GIKONYO M

JUDGE

In the presence of:

Musili for Applicant

Ms. Ali for Respondent

CA- Kinyua

