

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
INSOLVENCY NOTICE NO. E026 OF 2025

ENCOMM LIMITED.....
.....APPLICANT

VERSUS

IOMInvest.Com LIMITED t/a M & A
SERVICES.....RESPONDENT

RULING

1. This ruling determines two applications filed by the Applicant Encomm Limited dated 19th March 2025 (hereinafter the first application) and the application dated 14th May 2025 (herein after the 2nd Application).
2. By the first application, brought under Section 384 of the Insolvency Act, Regulations 16, 17 and 77B(2)(a) of the Insolvency Regulations, and Sections 1A, 1B and 3A of the Civil Procedure Act, the Applicant seeks, in substance, orders restraining the Respondent from commencing or continuing insolvency proceedings, including the gazettelement of any petition, and further seeks the setting aside of the statutory demand dated 25th February 2025, together with costs. The application is supported by the Affidavit of Noor Maalim Adan and the further affidavit of Maureen Okomo, sworn on 20th June 2025
3. The application is premised on the contention that the alleged debt is disputed and that the statutory demand is

defective for want of compliance with the Insolvency Regulations, particularly the requirement for endorsement by the Deputy Registrar and for sufficient particulars of the claim. The Applicant avers that some of the services billed were either not rendered or were improperly rendered, and that it has a subsisting counterclaim arising from the same transaction, having already paid a substantial sum.

4. It is further contended that the period of the alleged debt is inconsistent with the operative agreement between the parties. The Applicant also asserts that the statutory demand has been issued as a coercive measure to compel payment of a disputed claim, and that the threatened insolvency proceedings would occasion grave reputational and commercial prejudice, particularly in the aviation sector where regulatory compliance and financial standing are critical.
5. The application is opposed through the sworn affidavit of Christopher Andrew Astely on 12th May 2025. The Respondent maintains that the debt is valid, due, and undisputed, arising from aircraft maintenance and ground handling services rendered under successive Standard Ground Handling Agreements between the parties. It is deposed that the Applicant expressly acknowledged the indebtedness and undertook to settle outstanding invoices, but subsequently defaulted, resulting in an outstanding sum of GBP £120,952.37.
6. The Respondent contends that the alleged dispute and counterclaim are neither *bona fide* nor supported by

evidence, and are instead an afterthought raised only after issuance of the statutory demand. It is asserted that the Applicant received the invoices without objection, acknowledged the debt in correspondence, and continued to benefit from the services rendered.

7. The Respondent further avers that the statutory demand was lawfully issued in compliance with the Insolvency Act and Regulations, and that the Applicant has failed to satisfy the same within the prescribed period, thereby rendering it to be deemed unable to pay its debts. It is contended that the alleged defects, including lack of endorsement and currency discrepancies, are without legal basis and do not invalidate the demand.
8. Accordingly, the Respondent asserts that the present application is a stratagem to frustrate lawful insolvency proceedings and to evade settlement of a legitimately accrued debt.
9. The Applicant's second application, brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 26 Rules 1, 2 and 5 of the Civil Procedure Rules, seeks an order compelling the Respondent, IOM Investment.com Ltd t/a M&A Services, to furnish security for costs in the sum of Kshs. 3,000,000/=, failing which the statutory demand dated 25th February 2025 be set aside, with costs of the application.
10. The application is supported by the affidavit of Noor Maalim Adan, who avers that the alleged debt arises from aircraft maintenance agreements, principally the *Encomm*

SGHA dated 1st June 2022, and contends that no evidence has been tendered to support services allegedly rendered outside that agreement or to establish any contractual nexus between the parties. It is further deposed that some services were undertaken without the requisite certification from the Kenya Civil Aviation Authority, thereby rendering them unlawful and incapable of giving rise to a valid claim.

11. The Applicant also asserts a counterclaim in the sum of USD 156,650.63 for work not performed and damages arising from alleged negligence. It is further contended that the Respondent is a foreign entity domiciled in the Isle of Man, with no known assets or presence within the jurisdiction, and has not demonstrated its ability to satisfy an adverse costs order, thereby necessitating the provision of security for costs.'

12. Both applications were heard together by way of written submissions.

Analysis and determination

13. I have considered the two applications, the affidavits on record, and the rival submissions by counsel. For clarity, I shall determine each application separately.

Application dated 19th March 2025

14. This application seeks, inter alia, the setting aside of the statutory demand dated 25th February 2025 and injunctive relief restraining the Respondent from commencing or continuing insolvency proceedings against the Applicant.

