Diamond Trust Bank Kenya Limited v Replay Capital (Insolvency Cause E027 of 2024) [2026] KEHC 4617 (KLR) (10 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4617 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

INSOLVENCY CAUSE E027 OF 2024

J NGAAH, J

APRIL 10, 2026

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED ..... APPLICANT

AND

REPLAY CAPITAL ..... RESPONDENT

RULING

1. By a motion dated 10 January 2025, the applicant has, in the main, moved this Honourable Court for an order to set aside a statutory demand dated 19 December 2024, issued by the respondent against the applicant. The application is expressed to be brought under article 159(2)(d) of *the Constitution*; section 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21;section 384, 692 of the *Insolvency Act*, cap. 53 and Regulations 16 and 17 of the Insolvency Regulations, 2016.

2. An affidavit in support of the motion has been sworn by Stephen Kodumbe who has introduced himself as the applicant's company secretary. Kodumbe has sworn that the Applicant (which I will also hereinafter refer to as "the bank") is a thriving and leading Kenyan bank with a legacy spanning over 79 years as a tier-one East African bank and one of the largest financial services groups in the region. The applicant's latest financial audit report, shows that the Applicant recorded a net profit of over Kshs. 4.9 billion and had a total asset portfolio of Kshs. 399 billion. It also has a weighted market share of 5.3% and employs over 1,500 people.

3. The regulator - Central Bank of Kenya (hereinafter 'CBK'), highly ranks the Applicant among the many banks in Kenya in terms of profitability, core capital market share, access to financial services, protected deposits, and regional and international development initiatives. Thus, the Applicant is solvent and can pay its existing liabilities.

4. The Respondent, on the other hand, is said to be an unknown foreign entity without proper domicile or known assets. As such, Kodumbe is advised by the Applicant's Advocates, which advice he verily

believes to be true and correct, that the Applicant faces the risk of not being in a position to enforce any orders, including an award of costs, against the Respondent.

5. One of the Applicant's customers is Steelmakers Limited (or "SML"). Sometime between the years 2011 and 2022, the Applicant advanced various credit facilities to SML which were secured by various securities created in favour of the Applicant including charges and what Kodumbe has described as all-encompassing fixed and floating debenture dated 24 March 2010 and supplemental debentures dated 17 February 2011, 23 November 2011, 20 November 2012, 28 October 2014, 27 July 2015 and 9 January 2019 (hereinafter "the existing security documents").

6. It was agreed under the existing security documents that the principal, interest and other moneys secured shall immediately become payable and fall due to be discharged without demand if, inter alia, SML fails to pay on the due date any money or defaults under the said existing security documents. The parties expressly conferred on the Bank under Clause 11 of the existing security documents the power and right to appoint a receiver and manager over SML's assets at any time the amounts advanced became payable.

7. Sometime in 2018, SML further approached the Bank for the establishment of trade finance facility for USD 78.5 million which request was approved by the Bank. This facility was secured by the existing security documents and on terms set out in the Letter of Offer dated 25 October 2018.

8. SML defaulted in repayment obligation. It, thereafter, approached the Bank through Replay Trading Limited, represented by one Nayen Kavia, requesting for a restructure of SML's debt exposure and for the grant of additional facilities. Mr Nayen Kavia was represented as an investment banker with extensive experience in restructuring debt.

9. It is the Bank's position that the person who advised the Bank on the restructure was Replay Trading Limited (through one Nayen Kavia) and not Replay Capital (the Respondent) which, according to Kodumbe, is an entity incorporated in Mauritius and of unknown persons. The Respondent was only introduced through the Replay Agreement sometime in 2022 by the said Nayen Kavia purely as an offshore vehicle to govern legal documents and oversight of the proposed restructure.

