

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**INSOLVENCY CAUSE NO. E051 OF 2024**

**BRAWMWEL  
WAKACHUNGA.....DEBTOR/APPLICANT**

**WAMUKOTA**

**VERSUS**

**ZOHARI CREDIT LIMITED**

**(FORMERLY  
LIMITED).....CREDITOR/RESPONDENT**

**ZOHARI**

**LEASING**

**RULING**

1. This Ruling is in respect to the Application by the Applicant dated 29<sup>th</sup> March, 2024.

**Background Facts**

2. The Applicant filed the Application for setting aside a statutory demand dated 29<sup>th</sup> March 2024 seeking the following orders;

*a) The Statutory Demand dated 11<sup>th</sup> March 2024 be set aside.*

*b) Costs of this Application be borne by the Creditor*

3. The Application was supported by the sworn Affidavit of **Bramwel Wamukota Wakachunga**. He asserted that he is

merely a guarantor to the Finance Lease Agreement between the Creditor **and Down To Earth Technologies Limited**. That no rental payments have commenced because the installation and implementation of the leased equipment have not been completed. He further stated that neither the principal debtor nor its guarantors have any relationship with **Zohari Credit Limited**. He therefore contended that he is not indebted as alleged, terming the Statutory Demand premature, misconceived, and an attempt to exert pressure for sums not yet due.

4. In reply, the Respondent filed the Replying Affidavit sworn on 30<sup>th</sup> May 2024. It was averred that by a Finance Lease Agreement dated 25<sup>th</sup> July 2022, **Down To Earth Technologies Limited (DTE)** leased server and networking equipment from the Creditor for a 24-month term at quarterly instalments of Kshs. 117,876. The Applicant and his co-director executed a Personal Guarantee dated 26<sup>th</sup> July 2022, guaranteeing payment of up to USD 780,587 in the event of default. The Creditor issued a Letter of Credit for USD 780,587 to facilitate procurement of the asset, but the

Borrower subsequently defaulted, prompting a demand for Kshs. 105,379,245 and notice to the guarantors.

5. Further, that despite demand, both the Borrower and the Applicant as guarantor failed to settle the outstanding sums, leading to issuance of Statutory Demands under the **Insolvency Act, 2015**. The Applicant's claim that rental payments had not fallen due because installation was incomplete is refuted. This is on the basis that payment was triggered upon delivery of the asset, which the Borrower confirmed on 20<sup>th</sup> April 2023. That installation was not the Creditor's responsibility nor a condition precedent to payment.
6. The Respondent further dismissed as misconceived the allegation that there was no relationship between the parties. It noted that the Finance Lease Agreement and Personal Guarantee expressly establish privity between the Borrower, the Creditor, and the guarantors. Given the admitted guarantee and the Borrower's default, the Creditor maintained that the Applicant is liable and that the present application lacks merit and should not be granted.

## **Issues for determination**

7. After carefully considering the Application, the response, and the written submissions, the Court frames a single issue for determination;

*a) Whether the statutory demand should be set aside.*

## **Analysis**

8. The main issue for determination is whether the Court should set aside the Statutory Demand. A Statutory Demand is ordinarily issued where a company is unable to pay its debts. **Section 384(1) of the Insolvency Act** outlines the circumstances in which a company is unable to pay its debts as follows: -

**384. The circumstances in which a company is unable to pay its debts**

**(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;**

**(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or**

**(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.**

9. On the other hand, **Regulations 16 and 17 of The Insolvency Regulations** outline the grounds for setting aside a Statutory Demand and the procedure to be followed once it has been issued. **Regulation 16 of the Insolvency Regulations**, provides that-

**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 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, whichever is 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 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.**

**c. Annex a copy of the statutory demand.**

10. Further, **Regulation 17** of the said Regulations provides as follows-

**1. On receipt of an application under Regulation (6) 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 from 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 debt or debts specified in the statutory demand;***

***b. The debt is disputed on grounds which appear to the Court to be substantial;***

***c. If 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.***

11. The Applicant argued that pursuant to **paragraph 6(d) of Regulation 17** the Court may set aside a statutory demand if the Court is satisfied, on other grounds, that the demand ought to be set aside. In addition, it was the Applicant's submission that the Statutory Demand dated 11<sup>th</sup>

March 2024 is premature, misconceived, and a concocted to exert undue pressure on the Debtor. The debt is disputed and is not owing. This is in circumstances where no obligation has materialized and should be set aside.

