



REPUBLIC OF KENYA



Dynamic Mobile Communications Limited v Mediamax Networks Limited (Insolvency Cause E150 of 2023) [2025] KEHC 498 (KLR) (Commercial and Tax) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E150 OF 2023
BM MUSYOKI, J
JANUARY 24, 2025**

BETWEEN

DYNAMIC MOBILE COMMUNICATIONS LIMITED APPLICANT

AND

MEDIAMAX NETWORKS LIMITED RESPONDENT

RULING

1. On 30-10-2023 the respondent issued the applicant with a statutory demand under Regulation 77B of the Insolvency Regulations 2016 for a sum of Kshs 6,701,950.00. Upon receipt of the demand, the applicant filed application dated 7th February 2024 which is the subject of this ruling praying for the following orders;
 1. The application be certified as urgent and be heard ex-parte in the first instance.
 2. Pending hearing and determination of this application inter-partes there be a stay of any further insolvency proceedings against the applicant.
 3. The statutory demand dated 30th October 2023 be set aside.
 4. The costs of this application be borne by the respondent.
2. What is left for the decision of this court are prayers 3 and 4 of the said application. The grounds upon which the application is based are on the face of it and in the supporting affidavit of Joan Mwaura sworn on 7th February 2024 and further affidavit of the same deponent sworn on 14th May 2024. The deponent avers that the debt upon which the statutory demand is founded is disputed in substantial amount and that the applicant has a counterclaim or set of Kshs 18,437,603.00 which is more than what the respondent is claiming.



3. It is deponed further that the parties entered into joint venture agreements on 1-05-2017 where the respondent would provide its media outlets and advertise gaming platform known as TATUA and later on 8th June 2020 they signed an addendum where the respondent was to advertise another gaming platform known as LOTTO which was owned by the applicant. According to the agreements, the applicant was to pay the respondent an agreed revenue share. The applicant adds that it has between 2021 and 2022 paid the respondent a total sum of Kshs 76,632,015.00 against invoices of Kshs 53,863,085.00 and again in 2023 paid a sum of Kshs 23,565,801.00 against invoices of Kshs 27,897,128.00 meaning that the respondent was overpaid by a sum of Kshs 18,437,603.00.
4. The applicant further depones that in August 2023, there arose dispute between the parties as to the quality of work done by the respondent which ultimately culminated to frustration of the performance of the agreement which led to the respondent stopping airing of the advertisements as agreed. The deponent has exhibited correspondences between the parties on the issue which are dated between 1st September 2023 and 6th October 2023 which period was prior to the date of the statutory demand. Soon after the statutory demand was issued, the respondent filed in the chief magistrate's court, civil case number E4803 of 2023 where it sought an injunction against the applicant and Cape Media Limited trading as TV 47 from airing or running the Tatua game in their TV and media stations.
5. The respondent has opposed the application through an affidavit sworn by its Chief Executive Officer one Ken Ngaruiya on 7th March 2024. The deponent acknowledges that the parties entered into a joint venture agreement but not the one exhibited by the applicant. The deponent has exhibited what he terms as the genuine agreements. He states that the agreement for the Tatua game was different and separate from the subject matter of the statutory demand and insists that the statutory demand is related only to the agreement entered between the parties on 8-06-2020 in respect of the lotto game.
6. Ken has gone further to state that the reconciliation of accounts the applicant has mentioned led to reduction of an initial amount of Kshs 8,832,363.00 to Kshs 6,065,840.00. He has exhibited an email where the applicant acknowledged owing the respondent a sum of Kshs 6,065,840.00. He adds that the payments the applicant has referred to were for previous debts owed to the respondent on account of back tickets sales for which the applicant had been invoiced. He goes on to state that the amount in the statutory demand is Kshs 3,536,950.00 for the period ending July 2023 and Kshs 3,165,000.00 for the month of August 2023.
7. As for the cmcc number E4803 of 2023, the respondents avers that the same was for a permanent injunction with respect to disputed ownership of intellectual property of the Tatua game and involved the agreement dated 1st May 2017 which is not the subject of the statutory demand or these proceedings.
8. This matter was ordered to be heard by way of written submissions. The applicant filed its submissions dated 7th June 2024 while the respondent did not file any submissions but asked the court to consider the contents of its replying affidavit.
9. The respondent claims that the applicant has exhibited agreements which are not correct. However, it is not disputed that there were agreements between the parties on the subject matter. The dispute the respondent has on the agreements is its position is that the agreement in respect of Tatua game is separate and is not part of the current statutory demand. The statutory demand has given a figure of the debt and does not mention the genesis or details of the debt but that is not material as there is no requirement that the demand should give the details. However, it is expected that once a statutory demand is contested in an application of this nature, the creditor is under an obligation to set forth in details and precision the origin and status of the debt. The respondent in this matter has attached the



agreements, a thread of email including one dated 22-03-2023 in which the applicant acknowledges owing the respondent a sum of Kshs 6,065,840.00 for the Lotto game, four statements of account and invoices and ruling in Cmcc number E4803 of 2023 dated 29th December 2023.