10. Relying on Replay Trading Limited's representation, the Bank adopted all the recommendations and proposals sent to it; and executed all the documents that Replay Trading Limited, Nayen Kavia and eventually the Respondent conceived, prepared and presented to the Applicant including a Debt Settlement Agreement dated 19 October 2022 (or hereinafter "the DSA") in which it was agreed, inter alia, that:

    a) Any failure by SML to perform any of its obligations under the DSA shall constitute an additional event of default howsoever described for the purposes of the existing security documents and all rights of the Bank to accelerate outstanding or to enforce security under the existing security documents shall apply. Further, that the DSA would not in any way derogate from or limit the rights of the Lender under the existing security documents.

    b) The existing debt, in the region of USD 78.5 million prior to the grant under the DSA of additional facilities aggregating USD 8 million, was irrevocably and unconditionally acknowledged and agreed to be due and payable by SML and its guarantor.

    c) SML shall pay the existing debt and additional debt under the DSA based on the agreed annual repayment plan spread over 19 years, with the first repayment of USD 2,800,000 being effected on 28 February 2023 and the last annual repayment of USD 3,300,000 being made on 28 February 2042.

11. The Bank performed all its obligations under the DSA as agreed including suspending the debt of USD 16.5 million, issuing new facilities aggregating USD 8 million and agreed on a longer repayment plan for the debt owed until 28 February 2042. This was done in good faith, to ensure that SML is able to pay its debts, have additional capital for conducting business and reduce the risk of SML defaulting on its obligations to the bank and or to any of its creditors, who under the DSA includes Replay Capital represented by Mr Nayen Kavia.

12. However, the restructure plan did not go as planned. SML failed to perform its obligations and additionally, SML also defaulted in its repayment obligations, prompting the Bank to issue various notices on 19 February 2024, and 5 March 2024 both requesting the Applicant to rectify its default and eventually on 7 March 2024 recalling the debt.

13. However, SML failed to rectify its default, leaving the Bank with no option but to invoke its enforcement rights under the existing security documents and appoint a receiver and manager (Kolluri Venkata Subbaraya Kama Sastry) over the property and affairs of SML on 23 August 2024.

14. Shortly thereafter, SML and Mr Nayen purportedly representing the Respondent engaged the Applicant with a view to resolving the receivership on mutual acceptable terms. The Respondent, insisted on being the beneficial owner of some of SML's property at Mazeras Plant (the stock) despite the Applicant's interest over the stocks.

15. According to the applicant, another bank, ABSA Bank Kenya Limited had advanced money to Replay Trading Limited which was disguised as the Respondent, under a Letter of Credit with the stocks pledged as security and an undertaking or guarantee issued by the Applicant on behalf of the Respondent. When the Respondent failed to fulfil its obligation under the Letter of Credit, the Applicant paid ABSA the sum of USD 14,182,000.00. The Respondent has not reimbursed the Applicant these amounts which, in the applicant's view, are colossal.

16. It was only after the Applicant asserted its rights in relation to the existing security documents, that the Respondent triggered the insolvency proceedings resting with the statutory demand dated 19 December 2024 claiming to be by way of an indemnity for any loss suffered or sustained as a result of amounts due by SML to the Respondent.

17. The Applicant claims that it has incurred monumental loss which it intends to counterclaim against all "the concerned parties", including the Respondent. In any event, if there is any amount due, the same is due from SML – the principal debtor - against whom the Applicant shall counterclaim as well as against its directors who were at material times its guarantors.

18. Against this background, Kodumbe has sworn that he has been advised by the Applicant's Advocates, which advice he verily believes to be true and correct, that the statutory demand in question in these proceedings offends Sections 2 as read together with Section 384 of the *Insolvency Act* according to which such a notice can only be issued by the creditor. The statutory demand is, therefore, fatally defective and should be struck out.

19. Kodumbe has further been advised by the Applicant's Advocates, which advice he verily believes be true and correct, that no liability has been determined whether as against SML (as the principal debtor) or the Applicant, to warrant the statutory demand. There is no evidence that the Respondent has exhaustively pursued all enforcement measures against the principal debtor before prematurely commencing the instant insolvency proceedings against the Applicant by way of the demand.

