

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
INSOLVENCY NOTICE NO. E004 OF 2025

AND

**IN THE MATTER OF ZAKHEM INTERNATIONAL CONSTRUCTION
LIMITED**

AND

**IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE
LAWS OF KENYA)**

BETWEEN

**ZAKHEM INTERNATIONAL
CONSTRUCTION**

LIMITED.....DEBTOR/APPLICANT

AND

AZICON KENYA

LIMITED.....CREDITOR/RESPONDENT

RULING

Introduction & Background

1. The Debtor/Applicant has filed an application by way of the Notice of Motion dated 7th February 2025 seeking to have the Statutory Demand dated 14th January 2025 issued against it by the Respondent set aside and an order restraining the Creditor/Respondent from filing insolvency proceedings against the Debtor.

2. The application is supported by the affidavits of the Applicant's director, IBRAHIM ZAKHEM sworn on 7th February 2025 and 25th February 2025 and opposed by the Respondent through the replying affidavit of its Managing Director, DAVID KIBET TONUI sworn on 14th February 2025. The application has been canvassed by way of written submissions which together with the pleadings which I have considered and will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. **Section 26** of the ***Insolvency Act*** grants the court discretion to stay an application by a creditor on such terms, and for such period, as the Court considers appropriate. Further, **Regulations 16** and **17** of the ***Insolvency Regulations, 2016*** provides as follows:

16. Application to set aside statutory demand

(1) The debtor may, apply to the Court for an order to set aside the statutory demand—

(a) within twenty-one days from the date of the service on the debtor of the statutory demand; or

(b) if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier.

(2) Subject to any order of the Court under regulation 17 (7), time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the Court.

(3) *The debtor's application shall be in Form 7 set out in the First Schedule and shall be supported by an affidavit, which shall be in Form 8 set out in the First Schedule.*

(4) *The affidavit referred to under paragraph (3) shall—*

(a) *specify the date on which the statutory demand came into the debtor's possession;*

(b) *state the grounds on which the debtor claims that it should be set aside; and*

(c) *annex a copy of the statutory demand.*

17. Hearing of application to set aside statutory demand

(1) *On receipt of an application under regulation 16, the Court may, if satisfied that no sufficient cause is shown for granting the statutory demand, dismiss the application without giving notice to the creditor.*

(2) *The time limited for compliance with the statutory demand shall commence from the date on which the application is dismissed.*

(3) *If the application is not dismissed under paragraph (1), the Court shall fix a date and venue for it to be heard, and shall give at least seven days' notice to—*

(a) *the debtor or, if the debtor's application was made by an advocate acting for him, to the advocate,*

(b) *the creditor; and*

(c) *any other person who is named in the statutory demand as the person whom the debtor may enter into communication with in reference to the statutory demand or, if more than one person is named, the first person to be named.*

(4) Where the creditor responds to the application, the creditor shall serve the response upon the debtor and the Court at least three days before the date of hearing of the application.

(5) On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.

(6) 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.....

(9) If the Court dismisses the application, it shall make an Order authorising the creditor to present a bankruptcy application either immediately or on or after a date specified in the Order.

(10) The Registrar of the Court shall, after the Court has made an order under paragraph (8), send a copy of the Order to the creditor. [My Emphasis]

4. The Statutory Demand issued by the Respondent is demanding payment of USD 3,560,857.57 from the Applicant arising out of a judgment and decree issued in **HCCOMM Case No. E276 of 2019** (“the Suit”).

Regulation 17(6) above outlines the grounds upon which the Applicant's application to set aside the Statutory Demand may be allowed. The Applicant avers that the debt arises from a consent decree entered on 23rd September 2020 in the Suit and that the terms of that decree are that the decretal sum of USD 4,160,857.57 is payable to the Respondent within 14 days from the date the Applicant receives payment under a partial decree in another case, **HCCC No. E322 of 2019 ; Zakhem International Construction Limited v Kenya Pipeline Company Limited**. That since the Applicant has not yet received that payment, the debt to the Respondent is not yet due.

5. The Applicant avers that it has been unable to receive its funds from *Kenya Pipeline* due to factors beyond its control including a stay of execution granted by the Court of Appeal in **Civil Appeal Application No. E153 of 2021**, a Mareva Injunction in **HCCC No. 292 of 2018** favoring *Ecobank*, which allowed the Bank to attach and recover USD 31 Million from payments due to the Applicant. The Applicant states that when the Respondent previously tried to execute the decree in the Suit, the court (the late Majanja J.,) ruled on 23rd October 2020 that such execution was premature because the Applicant had not yet received funds from *Kenya Pipeline*. The Applicant thus argues that the present insolvency proceedings are another premature attempt to circumvent this finding.

6. The Applicant depones that there is a genuine and substantial dispute over whether the debt is due for payment and that insolvency proceedings are not the proper forum to determine such a dispute. The Applicant asserts that it is not insolvent and that it is actively pursuing the recovery of its much larger debt from *Kenya Pipeline* and that the delay in payment is due to legal impediments, not an inability to pay. That despite the debt not being due, the Applicant contends that it has demonstrated good faith by making significant partial payments to the Respondent totaling USD 600,000 and Kshs 2,000,000.00. The Applicant states that the Respondent is exploiting the ***Insolvency Act*** to bypass the terms of the decree they voluntarily entered into. The Statutory Demand is therefore described as unwarranted, baseless, premature, and an abuse of the court process.
7. In response, the Respondent asserts that the Applicant has received the full sums due from *Kenya Pipeline* in the said suit, **HCCC No. E322 of 2019** and consequently, the 14-day period for paying the Respondent under the consent decree was triggered, and the Applicant failed to pay. The Respondent also claims that **HCCC No. E322 of 2019** was formally withdrawn and closed on 2nd February 2024 and that *Kenya Pipeline* is not holding any funds on behalf of the Applicant. The Respondent avers that the Applicant is not insolvent but is evading payment and it points to the creation of a new company, *Talia Contracting Limited*, registered on 22nd September 2023 and its directors and shareholders are the

Applicant's deponent and NZ. The Respondent alleges this is a vehicle to hide assets and money belonging to the Applicant to defeat creditors.