12. On the other hand, the Respondent maintained that the Applicant is bound to repay the outstanding sum because the Borrower failed to discharge its contractual obligations. **That Section 14 of the Insolvency Act** does not provide that the Respondent should have pursued other alternatives before commencing the instant bankruptcy proceedings.
13. The Court does agree with the Respondent that this is a process recognized in law for recovering debts from companies. In **Prideinn Hotels & Investments Limited v Tropicana Hotels Limited (2018) KECA 651 (KLR)**, the Court of Appeal held that;

***“There is no requirement under the Insolvency Act or the Companies Act that stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the Insolvency Act which a creditor, such as the respondent in the case, could pursue to secure***

***payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.”***

14. However, the question that comes to mind is - is this a debt that has remained unpaid for several years and in respect of which the Appellant has been given adequate time, opportunity, and indulgence? The parties both agree that their agreement lacked a commencement date upon which the payments were to be remitted. There is an unresolved contest as to whether the Assets were to be paid for immediately upon delivery or upon installation. Further to this, the Respondent had only issued one demand letter to the Applicant as well as the borrower. The debt in issue is also seriously disputed. The Debtor maintains that he was but a Guarantor to the debt. That a dispute still exists between the Principal Borrower and the Creditor regarding the claim. For that reason, he disputes his liability to the Respondent. To this Court, this no longer presents as a situation where the Debtor has exhibited inability to pay. It reveals a contested claim on substantial grounds. **In BN**

**Kotecha & Sons Limited v Shah**  
**[2024] KEHC 8601 (KLR) A. A. Visram J.** stated as follows;

*“As regards the above issue, the Court of Appeal, in Universal Hardware Limited v African Safari Club Limited MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, provided the following guidance after reviewing several decisions: -*

*The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bonafide, proper or valid defence and not a mere semblance of a defence. 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.”*

15. In **Flower City Limited v Polytanks & Containers Kenya Limited [2021] KEHC 34 (KLR) Mativo J.** (as he then was) laid out the principles for consideration in applications for setting aside a statutory notice.

*“Once a debtor showed that even one issue had a sufficient degree of cogency to be arguable, a finding of a genuine dispute had to follow. The meaning of the expression genuine dispute connoted a plausible connection requiring investigation and raised much the same sort of considerations as the serious question to be tried criterion which arose on an application for an interlocutory injunction. The court was not required to uncritically accept as giving rise to a genuine dispute every statement in a supporting affidavit. The court would not exercise its discretion unless there was a genuine triable issue. That had been equated to the test of whether there was a real prospect of success for*

*the purpose of resisting an application for summary judgment. The debtor had to show that there was more than an arguable dispute.*

*The principles of law discernible from decisional law were clear that if a debtor had genuine and substantial grounds for disputing the debt, the court should not allow the statutory demand to stand but should instead dismiss it so that the parties could determine any dispute in a civil court. The debtor bore the onus of proof to demonstrate that there were genuine and substantial grounds for disputing the debt.*

*The true test was whether there was a bona fide dispute or whether there was a real dispute that was, a real and not fanciful or insubstantial dispute about the debt. Alternatively, the test could be defined as whether the debt was disputed upon substantial grounds? The true question was whether there was a substantial dispute as to the debt upon which the statutory demand was allegedly founded? Something more than mere assertion was required because if that*

*were not so, then anyone could merely say he did not owe a debt.*

*The court had to be satisfied that the debt was not disputed on substantial grounds and was bona fide. The substantial dispute had to be the kind of dispute that in an ordinary civil case would amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It was not sufficient to dispute the debt. The person disputing had to go further and demonstrate on reasonable grounds why he was disputing the debt.”*

16. To this, the Court concludes that insolvency proceedings should not be used as a tool to coerce a debtor to pay a debt where the same is substantially disputed. The Court should also resist in embarking on a process of proving a debt that ought to be proved through ordinary civil proceedings.

17. Therefore, the statutory demand dated 11<sup>th</sup> March 2024 is hereby set aside.

18. As to costs the same lie at the discretion of this Court.  
Costs ordinarily follow the event. The same are awarded to the Applicant as the successful party.

**Determination**

19. The Applicant/Debtor's Application dated 29th March, 2024 is allowed in the following terms;
- (a) The Statutory Demand dated 11th March, 2024 be and is **HEREBY** set aside.
  - (b) Costs of this Application be borne by the Creditor.
20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS  
13<sup>TH</sup> DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.**

**JUDGE**

**In the presence of;**

Miss Gitau for the Applicant/Debtor.

Miss Bett for the Respondent/Creditor.

Mr. John Paul - Court Assistant.