20. In any event, concurrent with serving the purported statutory demand, the Respondent has filed in this Honourable Court Civil Suit No. E075 of 2024: Replay Capital vs Diamond Trust Bank Kenya

Limited & Kolluri Venkata Subbaraya Kamasastry (the Respondent's suit) by which it has sought an interim injunction to restrain the Bank from breaching the terms of the agreements pending reference of its dispute to arbitration.SML has also filed Civil Suit Number E074 OF 2024: Steelmakers Limited vs Diamond Trust Bank Kenya Limited & Kolluri Venkata Subbaraya Kamasastry (the SML suit) by which it has also sought interim injunction orders without disclosing the material facts.

21. The applicant's position is that the relationship between the Applicant, SML and the Respondent, and any liability arising therefrom is in dispute and in active litigation as admitted and acknowledged by the Respondent under oath. Thus, Kodumbe has been advised by the Applicant's Advocates, which advice he verily believes to be true and correct, that the Respondent cannot, on the one hand, claim to be a creditor serving a statutory demand and, on the other hand, be in active litigation over the contractual relationship.

22. The applicant believes that the statutory demand, the Respondent's suit and SML's suit are collusive proceedings intended to deprive the Applicant from its recovery of a debt of over USD 86.5 million, exclusive of interest and any other applicable charges and costs associated therewith, due from SML.

23. The statutory demand, is alleged to be an attempt to unjustly exert pressure upon the Applicant to settle the alleged claims by the Respondent and due from SML without affording the Applicant an opportunity to defend the said claims or counterclaim against them.The demand, therefore, constitutes blatant abuse of court process in a bid to enforce agreements whose constructions, validity and enforcement are purportedly intended for determination in arbitration. The applicant's position is that there exist genuine, real and substantial disputes among the parties regarding the various debts, and the construction, validity and enforceability of the various agreements from which these debts arise, thus necessitating investigation by a neutral arbiter in line with rules of natural justice and fair hearing.

24. The Applicant is apprehensive that if this Honourable Court does not allow the application, the Respondent will proceed with taking further insolvency steps potentially resulting in a run on deposits causing irreversible and irreparable injury to the Applicant's customers, impact the banking industry and the Applicant's reputation and business, due to unjustified negative publicity or worse still, an unjustified and premature statutory management by the regulator.

25. The respondent opposed the applicant's motion and, to that end, filed a relying affidavit sworn on its behalf by Nayen Kavia. Kavia has identified himself as "the duly authorized representative of the Respondent, Replay Capital, a Company incorporated in Mauritius under Registration Number 143519AC" and, therefore, duly authorized by the respondent to swear the replying affidavit on its behalf.

26. According to Kavia, under the provisions of Section 384 of the Insolvency Act, for the purposes of the question on liquidation of companies, a company is deemed to be unable to pay its debts if a creditor to whom the company is indebted for One Hundred Thousand Shillings (Kshs 100,000.00) or more has served on the company a demand requiring the company to pay the debt and the company, for twenty one (21) days after, has failed to pay the debt or secure or compound for it to the reasonable satisfaction of the creditor. Thus, the bank's stature or its asset base are irrelevant and the fact is and remains that the bank has failed to discharge payment under the statutory demand and is, under the law, deemed to be unable to pay its debts.

27. The bank's debt to Replay Capital arises under the Replay Agreement dated 19 October 2022 entered into between, inter alia, the bank and Replay Capital pursuant to which the bank indemnified and held Replay Capital harmless, on demand, for any loss suffered or sustained by it as a result of Steelmakers Limited's ('SML') failure to pay the sum of United States Dollars One Million Six Hundred and

Seventy Five Thousand (USD.1,675,000.00) plus the applicable VAT thereon on or before the two (2) year anniversary of the date of the Agreement; that is by, 19 October 2024.

28. Kavia has sworn that in its application to set aside the Statutory Demand, the bank has made no reference to the Replay Agreement whose terms are clear and categorical and under which its payment obligations arise. In what the respondent says is an attempt to "cloud matters", the bank has referred to the DSA between itself and SML which was entered into on 19 October 2022, the same day that the Replay Agreement was entered into. The DSA is irrelevant to the debt payment obligation of USD. 1,675,000.00 and Replay Capital is not even a party to the DSA which gives rise to no payment obligations on the part of the bank to Replay Capital. It does not, therefore, matter that the bank "is solvent and can pay its existing liabilities" as stated in Kodumbe's affidavit.

