Jaisham Limited v Amanda Apartments Limited (Insolvency Notice E094 of 2023) [2025] KEHC 1322 (KLR) (Commercial and Tax) (26 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY NOTICE E094 OF 2023

AA VISRAM, J

FEBRUARY 26, 2025

BETWEEN

JAISHAM LIMITED ..... CREDITOR

AND

AMANDA APARTMENTS LIMITED ..... DEBTOR

RULING

1. I have considered the Notice of Motion Application dated 31st August, 2023, together with the affidavit sworn in support sworn on even date and the Replying Affidavit sworn in opposition to the same on 13th October, 2023, the submissions of Counsel, and the relevant law.

2. The Applicant is seeking to set aside the Statutory Demand dated 27th July, 2023, of the Respondent/ Creditor.

3. Counsel for the Applicant submitted that the Statutory Demand as against Debtor is not valid for the reason that, the same is inflated and amounts to breach of contract between the parties.

4. The Applicant explained that its assets are encumbered because the same were advanced as security against a facility taken out by the Applicant with Imperial Bank, in liquidation. Accordingly, the Applicant experienced difficulty in exercising its equity of redemption in respect of the assets advanced as security.

5. The Applicant admitted that a debt was owing to the Creditor, but clarified that the Applicant has been making payments to settle the outstanding amounts. The Applicant admitted that the last payment made was on 3rd July, 2023.

6. Finally, the Applicant was of the opinion that since KCB Bank has since acquired certain assets of Imperial Bank, there is now the possibility of sale of its assets, which funds may be used to settle the outstanding amount due to the Creditor.

7. As regards the amount stipulated in the Statutory Demand, the Applicant admitted that the amount of Kshs. 15,045,564/- was due, but argued that the figure of Kshs. 36,337,069/- was above the amount due. Counsel submitted that the variance between the two figures was in part, owing to the rate of interest applied to the principal amount over the period of time since the same became due.

8. In this regard, the Applicant submitted that the Civil Procedure Rules provides for interest on debts due at 12%, whereas the Respondent had calculated the amount due based on a rate of 14%. Counsel further clarified that no contractualrate had been agreed upon between the parties in the applicable commercial agreement.

9. On the other hand, the Respondent argued that parties engaged in commercial trade, in particular, the parties entered into an Agreement and Conditions of Contract for Building Works, whereby the Creditor constructed up to completion a duplex on L.R No. Ngong/Ngong/49905 for the Debtor herein.

10. In addition to the terms of the Agreement and Conditions of Contract for Building Works, the parties also agreed under Clause 3.4 of the Agreement that:-

    The Employer shall make adequate financial arrangements to ensure that all payments to the Contractor are made within the periods and the manner stipulated in the Contract.

11. Despite the terms in the Agreement and Conditions of Contract for Building Works, the Debtor failed to honour its contractual terms by failing to make the scheduled payments to the Company as and when they fell due.

12. The Respondent pointed out that by a letter dated 3rd March, 2017, the Debtor herein admitted the debt, and informed the Company that they have been unable to settle the amounts due and owing to the Company, given that they have been unable to sell the subject property owing to a Charge of Imperial Bank Limited which is under receivership and as such, they proposed to settlethe same by way of monthly installments of Kshs. 100,000/- as from 30th November, 2016.

13. The Debtor further defaulted in settling the said sums and as such, the Company subsequently instructed their previous Advocates on record, Messrs. Arwa & Change Advocates LLP, to issue a demand letter dated 27th July, 2018, to the Debtor herein. I note that evidence of the same is found at Exhibit JB2 of the Replying Affidavit.

14. Owing to a further default in settling the said sums by way of monthly installments, the Debtor failed and/or neglected to attend to the default hence the Company instructed its Advocates on record to issue a demand letter dated 16th June, 2023, seeking the entire outstanding amount of Kshs. 35,922,639.03/- as at 5th June, 2023. I note that evidence of the same is found at exhibit JB3 and JB 4 of the Replying Affidavit.

15. In non – compliance with the aforementioned demand letter dated 16th June, 2023, that prompted the Company to further instruct its current Advocates on record to commence Insolvency Proceedings against the Debtor herein and proceeded to issue a Statutory Demand dated 27th July, 2023.

16. 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 Act outlines the circumstances in which a company is unable to pay its debts as follows:-

(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. [Emphasis mine]

17. The Regulation 16 and 17 of the Regulations outlines the grounds for setting aside a Statutory Demand and the procedure to be followed once it has been issued. The provisions state, in part, as follows:-

16. Application to set aside Statutory Demand

(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 the 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 or its first appearance, whichever is the 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 the court.

Regulation 17 (6) on Hearing of application to set aside Statutory Demand states,

(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 the debt or debts 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 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.