10. On the other hand, the applicant claims that the debt herein is disputed in a substantial amount and it has a counterclaim against the respondent. The respondent has at paragraph 15 of its replying affidavit claimed that the payments mentioned by the applicants were for previous engagements and not in relation to this debt. However, the respondent has not given a breakdown or mentioned which other invoices or engagements were these payments for. The statement of account appearing at page 20 of the respondent's annexure runs from 31-05-2023 to 16-08-2023. The respondent has exhibited another statement running from 31-07-2023 to 1-09-2023 which shows the outstanding amount as Kshs 6,701,950.00. There is a summary at page 22 of the same annexure which shows that between January 2023 and July 2023 the respondent was paid a sum of Kshs 26,433,811.00 leaving a balance of Kshs 3,422,829.41. On the same page, there is also a sum of Kshs 3,197,830.00 running to 14-08-2024 shown to be for back tickets. This in my view, resonates with the applicant's averments that the dispute between the parties arose from the respondent applying payments to previous invoices which were alleged to have been paid especially noting that the respondent has not exhibited the invoices or statements prior to the period in dispute.
11. I have seen correspondence by the applicant dated 1-09-2023 in which it was disputing the application of its payments to back tickets. I have also seen the payments confirmation slips exhibited by the applicant as annexure which show payment of a total of Kshs 25,586,751.00 between March and August 2023. It is not lost to this court that the statement for the same period by exhibited by the respondent is much less than the amount ostensibly paid by the applicant. It is therefore more likely that the applicant would have a counter-claim against the respondent especially noting that the respondent has acknowledged receipt of these payments.
12. The respondent has clutched on the email by the respondent dated 22-03-2023 in which it admitted a debt of Kshs 6,065,840.00. This fact does not mean that the same position obtained when the parties severed their relationship. In any event as observed above, the payments made between March 2023 and August 2023 are more than the admitted sum. I have noted from the replying affidavit that the respondent has not effectively answered to the applicant's allegation of the overpayment or counter-claim save to state generally that the payments were for previous debts whose details it has not given. In view of the serious contentions between the parties on what was due, this court finds that the debt is disputed on substantial ground. This nature of dispute cannot be done in an insolvency proceedings like this one. It belongs to other jurisdiction such as civil litigation. In *Flower City Limited v Polytanks & Containers Kenya Limited* (2021) KEHC 34 (KLR) Honourable Justice J. Mativo held that;

‘When a debtor claimed to have a counterclaim within the meaning of regulation 17(6) of the Insolvency Regulations, 2016, the court would normally set aside the statutory demand if, in the court's opinion, on the evidence, there was a genuine triable issue. The function of the bankruptcy court, on the hearing of an application brought under regulation 17 (6) was not to conduct a full hearing of the putative claim. Rather, it was simply to determine whether the claim in question, after having regard to all the circumstances, raised a genuine triable issue. The rationale for applications of that nature was to enable the debtor to satisfy the court that he genuinely disputed the debt.’
13. Even if I were wrong on the above, I have formed opinion that existence of cmcc number E4803 of 2023 is a good cause for setting aside the statutory demand. The summary of payment exhibited by the respondent at page 22 of its annexure show that Tatua game was part of the engagement including



sharing of revenue between the parties. The same game is a subject of litigation in the chief magistrate's court.

14. Further in cmcc number E4803 of 2023, the respondent is claiming ownership of the intellectual property in the game platform. If indeed the respondent has intellectual property in the said platform, the same cannot be a subject of insolvency as in this matter and as such the statements and payments shown in the respondent's own exhibit showing Tatua as part of the transactions between the parties discloses a legitimate course between the parties in form of income therefrom. It cannot be true that Tatua was not part of these proceedings as the respondent's statement indicates that revenue from the game is part of what is being claimed.
15. Flowing from the above, I reach the inevitable conclusion that the debt herein is disputed and the applicant has made out a good case for a probable counter-claim. The application dated 7th February 2024 is allowed with a consequence that the statutory demand dated 30-10-2023 issued by the respondent is hereby set aside. The costs of this application are awarded to the applicant Dynamic Mobile Communication Limited.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Miss Wairimu holding brief for Mr. Kabugu for the applicant/debtor and absence of counsel for for the respondent/creditor.