29. Although Kodumbe has described the respondent as "an unknown foreign entity without proper domicile or known assets" the bank unequivocally agreed to indemnify and hold Replay Capital harmless in the Replay Agreement dated 19 October 2022.

30. On the face of the Replay Agreement itself which bank's Managing Director, Ms. Nasim Devji and Director - Credit, Ms. Constance Macharia signed, Replay Capital's incorporation status and domicile is clearly stated. In addition to this, Replay Capital, has since the year 2020 traded through the bank in substantial sums in USD on account of the SML and other matters and provided to the bank and its other customers financial restructuring offers and debt resolve guidance.

31. In the circumstances, the bank cannot seriously state that it disputes the debt due and owing to Replay Capital. Indeed, no dispute has previously ever been raised by the bank as to its indebtedness to Replay Capital for the sum of USD 1,675,000.00 plus the applicable VAT and it cannot now contend otherwise.

32. It is not true, as stated by Kodumbe, that it was Replay Trading Limited, and not Replay Capital, that advised the bank on the restructuring Clause 2 of the Replay Agreement. The agreement was signed by the bank's Managing Director, Ms. Nasim Devji and Director - Credit, Ms. Constance Macharia and not, in the words of Kavia, "any junior officer of DTBKL". The Replay Agreement clearly spells out, at Clause 2, Replay Capital's role and Kavia's representation of Replay Capital in so far as the DSA was concerned. It is inconceivable that the bank's senior directors would sign the Replay Agreement spelling out Replay Capital's role in assisting both the bank and SML in brokering the negotiations between the bank and SML at their mutual request and turn against the Replay Capital as a non-entity.

33. Kavia has sworn that at no time did Replay Trading Limited make any representation to the bank as is alleged by Kodumbe. This deposition has, in any event, not been substantiated since both Ms. Nasim Devji and Kodumbe are aware of Replay Capital's role and involvement in the restructuring of SML's facility at the bank, and this is clear from the Replay agreement.

34. It has also been denied that the restructuring agreement did not work. On the contrary, a sum of USD20,000,000.00 was recovered by the bank under the DSA terms. In particular, the sale of L.R. No 337/1951 was concluded on 14 September 2022 and USD Twenty Million (USD 20,000,000.00) was credited to SML's account towards reducing the debt owed to the bank. As far as ownership of the stock of steel is concerned, it has been sworn that under Clause 2.6 of the Replay Agreement, both SML and the bank accepted and acknowledged irrevocably and unconditionally that the goods specified in the Replay Agreement and held in Bonded Warehouse No. 430 were owned legally and beneficially by Replay Capital.

35. That notwithstanding, the fact remains that SML owes Replay Capital a sum of USDl,675,000.00 plus VAT and that, pursuant to the Replay Agreement, the bank had agreed to indemnify and hold

harmless Replay Capital from any loss or damage it was likely to sustain as a result of SML's failure to pay the restructuring fee.

36. It is the respondent's position that no dispute has ever been raised on the question of the debt payable under the Replay Agreement and, in the absence of any dispute, no liability need be determined as suggested by Kodumbe since the Debt is undisputed and remains payable.Having derived a substantial benefit from reduction of the SML debt by USD 20,000,000.00, it is sworn, the bank cannot claim that liability for the said fee would have to be first determined when the Replay Agreement is clear on this and that the debt remains undisputed.

37. The respondent denies that the Statutory Demand offends the mandatory provisions of Section 2 as read together with Section 384 of the *Insolvency Act*. In this regard, Kavia has sworn that he has been advised by the respondent's advocates, and he verily believes that the provisions of Rule 15(3) equally apply as do Regulation 16 and 17 of the Insolvency Regulations 2015 and, Regulation 15(3) requires that any Petition filed would be preceded by a Statutory Demand as is Form 6 set out in the First Schedule. Accordingly, the respondent's demand strictly complies with the criteria in Form 6 in so far as the issuance of the statutory demand is concerned.

