



Ndung'u v Advanclly Embed Technologies Limited (Insolvency Cause E032 & E033 of 2024 (Consolidated)) [2026] KEHC 1073 (KLR) (Commercial and Tax) (29 January 2026) (Ruling)

Neutral citation: [2026] KEHC 1073 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E032 & E033 OF 2024 (CONSOLIDATED)
MA OTIENO, J
JANUARY 29, 2026
IN THE MATTER OF THE INSOLVENCY ACT NO 18 OF 2015;
IN THE MATTER OF RULES 16 AND 17 OF THE INSOLVENCY

BETWEEN

FREDRICK NGUGI NDUNG'U APPLICANT

AND

ADVANCLY EMBED TECHNOLOGIES LIMITED RESPONDENT

RULING

1. Before the court for determination is the application dated 13th March 2024, whereby the Applicant sought orders to set aside a statutory demand dated 14th February 2024.
2. The Applicant contended that the demand was an abuse of the court process. It was deposed that the Respondent had issued contradictory and unsubstantiated figures on the alleged debt, failed to account for substantial payments already made, and thereby rendered the demand unclear and disputed. Reliance was placed on the principle that a disputed debt cannot ground for insolvency proceedings.
3. The Applicant explained that the alleged indebtedness arose from a commodity finance arrangement in which the Applicant, as a director, shareholder, and guarantor of the principal Debtor, sought a USD 500,000 working capital facility for the purchase and resale of LPG and cylinders.
4. The Applicant stated that although the principal Debtor submitted an invoice for the full amount, the Respondent only disbursed USD 265,000, contrary to the agreed terms, and that repayment was contractually to be made solely from proceeds of sales under the approved credit line.



5. It was averred that the principal Debtor nonetheless made payments of USD 70,000 towards cash build-up and USD 35,000 in interest. Despite this, the Respondent failed to credit these payments and later unilaterally revised the alleged outstanding balance from a facility of USD 300,000 to USD 230,000 without explanation or justification, raising serious doubt as to the accuracy of the demand.
6. The Applicant further stated that the shortfall in disbursement undermined the principal Debtor's business operations and cash flow, and that the parties had continued to engage in discussions on restructuring, utilisation of headroom, and full repayment. In the circumstances, it was asserted that there was no default capable of grounding a statutory demand, and that the parties were in the process of agreeing on a mutually beneficial repayment proposal.
7. In opposition to the application, the Respondent filed a replying affidavit sworn on 17th April 2024 by Festus Ilesanmi, its head of finance.
8. He stated that the borrower had applied for a working capital facility, following which the parties executed a service level agreement and a letter of offer under which the Creditor agreed to provide a commodity financing facility of USD 500,000, subject to an initial pilot disbursement of USD 300,000. The facility was to finance the purchase of LPG and cylinders, carried interest of 5% per month, and had a loan tenor of 90 days, with a default charge of 5% on any amount remaining unpaid beyond 60 days from drawdown. The Applicant and a co-director executed personal guarantees for the facility.
9. Mr. Ilesanmi averred that pursuant to a deal slip dated 16th June 2023, the Creditor disbursed USD 300,000 to the borrower, but the borrower failed to repay the facility as agreed, prompting demands for payment and the issuance of statutory demands to the guarantors.
10. In response to the allegation that the amounts demanded were opaque, he stated that although USD 300,000 was disbursed, the letter of offer required a cash build-up of USD 35,000 as cash-backed collateral, resulting in a net disbursement of USD 265,000. He deponed that the borrower made partial payments before defaulting, and that the Creditor had, in good faith, waived the cash-backed collateral when calculating the outstanding amount. He maintained that any discrepancy in figures did not constitute a lawful ground for setting aside a statutory demand and that the Applicant had neither paid nor demonstrated what amount he considered due.
11. On the allegation that the Creditor lacked a license to offer digital credit services, it was stated that the Creditor was not a digital credit provider within the meaning of the Central Bank of Kenya (Amendment) Act, as the facility was not applied for, approved, or disbursed through a digital platform but through a conventional process culminating in disbursement to a joint escrow bank account in accordance with the letter of offer.
12. He further deponed that all payments made by the borrower, totaling USD 83,000, had been fully accounted for in the loan statement shared with the borrower's advocates. He denied any deviation from the contractual terms, stating that the agreements expressly provided for an initial pilot disbursement of USD 300,000 and for the deduction of the cash-backed collateral.
13. Regarding default interest, he stated that although a 5% per month default charge had initially been applied in line with the deal slip, the Creditor had since aligned the calculation with the letter of offer, applying a 5% charge on amounts unpaid beyond 60 days from drawdown. On that basis, he asserted that the debt remained due and payable and that the application disclosed no valid grounds for setting aside the statutory demand. He therefore urged the court to dismiss the application with costs.

