



**Kevian Kenya Limited v Hipora Business East Africa Limited (Civil Appeal 50 of 2019) [2025] KECA 1195 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1195 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 50 OF 2019  
J MOHAMMED, FA OCHIENG & AO MUCHELULE, JJA  
JULY 4, 2025**

**BETWEEN**

**KEVIAN KENYA LIMITED ..... APPELLANT**

**AND**

**HIPORA BUSINESS EAST AFRICA LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 9th November 2018 in Insolvency Petition No. 19 of 2017)*

**JUDGMENT**

1. This appeal arises from the ruling of the High Court at Nairobi (F. Tuiyott, J.), as he then was, delivered on 9<sup>th</sup> November 2018. The dispute involved an insolvency petition filed by the respondent against the appellant. The appellant sought to challenge the High Court's decision not to strike out the insolvency petition, arguing that the debt underlying the petition was genuinely disputed and therefore not suitable for resolution within insolvency proceedings.
2. The dispute originated from Service Level Agreements (SLAs) dated 24<sup>th</sup> August 2015, under which the respondent was contracted to provide system controllers and double checkers to the appellant. Although initially framed as three-month contracts, the SLAs were mutually extended over time.
3. In December 2016, the appellant raised concerns about alleged overcharging in the respondent's invoices and formally requested a reconciliation of accounts. This request was reiterated via a follow-up letter dated January 2017.
4. Despite these concerns, in May 2017, the respondent issued a statutory demand in the sum of Kshs. 2,799,625.26, asserting that this amount remained unpaid. The respondent contended that billing was done per personnel, while the appellant maintained that the SLAs stipulated fixed monthly rates of



Kshs. 52,000 for system controllers and Kshs. 42,500 for double checkers. The demand was disputed in writing by the appellant on 25<sup>th</sup> May 2017.

5. Subsequently, the respondent filed a liquidation petition, prompting the appellant to lodge an application dated 20<sup>th</sup> December 2017 to strike out the petition, contending that the alleged debt was genuinely disputed. This application was supported by the affidavit of Kimani Rugendo dated 20<sup>th</sup> December 2017, and a further affidavit sworn on 15<sup>th</sup> January 2018.
6. The learned judge declined to strike out the petition, finding that the dispute did not rise to the level of a genuine and substantial controversy sufficient to oust insolvency jurisdiction. The learned judge ruled that the petition met the statutory threshold under Section 384(1)(a) of the *Insolvency Act*, and that the allegations raised by the appellant were not sufficiently substantiated.
7. When the appeal came up for hearing on 25<sup>th</sup> February 2025, learned counsel Mr. Opole appeared for the appellant, while Ms. Kivindo, learned counsel, represented the respondent. Parties relied on their written submissions, which they orally highlighted.
8. Mr. Opole submitted that the learned Judge erred by failing to consider the further affidavit dated 15<sup>th</sup> January 2018, which introduced critical evidence and grounds of dispute, including a claim of overcharge amounting to Kshs. 1.6 million and an overpayment of Kshs. 279,000.
9. The appellant contended that the further affidavit highlighted the inconsistency between the respondent's per-head billing approach and the fixed rates stipulated in the SLA, and also the results of the appellant's reconciliation, indicating an overcharge of Kshs. 1.6 million and an overpayment of Kshs. 279,092.65. The omission of this affidavit, the appellant argued, materially influenced the court's erroneous conclusion that the matter should proceed as a liquidation petition.
10. Counsel argued that the High Court should not have proceeded to hear or determine the insolvency petition where there existed a genuine dispute of fact and law, and that the proper forum for such disputes requiring reconciliation of accounts, cross-examination, and counterclaims was a civil suit.
11. The appellant emphasized that the insolvency court is not the appropriate forum to adjudicate genuinely disputed debts, particularly where factual controversies exist and the matter requires a reconciliation of accounts, documentary examination, or potentially cross-examination of witnesses. According to the appellant, the dispute raised complex accounting issues that are more appropriately resolved in a civil suit, not through summary insolvency proceedings.
12. The appellant reiterated that a genuine and substantial dispute existed concerning: the methodology of invoicing (per personnel v fixed monthly rate); the accuracy of the amounts claimed in the statutory demand; and the reconciled findings that the respondent was in fact indebted to the appellant, not the reverse.
13. The appellant further submitted that the respondent's failure to rebut the appellant's reconciliation, showing an overpayment of Kshs. 279,092.65, amounted to an admission by omission, thereby reinforcing the existence of a genuine dispute.
14. Counsel further noted that the respondent's replying affidavit dated 8<sup>th</sup> February 2018 had the benefit of both the initial and further affidavits filed by the appellant, and that it was prejudicial for the High Court to ignore the later affidavit in its determination.
15. In support of its position, the appellant cited the following authorities: Re the matter of Africa Safari Club Limited, [2006] eKLR – for the proposition that a winding-up petition should not be used where a debt is substantially disputed; Universal Hardware Limited v African Safari Club Limited [2020]