38. As for the arbitration proceedings, it has been sworn that the dispute between Replay Capital and the bank under the Replay Agreement is simply confined to the steel deformed bar stock and that is the dispute which has been referred to arbitration, with interim protection having been sought under the provisions of Section 7 of The *Arbitration Act*.

39. On whether the statutory notice is meant to exert pressure upon the applicant, it is sworn that the debt for the structuring fee under Clause 2.4 of the Replay Agreement was payable on or before the 2 (two) year anniversary of the date of that agreement which was the 19 October 2022. Replay Capital's cause of action under the indemnity clause against the bank could only, therefore, arise if SML failed to make payment before 19 October 2024. The respondent took action immediately its cause of action accrued in October 2024 as it was entitled to do. The statutory demand is to enforce the contractual indemnity from the bank which has benefitted from the restructuring under the DSA to the extent of a debt reduction of USD Twenty Million (USD 20,000,000.00) as it is entitled to do in law.

40. Kavia has reiterated that Replay Capital has been known to the bank all along and has not only had financial dealings through the bank to a great extent but has also previously provided the bank proof of its financial capacity through a working group comprising Kavia, one Mr. Mohamed Nyaoga, one Mr. Patrick Ogola, Ms Nasim Devji, Stephen Kodumbe and one Mr Biko Andweny, amongst other people, when the Tusky 's (apparently a separate and distinct company) restructuring option was being explored with the bank.

41. It is sworn on behalf of the respondent that the bank cannot avoid payment of its just, contractual and undisputed debts under the guise of the fears of the existence of Replay Capital and it must abide by the consequence of the choice it makes. The honourable thing for the bank to do, it is sworn, is to discharge its contractual and undisputed indemnity obligation under the Replay Agreement. The respondent has, thus, asked this Honourable Court to dismiss the application.

42. Central to the applicant's application is, of course, the statutory demand dated 19 December 2024. The legal basis for such notices is section 384(1)(a) of the *Insolvency Act* which reads as follows:

384.

(1) For the purposes of this Part, a company is unable to pay its debts—

(a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty—one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor.

43. In line with this provision, Rule 15(3) of the Insolvency Regulations provides that a petition for bankruptcy (in this case, for insolvency) shall be preceded by a statutory demand. It reads, thus:

15(3) The petition shall be preceded by a statutory demand and shall be in Form 6 set out in the First Schedule.

44. Besides the prescription as to form of the statutory in regulation 15(3), paragraph (4) of the same regulation states that the statutory demand "shall be endorsed by the Deputy Registrar of the High Court before it is served on the debtor".

45. The deputy registrar's role in the statutory demand is a reminder that the liquidation is not voluntary but a liquidation by court as provided under section 381 (2) (b) of the *Insolvency Act*. In short, it is a court sanctioned process.

46. And for the avoidance of doubt, section 423 (1) of the *Insolvency Act* is express that only this Honourable Court has jurisdiction to supervise the liquidation of companies registered in Kenya.

47. Against this background, in its quest to recover its fee from the applicant, the respondent invoked the jurisdiction of the Court and engaged it from the word go. In that regard, it had the impugned statutory demand prepared and endorsed by the Deputy Registrar as prescribed by regulation 15(3) and (4). There is no dispute that the demand was served on the applicant. As a matter of fact, it is after service of the demand that the applicant filed the instant application to set aside the demand. Regulation 16 (1) of the Insolvency Regulations provides for such an application; it states 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.

48. The statutory demand in question was signed, not by the creditor but by the deputy registrar of this Honourable Court. This fact has provoked relatively extensive submissions from both learned counsel for the applicant and the respondent on the validity of the demand. Other grounds of the application on which submissions have been made are that the applicant has a counter-claim against the respondent that may as well exceed the alleged debt which, in any event, is disputed on substantial grounds.

49. The background of the statutory demand is an agreement dated 19 October 2022 which was captioned "Replay Agreement". The parties to the agreement were named as Diamond Trust Bank Kenya Limited; Steel Makers Limited; Replay Capital and Kalpesh Rasikbhai Patel.