15. A Statutory Demand issued under Section 17 of the Insolvency Act triggers the insolvency proceedings. Where a valid demand is served upon the debtor, and it is not heeded within the statutory twenty-one (21) days, the debtor will be deemed as unable to pay the debt demanded.
16. **Regulation 16(1)(a)** of the **Insolvency Regulations** stipulates as follows:
“The debtor may apply to the court for an order to set aside the statutory demand within twenty on days from the date of the service on the debtor of the statutory demand.”
17. In the instant case, it is not in dispute that the statutory demand dated 25th February 2025 was served on 27th February 2025, and the current application was filed on 19th March 2025, this is within the 21-day limit prescribed under Regulation 16(1)(a).
18. **Regulation 17(6)**, which provides the grounds upon which the court may set aside a Statutory Demand, is as follows:
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.**
19. In the instant case the Applicant contends that the debt is disputed on substantial grounds and that it has a counterclaim against the Respondent. 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:

“...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 bona fide, 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.”

20. The law is settled that insolvency proceedings are not to be used as a means of enforcing payment of a disputed debt. The question for determination is therefore whether the Applicant has demonstrated the existence of a *bona fide* dispute on substantial grounds.
21. The Applicant challenges the debt on several fronts, including the legality of services allegedly rendered without requisite certification, the absence of a contractual nexus in respect of some claims, inconsistencies in the period of the alleged debt, and the existence of a counterclaim arising from the same transactions. The Applicant further contends that the statutory demand is defective and has been issued as a coercive tool.
22. The Respondent, on its part, maintains that the debt is due, admitted, and arises from services rendered under successive Standard Ground Handling Agreements, and that the Applicant acknowledged the indebtedness and failed to settle the same.
23. Having considered the material before the Court, I am satisfied that the dispute raised by the Applicant is not frivolous. The issues regarding the validity of the services rendered, the scope of the agreements, and the alleged counterclaim raise serious and triable questions that cannot be resolved summarily within insolvency proceedings.
24. In the circumstances, I find that the Applicant has demonstrated a *bona fide* dispute on substantial grounds within the meaning of Regulation 17(6) of the Insolvency Regulations.

25. Accordingly, the statutory demand dated 25th February 2025 is hereby set aside. Consequently, the prayer for injunctive relief restraining the commencement or continuation of insolvency proceedings is merited, as to allow such proceedings to proceed would amount to an abuse of the insolvency process.
26. In the circumstances I find merit in the application dated 19th March 2025 and allow the same.

Application dated 14th May 2025

27. This application seeks an order compelling the Respondent to furnish security for costs in the sum of Kshs. 3,000,000/= pursuant to Order 26, Rules 1, 2 and 5 of the Civil Procedure Rules.
28. The power of the Court under Order 26 is discretionary and must be exercised judiciously, having regard to all the circumstances of the case.
29. In **Shah v Shah [1982] KLR 95**, the Court held that the jurisdiction is intended to ensure that a successful party is not left with an empty decree for costs, while at the same time guarding against the use of such orders to stifle a party's right of access to justice.
30. It is not in dispute that the Respondent is a foreign entity domiciled in the Isle of Man. However, the mere fact of residence outside the jurisdiction is not, of itself, sufficient to warrant an order for security for costs. It is but one of several factors to be taken into account, and the Court must

guard against making an order that would unjustly impede the prosecution or defence of a claim.

31. The Court must therefore strike a balance between two competing considerations, that is; the Applicant's apprehension that it may be unable to recover costs, and the Respondent's right to pursue or defend its claim without undue hindrance. In doing so, the Court must consider, inter alia, the bona fides of the claim, the strength of the respective cases, and whether the order sought would have the effect of shutting out a litigant from the seat of justice.
32. In the present case, I have already found, in respect of the first application, that the dispute between the parties raises substantial and bona fide triable issues concerning the existence, validity and enforceability of the alleged debt. These issues go to the very root of the parties' relationship and can only be resolved upon a full hearing.
33. In such circumstances, to require the Respondent to furnish substantial security for costs at this stage would, in my view, risk prejudicing its ability to ventilate its claim. The Applicant's apprehension, though not entirely unfounded, remains speculative and is not supported by cogent evidence demonstrating that the Respondent would be unable to satisfy an adverse costs order.
34. Further, the Court must be slow to impose conditions that may have the effect of stifling proceedings, particularly where the dispute is commercial in nature and arises from a longstanding contractual relationship between the parties.

35. Taking all these factors into account, I am not persuaded that this is a proper case for the grant of an order for security for costs.
36. Accordingly, the prayer for security for costs is declined.
37. In the result, I make the following orders:
- a) The statutory demand dated 25th February 2025 is hereby set aside.***
 - b) An order is hereby issued restraining the Respondent from commencing or continuing insolvency proceedings against the Applicant based on the said statutory demand.***
 - c) The application dated 14th May 2025 is hereby dismissed.***
 - d) The costs of the applications shall be in the cause.***

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

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

P.M. MULWA
JUDGE

In the presence of:

Mr. Okeyo h/b Mr. Oloo for Applicant

Mr. Siganga h/b for Mr. Mueke Musau for Respondent

Court Assistant: Lispa