eKLR – affirming that a court ought not to entertain an insolvency petition where a dispute exists that requires trial; *Flower City Limited v Poly tanks & Containers Kenya Limited* [2021] KEHC 34 (KLR) – emphasizing that the role of a bankruptcy court is not to try disputed debts, but to determine whether a genuine triable issue arises; and Regulation 17(6) of the Insolvency Regulations, 2016, which allows setting aside of a statutory demand where a substantial dispute, set-off, or counterclaim exists.

16. Opposing the appeal, Ms. Kivindo asserted that the statutory demand was never effectively responded to by the appellant, and that the only issue raised in the original affidavit, an alleged theft, was later withdrawn, as no employees of the respondent were implicated.
17. Counsel further submitted that the appellant’s claims of overcharging and the request for reconciliation, contained in letters dated December 2016 and January 2017, were never received, pointing to the absence of a receiving stamp as indicative of this. Consequently, she contended that these letters were an afterthought, only introduced in the further affidavit, and not indicative of a genuine dispute.
18. Counsel submitted that the account statements issued by the respondent remained unchallenged until the filing of the insolvency petition, and the appellant had not previously objected to the invoicing method.
19. The respondent submitted that the insolvency petition was validly and lawfully filed in accordance with Section 384(1)(a) of the *Insolvency Act*, No. 18 of 2015, which provides that a company is deemed unable to pay its debts where a statutory demand of at least Kshs. 100,000 is served and remains unsatisfied after 21 days.
20. The respondent asserted that demand letters dated 5<sup>th</sup> May 2017 and 19<sup>th</sup> June 2017 were served on the appellant, both giving the requisite statutory period for response. The appellant’s failure to respond or satisfy the demand within the prescribed time, and the lapse of more than four months without action, was said to be evidence that the debt was not genuinely disputed.
21. The respondent submitted that the threshold under Section 384(1) had been met, justifying the commencement of insolvency proceedings. It relied on *Flower City Limited v Poly tanks & Containers Kenya Limited* (supra), in support of the proposition that non-compliance with a statutory demand warrants the initiation of bankruptcy or liquidation proceedings.
22. The respondent strongly refuted the appellant’s claim that the insolvency petition was deployed as a coercive tool to recover a disputed debt. The respondent referred to paragraphs 5 – 10 of the replying affidavit of Mr. John Wanjohi, which set out the history of correspondence, meetings, and discussions regarding the outstanding debt.
23. The respondent contended that it was the appellant who breached the SLAs, resulting in the eventual termination of the agreement due to non-payment. It questioned the credibility of the appellant’s documentary evidence, particularly letters dated 10<sup>th</sup> January 2017, 4<sup>th</sup> January 2017, and 23<sup>rd</sup> December 2016, on the basis that these bore no stamp or acknowledgment of receipt by the respondent, which they asserted was the customary practice.
24. The respondent characterized the appellant’s claims as fabricated distractions that surfaced only after the insolvency petition was filed, and labelled them as part of a deliberate strategy to delay or derail the lawful proceedings.
25. The respondent submitted that a proper reading of the High Court’s ruling confirms that the learned Judge took the affidavit into account, but found that its contents effectively transformed the proceedings into a contested trial, which was not within the remit of insolvency proceedings.



26. The respondent further pointed out that the appellant's initial supporting affidavit made no mention of a disputed debt, and instead relied on general allegations such as bad faith, prior advertisement of the petition, and abuse of court process.
27. This sequence of events, according to the respondent, suggested that the issue of the alleged disputed debt was an afterthought, raised belatedly and lacking credible substantiation.
28. The respondent submitted that the appellant had failed to establish the existence of a genuine and substantial dispute, as required by both statute and precedent. It stated that a "genuine dispute" under Regulation 17(6) of the Insolvency Regulations, 2016 must be based on substantial grounds, and not be hypothetical, frivolous, or vexatious. The respondent was of the view that the appellant had not discharged this burden, given that the burden lies with the debtor to show objective, credible, and plausible reasons for disputing the debt.
29. In support of its submissions, the respondent cited the case of *Re matter of Al'amin Insurance Brokers Ltd [2009] eKLR*.
30. This being a first appeal, it is settled law that the first appellate court must re-evaluate the evidence in the superior court, both on points of law and facts, and come up with its own findings and conclusions. However, the court must bear in mind that it did not have the occasion to see or hear the witnesses testify, and therefore, make due allowance for the same. In the case of *Kamau v Mungai [2006] 1 KLR 15*, this Court stated that:

“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions, remembering that it had neither seen nor heard witnesses, hence making due allowance for that.”
31. We have carefully considered the record, submissions by the parties, the authorities cited, and the law. The issues for determination are: whether there exists a genuine and substantial dispute concerning the debt claimed in the statutory demand; whether the High Court erred in failing to consider the appellant's further affidavit; whether the insolvency petition was a proper recourse under the circumstances; whether the debt of Kshs. 2,799,625.26 claimed by the respondent is genuinely disputed, and whether the learned Judge erred by dismissing the appellant's application to strike out the insolvency petition.
32. The High Court's dismissal of the application to strike out implies a finding that the debt was either not disputed or that the dispute was not substantial enough to prevent the petition from proceeding. The respondent relied on Section 384(1) of the *Insolvency Act*, which deems a company unable to pay its debts if it fails to pay a demand of Kshs. 100,000 or more within twenty-one days. It is undisputed that the respondent served two demand letters to the appellant on 5<sup>th</sup> May 2017 and 19<sup>th</sup> June 2017, demanding Kshs. 2,799,625.26, and the appellant failed to comply.
33. The respondent cited *Flower City Limited v Poly tanks & Containers Kenya Limited* to emphasize that non-compliance with a statutory demand within the stipulated time justifies initiating a bankruptcy application, as it implies that the debtor is unable to meet their debts.
34. Conversely, the appellant stated that it responded to the demand by a letter dated 25<sup>th</sup> May 2017, clearly disputing the amount. Mr. Opole highlighted that the learned Judge, in his ruling at paragraph 7, did confirm that there was a response to the demand by the appellant. However, the core of the dispute went beyond a mere response to the nature of that response and whether it constituted a "genuine dispute on substantial grounds."



35. It is trite law that insolvency proceedings are not to be used to resolve substantial factual disputes or contested debts. The applicable principle, as articulated in *Re Africa Safari Club Limited* and restated in numerous authorities, is that a petition for liquidation will not be entertained where the debt is bona fide disputed on substantial grounds.
36. Regulation 17(6) of the Insolvency Regulations, 2016 provides that a debtor may apply to set aside a statutory demand if “the debt is disputed on grounds which appear to the court to be substantial.” The role of the court at this stage is not to determine the merits but to assess whether the dispute is genuine and not frivolous.
37. The further affidavit dated 15<sup>th</sup> January 2018 raised critical accounting discrepancies and documented alleged overcharging. The omission of this affidavit from active consideration, as contended by the appellant, was a material misdirection. A proper evaluation of that evidence reveals a plausible accounting dispute that goes beyond a mere denial.
38. Whether or not the letters raising the need for reconciliation were stamped or acknowledged by the respondent, their existence, coupled with documented inconsistencies in billing, demonstrates the presence of a triable issue that should not have been summarily dismissed at the insolvency stage.
39. The appellant claimed an overcharge and a reconciliation process showing it had overpaid Kshs. 279,092.65 to the respondent. The legal standard for a disputed debt in insolvency proceedings is high. As articulated in *Re Al'amin Insurance Brokers Ltd*, a debt must be disputed in “good faith and on substantial grounds,” implying “some substantial ground for defending the action”. It is not enough to merely dispute the debt; the party must “go further and demonstrate on reasonable grounds” why they are disputing it. The respondent argued that the appellant’s claim “lacks substantive foundation” and is “spurious, hypothetical, illusory, and misconceived”.
40. The exchange during the appellate hearing was insightful. It suggested that while the High Court found the dispute insufficiently clear to stop the petition, the complexities raised by the appellant’s further affidavit regarding reconciliation and overpayment, coupled with the respondent’s claims of unreceived letters and afterthought, pointed to a genuine dispute that required a more thorough examination. The insolvency court, as conceded by the respondent’s counsel, may not be the appropriate forum for resolving such complex factual disputes involving reconciliation of accounts and allegations of deceptive conduct.
41. The appellant’s reconciliation indicating an overpayment of Kshs. 279,092.65 was not effectively rebutted in the respondent’s affidavit evidence, nor was the methodology of per-head billing sufficiently grounded in the original SLAs. These matters were evidently not suited for summary determination in insolvency proceedings.
42. Accordingly, the statutory demand and subsequent petition ought to have been set aside to allow the parties to ventilate their dispute through a civil suit, where evidence could be thoroughly tested.
43. Section 384(1) of the *Insolvency Act*, 2015, provides that a company is deemed unable to pay its debts if a creditor serves a written demand for Kshs. 100,000 or more, and the company fails to pay within twenty-one days. In this case, the respondent served two demand letters on the appellant, but the appellant failed to comply, leading to the filing of the insolvency petition.
44. However, the appellant raised a genuine dispute regarding the debt, supported by documentary evidence, including a reconciliation showing that the appellant had overpaid Kshs. 279,092.65. In the persuasive case of *Flower City Limited v Polytanks & Containers Kenya Limited*, the court emphasized that a debtor must demonstrate a genuine dispute on substantial grounds to set aside a