50. Steel Makers Limited was described in the agreement as a limited liability company existing under the laws of the Republic of Kenya with Certificate of Incorporation No. C. 31568, having its registered office at Plot No. MSNBLOCK/XI l Pereira Building, 1st Floor, Pramukh Swami Maharaj Road,

P. 0. Bax 90553, 80100 Mombasa, K(the “Borrower”); the description given to the Replay Capital is “a company duly Incorporated in the Republic of Mauritius with Registration Number 143519 AC and whose Registered Office is at Suite 403, 4th Floor, The Catalyst Building, Silicon Avenue Ebene, Republic of Mauritius”. Kalpesh Rasikbhai Patel, was identified as “an adult male with a British passport issued on 29 August 2015 with number 518086186 (the "Guarantor", and together with the Lender, Replay and the Borrower the "Parties" and each a "Party").

51. According to the agreement, parties acknowledged that, at their instance, Replay had assisted them “to broker the negotiations between them for the purposes of their entry into the DSA and this Agreement”. For all its trouble in bringing the parties on to the negotiating table and the resultant restructure of the loan, Replay Capital was to be paid a “structuring fee”. The relevant clause in this regard was clause 2.4 which was in the following terms:

> “ 2.4. Structuring fee
>
> The Borrower hereby agrees to pay to Replay a structuring fee in the amount of USD1 675 000,00 (one million six hundred and seventy five thousand US Dollars) plus applicable VAT on or before the 2 (two) year anniversary of the date of this Agreement, and into a bank account as Replay shall nominate for the purposes. Such fee shall be paid without set-off, deduction, withholding or counterclaim.”

52. Under Clause 2.5 of the agreement Replay Capital was said to be indemnified against failure to pay its fee. The clause read as follows:

> “ 2. Indemnity
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> 5. The Lender hereby indemnifies and holds Replay harmless on demand for any loss suffered or sustained as a result of any amount due by the Borrower to Replay under clause 2.2 above not being paid on the due date therefor; The Lender shall enter into all such other documentation as Replay may require in connection with such indemnity, including without limitation, the issuance of same via SWIFT in favour of Replay.”

53. It is this indemnity that the respondent sought to enforce in initiating the court sanctioned process of liquidation of the applicant. This clear in paragraph 32 of the affidavit of Kavia where he stated, inter alia:

> “ Replay Capital is simply seeking to enforce the contractual indemnity from DTBKL who has benefitted from the restructuring under the DSA to the extent of a debt reduction of USD Twenty Million (USD 20,000,000.00) as it is entitled to do in law.”

54. The respondent may be entitled to enforce its indemnity but clause 4 of the agreement, on “governing law and arbitration”, raises the question whether the respondent was entitled to invoke the jurisdiction of this Honourable Court by way of liquidation proceedings to enforce the indemnity. This clause reads as follows:

> “ 4. Governing law and arbitration
>
> 4.1. This Agreement is governed by and shall be construed in accordance with Kenyan law.

4.2. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

4.3. The number of arbitrators shall be three.

4.4. The seat, or legal place, of arbitration shall be Nairobi, Kenya.

4.5. The language to be used in the arbitral proceedings shall be English.

4.6. Any arbitral proceedings under this Agreement shall be consolidated with any arbitral impending or subsisting proceedings under the DSA".

55. It has not been contested that this clause encapsulates what is, for or intents and purposes, an arbitration agreement the essence of which parties conferred upon an arbitrator or an arbitration tribunal the jurisdiction to determine any dispute arising from their contract. Considering the wide terms in which the arbitration clause is couched, "any dispute arising out of or in connection with this agreement" would include such a dispute as any money due to any party to the contract as fees or other sums, howsoever described.

56. Unlike courts which derive their jurisdiction from *the Constitution* and statute, arbitrators or arbitration tribunals derive their jurisdiction solely from an agreement between parties who, like in the instant case, submit their future disputes to arbitration.

57. In their book, Comparative International Commercial Arbitration, Julian D.M. Lew, Loukas A Mistelis and Stefan M. Kroll, postulate that arbitration agreement is evidence enough of the consent of the parties to submit their disputes to arbitration. Beyond that, the agreement establishes the jurisdiction and authority of the arbitrator or tribunal over that of the courts. (see pages 99, 100).

