

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
INSOLVENCY CAUSE NO E001 OF 2022

AGINA & ASSOCIATES
ADVOCATES.....APPLICANT

Versus

DAVID OLE NKEDIENYE.....
.....RESPONDENT

RULING

1. The initial statutory demand by **Agina & Associates Advocates** (hereafter the Petitioner) issued against **David Ole Nkediénye** (hereafter the Respondent) was amended pursuant to the court order granting the motion dated 6.06. 2022. Thus, an amended statutory demand dated 8.08.2022 issued against the Respondent. Subsequently, the Respondent filed the motion dated 8.9.2022, which is the subject of this ruling.
2. The application, brought under the Insolvency Act and the Insolvency regulations 2016, seeks that the suit herein and the amended statutory demand dated 8.08.2022 be set aside. The motion was supported by an affidavit sworn by the Respondent wherein he challenges the validity of the amended statutory demand. He asserts that he has been wrongfully enjoined in the matter and that the demand is an abuse of court process.

Confirming that his advocate received the amended statutory demand on 16.08.2022, he admitted that the **Election Petition No. 6 of 2013 Josiah Taraiya Kipelian Ole Kores Vs. Dr. David Ole Nkediemye**, in which he was a respondent, concluded in a judgment delivered on 29.8.2013 (hereafter the petition judgment).

3. The Respondent disputes the sum of Kshs. 4,441,101/= claimed in the amended statutory demand, which includes Kshs. 1,500,000 in costs, an additional sum of Kshs 750,000/=, and accrued interest at 12% per annum. Referring to paragraph 81 of the petition judgment, which capped the costs payable to the respondents at Kshs 2.5 million, with a maximum of Kshs 1.5 million allocated to the 1st and 2nd respondents, he contends that the said judgment clearly placed the burden of costs on the petitioner in the election petition, and not personally on him. Therefore, he asserts that the Petitioner herein ought to have pursued execution against the petitioner in the election petition. Thus, he maintains that he does not owe the debt claimed herein and that the statutory demand is defective. And that substantial injustice would result if the demand was not set aside.
4. The Petitioner responded through grounds of opposition dated 16.7.2024. To the effect that the application is scandalous, frivolous and vexatious; that this court is functus officio; and that the application is in breach of the rules of procedure governing such applications, the provisions of the Insolvency Act and regulations thereunder.

Submissions

5. The motion was canvassed via written submissions. By his submissions dated 28.5.2024, the Petitioner stated that in the petition judgment, the court awarded Kshs 1.5 million in costs to each of the 1st and 2nd respondents, who were represented by the Petitioner. That his efforts to recover these costs through various bills of costs, were unsuccessful, and leave was granted to file an amended statutory demand dated 8.8.2022 and insolvency petition dated 14.11.2022. That the Respondent challenged these through an application to set aside the statutory demand and a preliminary objection, which the court dismissed on 11.4.2024 for lack of merit. The court directing that the remaining application be resolved through written submissions.
6. The Petitioner views the Respondent's applications as aimed at frustrating execution to avoid satisfying lawful decrees. And while acknowledging the Respondent's right to be heard, the Petitioner contends that good faith requires a demonstration of willingness to comply with court orders. Invoking Article 159 of the Constitution, he urged the court to adopt a more inquisitorial approach, to preserve the sanctity of judgments and prevent abuse of process. He cited the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, for the definition of a preliminary objection as a pure point of law that, if successful, disposes of the suit. He thereafter proceeded to address the Respondent's earlier objections. Which having failed to meet this threshold were rejected vide the ruling of 11.4.2024, and thereby

effectively terminating trial, hence warranting judgment in favour of the Petitioner.

7. The Petitioner asserted that the statutory demand served on the Respondent was a valid test of solvency, and the Respondent failed to comply within the 21-day notice period or to demonstrate the existence of a genuine cross-demand. And that while Regulation 17(6) of the Insolvency Regulations, 2016 allows the court to set aside a statutory demand if a genuine dispute exists, the Petitioner argues that no such dispute has been demonstrated here by the Respondent. Because the Respondent's challenge which lacks substance and factual particularity does not meet the threshold of a plausible or non-frivolous claim. The Petitioner concludes that the statutory demand and insolvency petition are merited and urges the court to adjudge the Respondent bankrupt, award interest on the sum of Kshs 4,441,101/= from the date of filing until full payment at court rates, together with costs of the petition and interest.
8. The Respondent's submissions are dated 9.10.2024. Therein, the Respondent, challenged the statutory demand dated 8.8.2022 and the corresponding insolvency proceedings initiated by the Applicant. By way of background, counsel stated that the Petitioner was his advocate in Election Petition No. 6 of 2013, where the court awarded him, as the 1st Respondent, Kshs 1.5 million in costs; that the Petitioner subsequently issued a statutory demand claiming Kshs 4,441,101/-, which included the awarded costs, an additional Kshs 750,000, and accrued interest.