Analysis and determination



14. Both parties filed written submissions; the Applicant's is undated, while the Respondent's is dated 2nd July 2025. I have considered the same together with the pleadings and evidence filed by the parties.
15. The crux for determination is whether the statutory demand dated 14th February 2024 should be set aside.
16. Before proceeding to the analysis, it is critical that the Court first sets out the factual background of this matter. The borrower, Excellent Logistics Limited, by a letter dated 24th March 2024, approached the Respondent to advance working capital of USD 2,000,000 to enhance its LPG and cylinder stock capacity.
17. By a service level agreement dated 10th May 2023, the Respondent agreed to provide the borrower with a commodity facility of USD 500,000/- pursuant to which the parties executed a letter of offer dated 8th June 2023. The service level agreement and letter of offer were produced as 'FI-2' and 'FI-3' in the replying affidavit of the Respondent's head of finance.
18. In consideration of the Respondent advancing to the borrower the said facility, the Applicant executed a personal guarantee dated 8/6/2023, guaranteeing due payment in the event of default by the borrower. Thereafter, by a deal slip dated 16th June 2023, the Respondent advanced USD 300,000 to the borrower. The personal guarantee and deal slip were produced as 'FI-4' and 'FI-5' in the replying affidavit of the Respondent's head of finance.
19. The Respondent contended that the borrower breached the terms of the service level agreement, letter of offer, and deal slip by failing to repay the advanced sum as agreed. Consequently, by a letter dated 5th February 2024, the Respondent's advocates demanded payment of the outstanding sum of USD 345,000 as at 31st January 2024, which demand was not met.
20. was the Respondent's case that its advocates subsequently notified the Applicant of the borrower's default and demanded payment of the outstanding sum of USD 345,200/-, which demand the Applicant likewise failed to honour.
21. The circumstances under which a statutory demand may be set aside are provided for under regulation 17(6) of the Insolvency Regulations 2016, which states:

“ 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..., or
- d. The Court is satisfied, on other grounds, that the demand ought to be set aside.”



22. Regarding the question of “disputed debt” as a ground for setting aside a statutory demand, the Court of Appeal shed light in the case of *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR, where it held:

“The principle as I understand is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceedings on account of the company’s inability to pay its debts. The 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 and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.”

23. In *Universal Hardware Limited v African Safari Club Limited* MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, the court stated:

“...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...”

24. Further guidance was given in the case of *Flower City Limited v Poly tanks & Containers Kenya Limited* [2021] KEHC 34 (KLR), where the court enumerated the inexhaustive list of elements that ought to be demonstrated to prove a disputed debt as follows:

“A Debtor had to demonstrate the existence of a genuine dispute. Though it could not be possible to provide a closed list of the elements of a genuine dispute, the Applicant had to: -

- a. show a plausible contention requiring investigation;
- b. be bona fide, genuine and real;
- c. be in good faith and show a prima facie plausibility;
- d. truly exist in fact, and contain a serious question to be tried;
- e. be something more than mere bluster or mere assertion;
- f. be a claim that could have some substance;
- g. have a sufficient degree of cogency to be arguable;
- h. have objective existence; and
- i. have sufficient factual particularity.

A genuine dispute therefore should not: -

- a. be spurious, hypothetical, illusory or misconceived;
- b. be plainly vexatious or frivolous;
- c. be so devoid of substance that no further investigation was warranted;
- d. be a merely spurious claim, bluster or assertion; and
- e. be merely fanciful or futile.”



25. I concur with the findings in the line of authorities above. In this case, the Respondent issued a statutory demand dated 14th February 2024 to the Applicant. The Respondent demanded payment of USD 345,000.00 from the Applicant, which was outstanding as of 5th February 2024, which sum was the amount due from the Applicant pursuant to the personal guarantees dated 8th June 2023 to guarantee financial facilities to Excellent Logistics Limited.
26. The Applicant disputed the debt as stated in the statutory notice on the basis that firstly, the Respondent breached the contract by disbursing USD 265,000/- instead of USD 500,000, and secondly, that the Respondent initially claimed a facility amount of USD 300,000 but later revised it downwards to USD 230,000. Further, the Applicant stated that the payments it had made were not factored into the amount demanded.
27. I have analyzed the evidence on record. On the first ground, the Service Level Agreement (SLA) stipulated that the total facility to be extended to the borrower was USD 500,000. A key term of that agreement was that the financing would be released in phases, beginning with a pilot disbursement of USD 300,000.
28. In furtherance of the SLA, the parties executed a letter of offer dated 8th June 2023, which expressly provided that the initial drawdown would be USD 300,000. The letter of offer further required the borrower to accumulate USD 35,000 over a period of three months as a cash-backed security or investment, with the effect that the actual amount disbursed to the borrower at the outset was USD 265,000.
29. Based on the foregoing, the Applicant's contention that the Respondent breached the terms of the contract by disbursing USD 265,000/- instead of USD 500,000 is therefore false and incorrect.
30. On the second ground, the Applicant stated that the Respondent initially claimed USD 300,000/= and later revised it downwards to USD 230,000/=. However, the Applicant did not provide evidence to substantiate that assertion. In the absence of evidentiary support, the contention remains a bare allegation incapable of sustaining the argument advanced.
31. The Applicant further asserted that the Respondent failed to account for monies paid by the borrower. However, the Respondent produced a statement of account marked 'FI-7 a&b' in its replying affidavit, which indicated that the total sum of USD 83,000 paid by the borrower was indeed taken to account.
32. The Applicant's assertion is therefore unmerited and baseless. I am of the view that the Applicant has neither provided a cogent nor credible basis upon which he disputes the debt in tstatutory demand. I therefore find no sufficient grounds to justify the setting aside of the statutory demand.
33. Accordingly, the instant application is therefore dismissed with costs to the Respondent.
34. This Ruling also applies to HCCOMMIN/E033/2024, which was consolidated to the instant cause.
35. It is so ordered.

SIGNED, DATED, AND DELIVERED IN VIRTUAL COURT THIS 29TH JANUARY 2026

ADO MOSES

JUDGE

In the presence of: -

C/A – Moses

N/A.....for the Applicant/Debtor



Ms. Diru h/b for Ms Muthee.....for the Respondent/Creditor