58. The same authors state that by entering into an arbitration agreement, parties express their intention that all disputes between them will be referred to and settled by arbitration. By the same token, the choice manifests a conscious decision against resolution of the dispute by the competent state courts. With the acceptance of party autonomy, the level of court intervention is significantly diminished and the general trend is towards limiting court intervention to those cases where it is either necessary to support the arbitration process or required by public policy considerations.

59. Judicial, and effectively state respect for the parties' agreement to arbitrate, means that no court proceedings on merit of the dispute can be brought before courts and that all disputes covered by that agreement are referred to arbitration (see pages 355, 356).

60. The principle is codified in section 6 of the *Arbitration Act* which states:

6. Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

61. Section 6(1)(a) of the *Arbitration Act* incorporates article 8 of the UNCITRAL (United Nations Convention On International Trade Law) Model Law on International Commercial Arbitration; this article reads as follows:

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

62. This article was applied in Supreme Court of British Columbia in Pacific Erosion Control Systems Ltd. v. Western Quality Seeds [2003] BASK 1743. In that case, the defendant applied for a stay of proceedings in favour of arbitration pursuant to s. 8 of the (Canadian) International Commercial *Arbitration Act*, and pursuant to the inherent jurisdiction of the court. This section provides for stays on proceedings where a court has referred disputes to arbitration pursuant to Article 8 of the Model Law. The learned trial judge referred to the decision of Hinkson J. in the Court of Appeal in Gulf Canada Resources Ltd. v. Arochen International Ltd. [1992] BCJ 500, which, formulated a test for whether a stay of proceedings should be ordered, as follows:

" The test formulated is that a stay of proceedings should be ordered where:

SUBPARA (i)

it is arguable that the subject dispute falls within the terms of the arbitration agreement; and

(ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement. "

62. The principle that arbitration is consensual and that courts must give effect to the intention of the parties in arbitration agreement was addressed by the House of Lords in Fiona Trust & Holding Corp. v. Privalov [2007] UK HL 40. In this case, owners of vessels entered into charters with eight charterers. The contract provided, inter alia, that any dispute arising under this charter would be referred to arbitration. The owners of the vessels sought to rescind the contracts, saying they had been procured by fraud and they commenced court proceedings for a declaration that the charters had been validly

rescinded and that the arbitration agreement was rescinded also. The charterers sought a stay on the proceedings on the basis that the matter should have been arbitrated. A stay was refused at first instance but allowed by the Court of Appeal. The decision of the Court of Appeal was upheld in the House of Lords and the judgment was given by Lord Hoffman, who said:

> " [5] ... arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intend to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen, in particular, are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

62. At page 1060, the learned judge continued as follows:

> " In my opinion, the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same Tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore L.J remarked (at [17]):
>
> > 'If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so'. "

62. It has been held in P. Elliot & Co Ltd v. FCC Elliot Construction Ltd, [2012] IEHC 361 (Aug 28, 2012) that Article 8 of the Model Law directs courts to respect the arbitral process and stay court proceedings not out of deference to arbitration per se but rather as an expression of the most basic concept in the law of contract which is that parties who have mutually exchanged promises for value may, at the suit of each other, be kept to their promises. Where parties promise to arbitrate their disputes, courts should stay their proceedings in favour of arbitration if that promise is proved.

63. With this legal background in mind, there is merit in the argument that the initiation of the court sanctioned liquidation proceedings is contra the arbitration agreement. This Honourable Court is hesitant to assume jurisdiction to supervise the liquidation of the applicant when jurisdiction to resolve the dispute which provoked issuance of the impugned statutory demand has been conferred on an arbitrator or arbitration tribunal.