9. The Respondent argues that the Petitioner as his former advocate cannot lawfully claim or execute against him for costs that were awarded to him personally in the election petition. He contends that the statutory demand is fundamentally flawed, and that the Petitioner should have pursued recovery from the petitioner in the election petition, rather than from him.

10. Counsel for the Respondent further submits that the debt is disputed on substantial grounds, as required under Regulation 17(6) of the Insolvency Regulations, 2016. He cited the decision in **Flower City Ltd v Poly tanks & Containers Kenya Ltd, (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) (Ruling)** where the court held that a statutory demand may be set aside if there is a genuine dispute on the existence or amount of the debt. He also called to aid the case of **Xplico Insurance Co. Ltd v Musyimi Paul Maingi, Musyimi & Associates Advocates & another [2020] eKLR** where the court emphasized its inherent jurisdiction to strike out statutory demands that are not well-founded or amount to abuse of the court process. The Respondent maintaining that the Petitioner's claim is not supported by any judgment or decree against him, and that the Petitioner had misrepresented facts and misused the court process to pursue a baseless claim.

11. Counsel further asserts that the statutory demand and the insolvency petition are brought in bad faith and constitute an abuse of court process because there is no legal basis for the Petitioner to demand payment from him for costs awarded in his favour. Hence,

the Petitioners actions are procedurally and substantively defective. He urges the court to allow his application and to set aside the statutory demand and dismiss the suit with costs, citing several authorities including **Universal Engineering Works v Mohamedali Suleiman Essaji [1951] 2 LRK 99** and **Sonko v Clerk County Assembly of Nairobi City, & 12 others (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling)**.

Analysis and Determination

12. The court has considered the material canvassed in respect of the Respondent's motion. On the material before the court, it is common ground that the Petitioner was the advocate who represented the Respondent in Election Petition 6 of 2013 and that costs were awarded in the petition judgment. What is in dispute is the claim by the Petitioner that the Respondent is indebted to him in the sum of Kshs. 4,441,101/-, comprising Kshs. 1,500,000/- in costs awarded to the Respondent, an additional Kshs. 750,000/- and accrued interest at 12% per annum from 29.8.2013.
13. The Petitioner contends that the statutory demand was properly issued and that the Respondent's failure to satisfy the demand within the statutory period is indicative of insolvency, warranting bankruptcy proceedings. The Respondent on his part disputes the debt on substantial grounds, including that the costs in question were awarded to him personally as the 1st Respondent in the election petition and not to the Petitioner herein. Thus, the

Petitioner cannot lawfully claim from him costs that were awarded to him as a litigant. Further that the Petitioner has not obtained any decree against him and hence the statutory demand is baseless, defective and an abuse of court process.

14. Regulation 17 (6) of the Insolvency Regulations, 2016 lists the grounds upon which a court may grant an application to set aside a statutory notice as follows: -

“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.**

15. In the present case, it is evident that the Respondent disputes the debt claimed by the Petitioner. I have perused the petition judgement and note that therein **Mabeya J** expressly capped the costs payable to the 1st and 2nd respondents in the petition at Kshs 1.5 million and did not make any express award to counsel. The Petitioner has not demonstrated that he obtained a certificate of

taxation or any other enforceable order entitling him to recover the said sums directly from the Respondent.

16. The Court of Appeal in **Universal Hardware Limited v African Safari Club Limited [2013] KECA 507 (KLR)** observed inter alia that, ***“[T]he case law and scholarly writings are categorical that a creditor’s petition should not be entertained if it is to enforce a debt that is disputed…….”***

17. The statutory demand, in this context, appears to be premature and improperly invoked to recover a debt that is factually and legally contested. Therefore, the statutory demand dated 8.8.2022 is liable to be set aside and the Respondent’s application dated 8.9.2022 is hereby granted with costs.

DELIVERED AND SIGNED ELECTRONICALLY ATKAJIADO ON THIS 13TH DAY OF NOVEMBER 2025



C.MEOLI

JUDGE

In the presence of:

For the Petitioner: N/A

For the Respondent: Ms. Kabare

C/A: Lepatei