



**Njenga v Hamud (Insolvency Cause E002 of 2024)
[2025] KEHC 3864 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E002 OF 2024**

H NAMISI, J

MARCH 28, 2025

BETWEEN

ONESMUS NJENGA DEBTOR

AND

SULEIMAN AMUR HAMUD CREDITOR

RULING

1. On 8 January 2024, the Respondent issued a Statutory Demand against the Applicant for the sum of USD 115,311 and Kshs 1,393,000/= together with interest thereon and costs, being the amount due in respect of a judgement rendered in Milimani High Court Commercial & Admiralty Case No. 262 of 2015 on 31 March 2016.
2. The Applicant filed the present application dated 18 April 2024 seeking the following orders:
 - i. That the Statutory Demand dated 4th January 2024 be set aside;
 - ii. That this Honorable Court be pleased to issue an Order stopping the Respondent herein and/or his agents from initiating any further proceedings against the Debtor/Applicant until the hearing and determination of this Application;
 - iii. That the Respondent herein and/or his agents be barred from initiating any further proceedings against the Debtor/Applicant until the hearing and determination of Court Appeal Case No. 145 of 2020;
 - iv. That the Creditor/Respondent and/or his agents be barred from publishing or causing publication of any untrue and misleading information about the Debtor/Applicant herein;
 - v. That the costs of this Application be provided for;



- vi. Any other orders that Court may see fit and just in the circumstances
3. The Application is premised on the following grounds:
- a. That the Statutory Demand dated 8 January 2024 is premature, frivolous and vexatious and an abuse of the Court's precious time and resources;
 - b. That the said debt is without doubt contested and is pending hearing and determination before the Court of Appeal thereby removing the necessity of any further action pending the said determination by the superior Court;
 - c. That the said Debtor has a valid claim against the Creditor herein, which claim has never been heard and determined meritoriously or at all and that there still remain triable issues that ought to be canvassed before any insolvency proceedings can be entertained;
 - d. That the amounts claimed in the Statutory Demand dated 8 January 2024 have never been substantiated as claimed in the ex parte decision that the Applicant has sought to set aside and for him to be able to set the record straight awa to what was owed and what has since been paid back to date;
 - e. That the Creditor intentionally failed, neglected and refused to attach any proof in support of his claim in the Statutory Demand as the same is a misrepresentation of facts with exaggerated amounts and merely aimed at manipulating the Applicant herein to hurriedly settle a contested debt before the same has been determined by the appellate Court for clarity and finality of the litigation process;
 - f. That the Creditor has grievously misrepresented himself in overstating the amount claimed in the Statutory Demand whilst at the same time withholding material facts from this Honorable Court as to the amounts already received by him in settlement of the said debt;
 - g. That the Creditor brought/filed the current Bankruptcy Proceeding prematurely pending the hearing and determination of the Appeal wherein the debtor is challenging the colossal decretal sum in its entirety that is at its tail end in the Superior Court;
 - h. That the matter is sub judice and therefore the Creditor's actions/motive of filing the present bankruptcy proceeding are in bad faith and a flagrant abuse of principles of law and of Court Process;
 - i. That unless the Statutory Demand dated 8 January 2024 is set aside, the Debtor/Applicant herein will suffer serious financial loss and substantial prejudice including unjust enrichment of the said Creditor herein;
 - j. That it is in the interest of justice and pursuant to the principles of law of sub judice that the instant application is allowed and the purported statutory demand duly vacated.
4. The Application is supported by the Affidavit deponed by the Applicant on 18 April 2024. The Respondent filed a Replying Affidavit dated 16 May 2024. The Applicant then filed a Further Affidavit.

The Applicant's Case

5. It is the Applicant's case that the figures claimed in the Statutory Demand have been grossly and unjustifiably inflated by the Creditor/Respondent. The final debt is yet to be determined. The Applicant avers that judgement was entered summarily against him without his participation in the



trial, which is what necessitated the appeal to the Court of Appeal. It is his contention that the appeal raises triable issues which ought to be determined on merit before the said debt can be said to have been finalised and concluded, since he has a right to be heard.

6. Although the Applicant made reference to an annexed copy of the Appeal and copies of payments made to the Respondent in settlement of the debt, the same are not attached.
7. In his Further Affidavit, the Applicant argues that he has always been willing to pay off the correct amount as and when he is able and has done nothing but demonstrate his commitment to pay off the debt. He avers that whenever he is able to raise substantial funds, he always channels the same towards the payment of the debt. The Respondent either intentionally or negligently fails to keep a record of accounts, thus resulting in disagreement on what the actual balance is.
8. The Respondent challenges the Statutory Notice on the basis that he has made some payments in settlement of the amount claimed. He has attached a document evidencing payment of Kshs 1,500,000/= to the Respondent on 7 August 2018. The Applicant admitted that entered into agreement with the Respondent to clear his debt, which agreement was pegged on third party contracts. Unfortunately, the contracts did not materialise and the Applicant was unable to raise funds to pay the Respondent as agreed.
9. At paragraph 11 of the Further Affidavit, the Applicant states that he remains fully committed as ever to meeting his contractual obligations as noted in the Agreement dated 4 November 2023. However, due to financial constraints and the fact that work contracts did not materialise, he is constrained to ask for more time to seek alternative sources of income so as to be able to repay the Respondent.