64. Although the respondent invoked the liquidation process, ostensibly to enforce the indemnity for settlement of its fees, there is evidence that it was always alive to the fact that the arbitration was the only way to go. I say so because when the SML laid claim on certain stock of steel in a bonded warehouse whereas it had been agreed that the stock belonged to the Replay Capital under clause 2.6.1 of the agreement, the respondent referred or sought to refer the dispute to arbitration. The pertinent clause read as follows:

> " It is irrevocably and unconditionally acknowledged and agreed by the Parties that the goods specified in Annexure A (Replay Goods) hereto, held by the Borrower in a bonded warehouse (Bonded Warehouse #430), are owned (both legally and beneficially) by Replay (which purchased them from PESA pursuant to the enforcement by PESA of a pledge

interest over such goods to secure sums outstanding under the Facility Agreement (PESA having purchased the loan claim of ACF against the Borrower secured by such pledge)), and are being held by the Borrower to Replay's sole and exclusive order in such warehouse."

62. In paragraph 35 of the affidavit of Kavia, he swore that the dispute over enforcement of this particular clause had been referred to arbitration and stated as follows:

> 35. That the issuance of the Statutory Demand cannot, by any standard, be said to constitute blatant abuse of the Court process as Mr Kodumbe purports. The matter referred to arbitration by Replay Capital is solely on the question of the ownership of the stocks set out in Annexture A of the Replay Agreement and nothing else. As for the reference of the SML disputes under the DSA, these are limited to the receivership, accelerated payment demand and damages accruing out of DTBKL's wrongful conduct. None of these references have anything to do with payment of the Structuring Fee which accrued for payment on 19th October 2019 but payment was postponed to on or before the 19th October 2024."

62. As a matter of fact, the applicant has filed in this Honourable Court Civil Suit No. E075 of 2024 in which it has sued the respondent and one Kolluri Venkata Subbaraya Kamastry for among other prayers, an injunction to restrain the respondent "from breaching the terms of the Replay Agreement dated 19th October 2022 pending the hearing and determination of the reference to arbitration". Basically, the applicant is seeking in that suit interim measures pursuant to section 7(1) of the *Arbitration Act*; this section provides:

> (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

62. In making a case for arbitration in Civil Suit No. E075 of 2024, the applicant has, in the submissions filed on its behalf, invoked the depositions made by Kodumbe in his affidavit replying to the instant application and stated as follows:

> " 8. It is also common ground that a dispute has arisen between the parties as regards the ownership (beneficial and legal) or interest in the Reply Stocks and there are also disputes between SML and DTBKL which, according to DTBKL itself is where it has stated on oath that '...there exist genuine, real and substantial disputes among the parties regarding the various debts, and the construction, validity and enforceability of the various agreements from which these debts arise, thus necessitating investigation by a neutral arbiter in line with the rules of natural justice and fair hearing ....' - Stephen Kodumbe's Affidavit sworn on a related matter Mombasa Insolvency Cause No. E027 Of 2024 (diamond Trust Bank Kenya Limited & Replay Capital).

62. It is apparent from Kodumbe's depositions that the disputes he has made reference to are, in their nature, wide-ranging; these disputes which have been described as genuine, real and substantial include disputes on various debts and agreements from which these debts arise. My interpretation of Kodumbe's deposition is that "the debts due" would include what the applicant claims under the indemnity as the "various agreements" including the Replay agreement in which the indemnity clause has been encapsulated.

63. Thus, it cannot be that the respondent would submit one dispute to the arbitration and, in another dispute, arising from the same agreement, seek to invoke the jurisdiction of this Honourable Court for

determination. The arbitration agreement in the Replay Agreement is a one-stop shop, so to speak, with respect to all disputes arising from the agreement. To be precise, the dispute on the enforceability of the indemnity clause is as much subject to the arbitration as the dispute on the ownership of the stock to which both parties lay claim.

64. Under regulation 17(6)(d) of the Insolvency Regulations, a statutory demand may be set aside "on other grounds". The reasons I have given faulting the liquidation process would constitute such "other grounds" and, for those same reasons, I hold the applicant's application to be merited. I hereby allow the application dated 10 January 2025 to the extent that the statutory demand dated 19 December 2024 is hereby set aside. Parties will bear their respective costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 10 APRIL 2026

NGAAH JAIRUS

JUDGE