statutory demand in insolvency proceedings. To our minds, the appellant provided sufficient evidence to establish a genuine dispute.

45. In the case of *Universal Hardware Limited v African Safari Club Limited*, this Court held that a company is deemed to be unable to pay its debts once it has failed to respond to a statutory demand within 21 days of its service. However, the court also recognized that a genuine dispute regarding the debt can be raised to challenge the insolvency petition.
46. The appellant directly asserted that the learned Judge "did not consider the further affidavit". The respondent argued that this claim was "unfounded," stating that a "thorough examination of the ruling revealed that the able Judge considered all affidavits presented". The respondent explained that the learned Judge noted that the further affidavit "effectively converted the proceedings into a trial, necessitating the confirmation of evidence through cross-examination of witnesses," precisely because "the dispute was not clearly demonstrated".
47. Ms. Kivindo, during the hearing, affirmed that the further affidavit was placed before the court, and the court had an obligation to consider it. The essence of the learned Judge's observation, as interpreted by the respondent, was not a disregard but a recognition that the nature of the dispute, as presented in the further affidavit, was too complex for summary determination in an insolvency petition and required deeper evidentiary scrutiny.
48. The appellant's further affidavit, which was not considered by the trial court, contained crucial evidence supporting the dispute. The failure to consider this affidavit constituted an error in law.
49. Considering the appellant's claims of overpayment and reconciliation, the respondent's claims of unreceived letters and "afterthought", and the clear concession by the respondent's counsel regarding the suitability of the insolvency court for such a detailed dispute, it becomes apparent that the dispute, irrespective of its ultimate merits, is not merely vexatious or frivolous. It presents a "triable issue" that warrants a full hearing in a forum equipped to handle complex factual and accounting evidence. Allowing the insolvency petition to proceed without first resolving this fundamental dispute could amount to using insolvency proceedings as a debt collection mechanism for a contested amount, which is contrary to the underlying policy.
50. Therefore, we find that the learned Judge erred in directing the insolvency petition to proceed to hearing when the dispute raised, though requiring substantiation, presented complex factual issues and claims of reconciliation that were not amenable to summary determination within the confines of insolvency proceedings.
51. Having carefully considered the arguments advanced by both parties and the material placed before us, we make the following findings:
  - a. While the respondent followed the statutory demand procedure, the appellant did raise issues of dispute, including claims of overpayment and a counter-claim.
  - b. The allegations regarding unreceived letters and the nature of the dispute being an "afterthought", while significant, introduce complex factual questions that require an evidentiary hearing.
  - c. The learned judge correctly noted that the further affidavit converted the proceedings into a trial, necessitating confirmation of evidence through cross-examination.
  - d. Crucially, the concession by counsel for the respondent that the insolvency court "would not be the proper forum" for determining the authenticity and genuineness of such detailed disputes



is weighty. This aligns with the appellant's argument that the insolvency court is not equipped to handle the complex reconciliation of accounts.

- e. When there is a genuine dispute on substantial grounds that requires a full evidentiary hearing and reconciliation of accounts, insolvency proceedings are not the appropriate forum for determining the validity of the debt. The policy is to prevent the use of insolvency proceedings for coercive debt collection where a genuine dispute exists.

52. In light of the foregoing, we find that the appellant raised sufficient grounds to demonstrate that the debt was genuinely disputed, requiring a fuller hearing to establish the exact sum owed, if any. Such a determination is best left to a civil court.

53. Therefore, we allow the appeal. We accordingly make the following orders:

- a. The appeal is hereby allowed.
- b. The ruling and orders of the High Court delivered on 9<sup>th</sup> November 2018 are set aside.
- c. The appellant's application to strike out the insolvency petition is hereby allowed.
- d. The parties are at liberty to pursue their claims, including any reconciliation of accounts, in the appropriate civil forum.
- e. The respondent shall bear the costs of the appeal and the application before the High Court.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY, 2025.**

**JAMILA MOHAMMED.**

.....v

**JUDGE OF APPEAL.**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