18. The Debtor argued that the debt is disputed on substantial grounds. On this 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 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."(Emphasis mine)

19. In the present matter, the debt has been admitted in the sum of slightly over Kshs. 15,000,000/-, the question raised by the Applicant is whether the correct interest rate has been applied to reach the figure claimed by the Respondent/ Creditor. I do not think that this is the correct basis for challenging a Statutory Demand. The Applicant ought to have shown either a cross demand or, set off, which equals the amount due. It has not. Moreover, for the sake of clarity, the commercial court rate of interest quoted by the Applicant has in any event been revised from 12% to 14%. The court takes judicial notice of the same. Accordingly, the line of reasoning based on an interest rate of 12% is not tenable.

20. As such, based on the record before me, I do not think the Applicant has shown that the debt is disputed on any substantial grounds. The contention is simply on quantum, which is in my view, a matter of calculation.

21. I am further guided by the decision of the Court in Flower City Limited v Polytanks & Containers Kenya Limited [2021] KLR, where, on the issue of a claim that has substance, the court stated:-

> " The rationale for applications of this nature is to enable the Debtor to satisfy the court that he genuinely disputes the debt. Simply put, a Debtor must demonstrate the existence of a genuine dispute. Though it may not be possible to provide a closed list of the elements of a genuine dispute, the Applicant must:-
>
> i. Show a plausible contention requiring investigation;
>
> ii. Be bona fide, genuine and real;
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> iii. Be in good faith and show a prima facie plausibility;
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> iv. Truly exist in fact, and contain a serious question to be tried;
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> v. Be something more than mere bluster or mere assertion;
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> vi. Be a claim that may have some substance;
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> vii. Have a sufficient degree of cogency to be arguable;
>
> viii. Have objective existence; and
>
> ix. Have sufficient factual particularity."

22. Again, taking the above factors into consideration, and based on the record before me, I do not think that the above criteria has been met by the Applicant. Similarly, the Applicant has not shown that the Creditor holds some security in respect of the debt claimed by the demand to warrant any offset as is required pursuant to Regulation 17(b), as set out above.

23. I take note of the submission by the debtor, which is correct to state, that the debt of liquidation should not be used to pressure a company to pay its debts. This would amount to an abuse of the court process.

This is what the Court of Appeal observed on the subject in Matic General Contractors Limited v Kenya Power and Lighting Company Limited [2001] eKLR as follows:-

> " In the case of in Re a Company [1984] 2 Ch 349, it was held that where a petition against a company is presented ostensibly for a winding up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the Petition, and staying all proceedings upon it. I have no doubt in my mind that the Learned Judge was right in placing emphasis on the Appellant's motives, which in my view, were completely dishonorable. A winding up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim that seems to me to require that the Court, should proceed cautiously. Here was a debt which Kenya Power disputed vigorously on substantial grounds and the appellant was threatening Kenya Power with what really amounted to imminent corporation execution. Kenya Power had no alternative but to approach the Court for redress having regard to the appellant's intransigence."

24. I agree with the sentiments of the Court of Appeal in the aforesaid case but with a caveat. The case was decided prior to the enactment of the *Insolvency Act*, 2015, where a Company under the threat of winding up, as the process was known, was not afforded an opportunity to contest and set aside the Statutory Demand. This opportunity is now afforded to a company to satisfy the court that the Statutory Demand issued under section 384(1)(a) of the Act as a prelude to a liquidation petition is unwarranted. I note that the Respondent asserted that the Applicant did not respond to the Statutory Demand, and that this has not been disputed by the Applicant.

25. Finally, it is not lost on me, that the debt due to the Respondent remains outstanding since the year 2016, and that, despite attempts between the parties to settle the same by way of repayment schedules, the debt still remains due, and the agreements for repayments have since been breached by the Applicant.

26. Moreover, based on the record before me, several demand letters have been served on the Applicant prior to serving the Statutory Demand. The same are annexed to the Replying Affidavit and form part of the record. It is also not lost on me, that the admitted amount owed by the Applicant meets the threshold for the filing of a Statutory Demand under Section 384(1) of the *Insolvency Act*. Based on the record before me, the present application appears to be the first time that the Applicant has disputed the sum over and above the admitted amount, and claimed by the Respondent.

27. I am guided by the sentiments of the Court of Appeal majority judgment in Mombasa Civil Appeal No. 98 of 2017 Pride Inn Hotels & Investments Limited vs. Tropical Hotels Limited (2018) eKLR , where the court held as follows: -

> " This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the Respondent. Hence the Respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the *Insolvency Act* or the *Companies Act* which 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."(Emphasis mine)

28. Based on the reasons set out above, I am not satisfied that there are sufficient grounds to set aside the Statutory Demand dated 27th July, 2023. I dismiss the application dated 31st August, 2023, with costs to the Creditor.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 26TH DAY OF FEBRUARY, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant

.....For the Creditor

.....For the Debtor/Applicant