

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY NOTICE NO. E059 OF 2025

COSTALINA ENERGY LIMITED.....
APPLICANT

VERSUS

FLY PREMIER COMPANY LIMITED.....
RESPONDENT

RULING

1. This ruling concerns the Respondent’s Notice of Motion dated 17th April 2025 brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Section 16 and 384(1) of the Insolvency Act, No. 18 of 2015, and Regulations 16 and 17 of the Insolvency Regulations, 2016. The Applicant seeks, inter alia, orders that the statutory demand dated 28th March 2025 be set aside or struck out, and that the Respondent be restrained from presenting or proceeding with a winding up petition against it, as well as costs.
2. The application is premised on the grounds set out on its face and is supported by the affidavit of Abdikarim Mohamed Ali, a Director of the Applicant, sworn on 17th April 2025. The deponent avers that the Applicant was served with a statutory demand for USD 261,868 and contends that the same is defective and invalid on account of the alleged debt being disputed.

3. It is further deposed that the debt is overstated and incorporates sums allegedly owed to third parties. The Applicant asserts that the claim arises from the supply of jet fuel which, it contends, was contaminated, thereby causing damage to its aircraft and necessitating repairs costing USD 629,621. It is the Applicant's position that the statutory demand is being employed oppressively as a debt recovery mechanism rather than for a bona fide insolvency purpose.
4. In opposition, Abdullahi Abdulle Mahmoud, a Director of the Respondent, swore a replying affidavit on 30th June 2025. He deposes that the parties have maintained a commercial relationship since August 2023, pursuant to which the Respondent supplied jet fuel to the Applicant, each transaction being supported by invoices and delivery receipts
5. The Respondent avers that the Applicant duly honoured its obligations until December 2024 when it defaulted, prompting the issuance of a demand letter. It is further deposed that the Applicant acknowledged the indebtedness and proposed a repayment plan, which was rejected.
6. The Respondent disputes the allegation of contaminated fuel, contending that the report relied upon does not attribute any damage to the fuel supplied. It is further asserted that no complaint was raised contemporaneously and that the alleged counterclaim is an afterthought,

particularly given that the Applicant continued procuring fuel after the alleged incident.

7. The Respondent maintains that the debt is neither overstated nor inclusive of third-party claims, and that the statutory demand was issued in compliance with the law.
8. Parties filed written submissions. The applicant submissions are dated 27th October 2025, while the Respondent submissions are dated 26th September 2025.

Analysis and determination

9. Having considered the pleadings, affidavits and submissions by the parties, the issues for determination are:

- i. Whether the statutory demand dated 28th March 2025 is liable to be set aside; and*
- ii. Whether the Respondent should be restrained from presenting a winding up petition.*

10. The law governing statutory demands is anchored in Section 384(1)(a) of the Insolvency Act provides that a company is deemed unable to pay its debts if:

“...a creditor to whom the company is indebted for one hundred thousand shillings or more has served on the company...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...”

11. The effect of non-compliance with a statutory demand is to entitle a creditor to pursue liquidation, and that

liquidation is not a remedy of last resort but a lawful enforcement mechanism. (see **Pridelnn Hotels & Investments Limited v Tropicana Hotels Limited [2018] KECA 651 (KLR)**).

12. A Statutory Demand serves as a test of solvency. If a debtor does not comply with the Statutory Demand within a stipulated time, he is deemed to be unable to meet his debts and a bankruptcy application may be brought. However, a debtor passes this test of solvency if he proves that he has a genuine cross-demand with a value equal to or greater than that of the value of the Statutory Demand debt. This rationale is concretized in **Regulation 17(6)** which provides the grounds upon which the court may set aside a Statutory Demand:

- a. The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt 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 relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt;*
- d. The court is satisfied, on other grounds, that the demand ought to be set aside.*

13. The rationale underlying the foregoing provisions is that the insolvency process should not be used as a tool to

coerce payment of a disputed debt. Where a debtor demonstrates the existence of a genuine and substantial dispute, the Court will intervene and set aside the Statutory Demand if in its opinion, on the evidence there is a genuine triable issue.

14. “The principle as I understand it is that a disputed debt on substantial and *bona fide* grounds cannot be the subject of a winding-up proceeding 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.” (**See Universal Hardware Limited vs African Safari Club Limited (2013) KECA 507 KLR**).
15. In the present case, it is not disputed that the parties were in a commercial relationship involving the supply of aviation fuel. It is also not disputed that the Applicant supplied fuel to the Respondent and that the Respondent made payments up to December 2024. The Respondent, however, contends that the fuel supplied was contaminated and caused damage to its aircraft, thereby giving rise to a counterclaim exceeding the amount demanded.
16. While the Court is mindful that it is not required at this stage to conclusively determine the merits of the alleged counterclaim, the Respondent must nevertheless

demonstrate that the dispute is bona fide and founded on substantial grounds.

17. Upon careful consideration of the material placed before the Court, I am satisfied that the Respondent has raised a triable and arguable dispute. The allegation of contaminated fuel, coupled with a quantified claim for repairs, is not a mere bare denial. It raises technical and evidentiary questions which can only be properly interrogated at trial.
18. The Court must guard against the use of insolvency proceedings as a means of exerting undue pressure on a debtor
19. Accordingly, I am satisfied that the Applicant has demonstrated the existence of a bona fide dispute on substantial grounds.
20. In those circumstances, the statutory demand cannot stand.
21. As regards the prayer restraining the presentation of a winding-up petition, it follows that where a statutory demand is set aside on account of a disputed debt, it would be an abuse of the Court process to permit the creditor to proceed with insolvency proceedings founded on the same disputed claim.
22. In the result, the Respondent's Notice of Motion dated 17th April 2025 is hereby allowed.

23. The statutory demand dated 28th March 2025 is hereby set aside.
24. The Applicant is restrained from presenting or proceeding with any winding-up petition against the Respondent based on the said demand or the disputed debt.
25. The costs of the application shall cause.

It is so ordered.

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

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Ms. Rosa h/b for Ms. Chebet for Creditor

Mr. Gitau for Respondent

Court Assistant: Lispa