

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCOMMIN NO. E060 OF 2020

IN THE MATTER OF INSOLVENCY ACT NO. 18 OF 2016
AND
IN THE MATTER OF EAST AFRICAN PORTLAND CEMENT
COMPANY LIMITED

BETWEEN

OIL SEALS AND BEARING

CENTER LIMITED.....CREDITOR/RESPONDENT

AND

EAST AFRICAN PORTLAND CEMENT
COMPANY

LTD.....DEBTOR/APPLICANT

RULING

1. Before the court is the Notice of Motion application dated 15th May 2025 by the applicant/Debtor brought under section 384 and 696 of the Insolvency Act, 2015 Regulations 10, 16 and 17 of the Insolvency Regulations of 2016, Section 1A, 1B, 3, 3A and 95 of the Civil Procedure Act, Order 50 rule 6 and Orders 51 Rule 1 of the civil Procedure Rules, Article 159(2) of the Constitution of Kenya. The applicant seeks orders, inter alia, that the statutory demand dated 10th May

- 2023 (as amended) be set aside and that the insolvency proceedings commenced thereon be struck out or dismissed.
2. The application is premised on the grounds set out on its face and is supported by the affidavit of **Abdisalan Ali Hassan**, the Applicant's Legal Officer, sworn on 15th May 2025. The Applicant avers that following a reconciliation exercise, it was confirmed that all sums due to the Respondent had been settled save for claims which were unsupported by documentary proof.
 3. It is the Applicant's contention that owing to the lack of proof, the sum of Kshs. 12,396,846.80 is not due and payable, and consequently, there exists no lawful basis for the statutory demand or the ensuing insolvency proceedings. The Applicant maintains that the alleged debt is highly contested and disputed and therefore incapable of founding insolvency proceedings. It is further averred that the Applicant is financially stable, a going concern, and capable of settling any bona fide debt.
 4. The application is opposed through a Replying Affidavit sworn by **Satish Patel** on 8th July 2025. The Respondent contends that the Applicant is indebted to it for goods duly supplied, the debt being liquidated, due, and supported by invoices, delivery notes, statements of account, and correspondence.
 5. The Respondent maintains that the statutory demand was lawfully issued and properly served in compliance with the Insolvency Act and the Insolvency Regulations, and that the

Applicant has failed to demonstrate any bona fide or substantial dispute, counterclaim, set-off, or cross-demand capable of warranting the setting aside of the statutory demand. It is further argued that the Applicant's reliance on alleged internal procurement irregularities is misplaced and cannot defeat a valid commercial claim after receipt of goods. The Respondent asserts that the Applicant's continued non-payment despite repeated demands evidences inability or unwillingness to pay its debts as they fall due, and urges the Court to dismiss the application with costs.

Analysis and determination

6. Having carefully considered the pleadings, affidavits, and submissions on record, the sole issue that falls for determination is whether the statutory demand dated 10th May 2023 (as amended), and the ensuing insolvency proceedings ought to be set aside.
7. A statutory demand issued under the Insolvency Act constitutes the trigger for insolvency proceedings. Where a valid statutory demand is served upon a debtor and is not complied with within the statutory period of twenty-one (21) days, the debtor is deemed unable to pay its debts, thereby entitling the creditor to commence insolvency proceedings, unless the demand is set aside by the Court.
8. The Court's power to set aside a statutory demand is anchored both in its inherent jurisdiction and in statute, and is expressly provided for under **Regulations 16** and **17** of

the **Insolvency Regulations, 2016**. In particular, **Regulation 17(6)** empowers the Court to set aside a statutory demand where:

- a. the debtor appears to have a counterclaim, set-off, or cross-demand equal to or exceeding the amount demanded;*
 - b. the debt is disputed on grounds which appear to the Court to be substantial;*
 - c. the creditor holds security whose value equals or exceeds the debt; or*
 - d. the Court is satisfied, on other grounds, that the demand ought to be set aside.*
8. Further, Regulation 16(1) of the Insolvency Regulations, 2016 provides that a debtor may apply to set aside a statutory demand within twenty-one (21) days from the date of service of the demand, or where the demand has been advertised, from the date of the advertisement's first appearance.
9. The law is settled that insolvency proceedings are not a substitute for ordinary debt recovery mechanisms. In **Universal Hardware Limited v African Safari Club Limited, MSA Civil Appeal No. 209 of 2007 [2013] eKLR**, the Court of Appeal held that a debt which is disputed on substantial and bona fide grounds cannot form the basis

of insolvency proceedings. Makhandia, JA., delivering the lead judgment, stated as follows:

“The principle as I understand it is that a disputed debt on substantial and bona fide grounds cannot be the subject of winding-up proceedings on account of the company’s inability to pay its debts. A creditor’s petition should not be entertained if it is intended to enforce a debt that is disputed and the company is solvent, otherwise it would amount to an abuse of the process of the court.”

12. In the present case, the Applicant has placed before the Court material demonstrating that the alleged debt of Kshs. 12,396,846.80 is disputed both as to liability and quantum. The dispute arises from the reconciliation of accounts, proof of supply, contractual documentation, and the basis upon which the sums claimed accrued. The Applicant contends that the debt as claimed in the statutory demand is disputed on substantial grounds, including whether the Respondent duly supplied goods on credit, whether the Applicant is contractually bound to pay the sums claimed, and whether internal procurement procedures were complied with.
13. These issues call for interrogation through *viva voce* evidence and cross-examination and are therefore properly suited for determination in an ordinary civil suit, rather than

within insolvency proceedings. To permit insolvency proceedings to proceed in the face of such a dispute would be to allow the insolvency process to be used oppressively and as a debt-collection tool, contrary to the spirit and purpose of the Insolvency Act.

14. I am further persuaded by the uncontroverted assertion that the Applicant is a going concern and is financially capable of settling any bona fide debt upon proof. Insolvency jurisdiction is a collective remedy designed to address the inability to pay debts, not a mechanism to coerce payment of disputed claims.

Conclusion

15. For the reasons set out above, I find that the statutory demand is founded on a debt that is disputed on substantial and bona fide grounds. Accordingly, the Notice of Motion dated 15th May 2025 is allowed, and the statutory demand dated 10th May 2023 (as amended) is hereby set aside.
16. The Respondent shall bear the costs of the application. It is so ordered.

RULING delivered virtually, dated and signed at **NAIROBI**

This **29th** day of **January** 2026.

P.M. MULWA

JUDGE

In the presence of:

Mr. Bundotich for Petitioner/Respondent

Mr. Simiyu for Debtor/Applicant
Court Assistant: *Carlos*