8. The Respondent highlights that the current insolvency proceedings are a lawful method of execution permitted by virtue of Clause 3 of the consent decree. It notes that the Statutory Demand was served on 17th January 2025, the 21-day period lapsed without payment or any application to set aside the demand and subsequently, on 10th February 2025, the Respondent filed a Liquidation Petition. It argues that the current application to set aside the demand was only filed after the petition was lodged and for the above reasons, urges the court to dismiss the application.
9. I have gone through the parties' arguments and submissions. The central issue here is not whether a debt exists, but whether the conditions for its payment have been met. In my view, the evidence presented by both sides, when weighed against the legal test, strongly suggests that the debt is genuinely and substantially disputed. The proper forum for resolving this dispute is not this court as the insolvency court, but the civil process in the Suit where the underlying decree originated and I will explain why.
10. The parties agree on the existence of the consent decree issued in the Suit where Clause 2 of states that in part that payment is due "*....within Fourteen (14) days from the date of receipt of the sums in the Partial Decree in HCCC E322 of 2019.*" In its further deposition, the Applicant

has annexed a demand letter sent to *Kenya Pipeline* claiming that USD 7,157,824.77 is still outstanding and a court ruling by Ngenye-Macharia J.,(as she was then) on 6th January 2021 in **HCCC 322 of 2019** acknowledging that reconciliation of dues as per the prevailing exchange rate was required. Whereas the Respondent argued that because **HCCC E322 of 2019** was withdrawn and because the Applicant and *Kenya Pipeline* stated in affidavits that *Kenya Pipeline* holds no funds, then the condition in the decree is met, I find that the Applicant's response provides a plausible explanation: The averments referred to therein were in respect of a different pot of money, that is, USD 31 Million attached by *Ecobank* in **HCCC No. 292 of 2018** not the specific outstanding balance under the Partial Decree in **HCCC E322 of 2019**.

11. In **Flower City Limited v Poly tanks & Containers Limited (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR)**, Mativo J., (as he was then) held as follows in respect of the provisions of setting aside a statutory demand:

A reading of the above provision leaves no doubt that the existence of a genuine dispute regarding the debt is a sufficient ground for the Court to set aside a statutory demand. The policy underlying this provision is that the statutory demand procedure should not be used to coerce a person to pay a disputed amount. Put differently, the Court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. The Court must be satisfied that there is a claim that may have some substance. Talking about a claim that has substance, it is important to mention that it is often possible to discern the spurious, and to

identify mere bluster or assertion. A dispute that has substance should have a sufficient objective and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile.

When a Debtor claims to have a counter-claim within the meaning the above regulation, the Court will normally set aside the Stationary Demand if, in its opinion, on the evidence there is a genuine triable issue. 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,” raised a ‘genuine triable issue.’ (Emphasis added).

12. Applying the dicta above, I find that the Applicant has moved beyond "mere bluster or assertion" and has provided prima facie evidence to support its claim that the funds from the designated source at *Kenya Pipeline* have not been received. This, in my view, establishes a genuine triable issue regarding the debt's maturity. The insolvency court is not the place to determine the factual question of whether *Kenya Pipeline* still owes the USD 7.1 Million. That is a matter for the court in the execution proceedings of **HCCC E322 of 2019**. While the Applicant has not filed a formal counterclaim against the Respondent, the principle is analogous. The Applicant's argument is that its liability to the Respondent is contingent on and can be set off against its own recovery from *Kenya Pipeline* under the Partial Decree. This reliance on a linked,

third-party obligation creates a dispute that goes to the very heart of the debt's enforceability.

13. As stated above, the court has wide discretion and that even outside the specific grounds, the court can set aside a demand if it is satisfied "*on other grounds, that the demand ought to be set aside*". It is also my finding that the Applicant's argument that the Respondent is using insolvency proceedings to bypass the terms of a consent decree carries weight. The decree explicitly provides a mechanism for execution in any ways recognized by law but after the condition is met. Jumping to a liquidation petition while a substantial dispute exists about that very condition is an abuse of process.
14. In summary, the Respondent has failed to prove that the debt is due in the specific, contractual sense agreed upon by the parties. The Applicant has raised a substantial, evidence-backed dispute regarding the satisfaction of the condition precedent for payment. To allow the Statutory Demand to stand would be to misuse the insolvency process. It would coerce a company into liquidation based on a debt whose maturity is genuinely and plausibly contested. As stated, the function of the insolvency court is not to conduct a full hearing of the putative claim but to filter out demands that are not based on a clear, undisputed, and due debt. This is not such a case.

Conclusion and Disposition

15. In the upshot, the application dated 7th February 2025 has merit and the court now exercises its discretion under **Regulation 17(6)(b) and (d)** and sets aside the Statutory Demand. Each party will bear its own costs.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 9th
OF MARCH 2026**

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Asli Osman for the Applicant.
2. Mr. Kuria holding brief for Mr. Taliti for the Respondent.
3. Amos- Court Assistant