The Respondent's Case

10. In his Replying Affidavit, the Respondent gave a chronology of proceedings in Milimani High Court Commercial Court Civil Suit No. 282 of 2015. He avers that the Debtor/Applicant was served but did not enter appearance nor file a defence. Default judgement was entered and a decree extracted on 6 April 2016.
11. With respect to the appeal pending in the Court of Appeal, the Respondent avers that the Applicant herein filed an Application in the Court of Appeal seeking stay of execution. The Application was heard by a full bench and subsequently dismissed. A copy of the Ruling is attached to the Replying Affidavit.
12. It is the Respondent's contention that in the absence of an order from the Court of Appeal staying any execution proceedings, the bankruptcy proceedings are perfectly in order and cannot be termed as procedurally or substantially defective.
13. In response to the argument about triable issues, the Respondent avers that the parties executed an Agreement signed by the parties dated 2 March 2015. In the said Agreement, the Applicant acknowledges a debt of USD 68,511 owed to the Respondent. The Agreement also laid out a repayment schedule. The Respondent avers that since the Applicant has never disputed the agreement and has never claimed to have honoured his obligations as per the Agreement, then there is nothing for the court to determine. The Respondent has attached an extract of the proceedings on 25 June 2018, when the Applicant was arrested and presented to the Court. The Applicant stated as follows:

“There is an area of agreement that i have never complied with. I have not refused to pay and I am still repairing his aircraft and business is low and ask for time to clear the amount”



14. Additionally, the Respondent has produced yet another agreement dated 4 November 2023, authored by the Applicant, in which the parties agreed on the amounts due and owing. The Applicant agreed to settle the entire amount before 31 December 2023. The said agreement includes a waiver of USD 24,000 by the Respondent and interest on the amount outstanding.
15. The Respondent noted that despite the Respondent having 21 days within which to respond to the Statutory Demand, he chose to wait until 18 April 2024, 99 days after he was served, with no explanation for the delay. The Respondent contends that the Applicant is taking the Court for granted. There is a recurring pattern that the Applicant ignores court documents served upon him only to wake up from his slumber when he is not able to live up to the many promises he makes.

Analysis & Determination

16. The Application was canvassed by way of written submissions.
17. Having keenly read the Application, Affidavits and submissions, the issue for determination is whether the statutory Demand dated 8 January 2024 should be set aside.
18. The Applicant has identified one additional issue, whether the matter is sub judice. In referencing the provisions of section 6 of the [Civil Procedure Act](#), the Applicant rightly submitted that the rationale behind the sub judice rule is to prevent a situation of having conflicting orders emanating from two or more different courts over the same subject matter. The Applicant contends that in this instance, the Respondent's actions directly undermine this principle. By filing the statutory demand whilst there is a pending appeal, there lies a risk of the Court reaching a determination that is inconsistent with the pending appeal, thus jeopardizing judicial consistency and fairness.
19. I have read through the submissions by both parties on this particular issue. Needless to say, the answer to the question is an emphatic No. The proceedings herein relate to execution of a decree issued in 2016. In no way can these proceedings be considered to be sub judice because there is a pending appeal.
20. Section 5(2)(b) of the Court of Appeal Rules provides follows:

Subject to subrule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.
21. Further, I note that the Court of Appeal dismissed an application for stay of execution by the Applicant, thus paving the way for the Respondent to pursue execution of the decree, which he did. When the same was not successful, the Respondent initiated these proceedings. In its Ruling, the Court of Appeal observed that the Applicant had variously admitted the debt owed to the Respondent, thus the only issue was whether there would be an agreement on how the debt was to be paid. On that basis, the Court opined that there cannot be an arguable appeal.
22. On the issue of setting aside the Statutory Demand, the Debtor/Applicant relied on regulation 17(6) of the Insolvency Regulations 2016, which provides as follows:

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. (emphasis added)
23. Without stating the obvious, the judgement in Milimani H.C Suit No. 282 of 2015 was regular. The same has not been set aside by any Court of competent jurisdiction. Despite the pending appeal, there are no stay orders. The Applicant has on various occasions, even as late as November 2023, admitted the debt. His claim that the amount in the Statutory Demand is erroneous is not supported, save for a document evidencing payment made in 2018, yet there is an agreement dated November 2023 admitting the debt. The Respondent's only defence is that business has been bad, that he needs more time to raise the funds.
24. The long and shot of it is that the Applicant's Notice of Motion lacks merit. The same is dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF MARCH 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Ms. Maina.....for the Debtor/Applicant

Mr. Osiemo.....for the Creditor/Respondent

Libertine Achieng Court Assistant

