



**Salwa Kenya Limited v Mamlaka Holdings Limited (Insolvency Cause E054 of 2023)
[2024] KEHC 4212 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E054 OF 2023
A MABEYA, J
APRIL 30, 2024
RE IN THE MATTER OF THE INSOLVENCY ACT NO 18 OF 2015
IN THE MATTER OF AN APPLICATION TO SET ASIDE A STATUTORY DEMAND**

BETWEEN

SALWA KENYA LIMITED APPLICANT

AND

MAMLAKA HOLDINGS LIMITED CREDITOR

RULING

1. Before Court is the application by the debtor dated 26/5/2023. The same is brought under section 692 of the *Insolvency Act* 2015, rule 10 of the *Insolvency Regulations* 2016, rules 16,17 and 19 of the *High Court (Organization and Administrative Rules)* 2016.
2. The application seeks the setting aside of the statutory demand dated 5/5/2023. The applicant further sought that the documents in the application be kept private and the respondent be restrained from advertising the liquidation proceedings.
3. The application was premised on the grounds set out on the face of it and the supporting affidavit of Ahmed Maalim Osman sworn on 25/5/2023. The applicant stated that the statutory demand was defective and flawed as it omitted necessary parties who were pertinent to the contract and the debt. It was contended that the amount in the statutory demand was incorrect and it therefore did not reflect the true position of the debt. It was further stated that the creditor had been secured by the debtor and there was no evidence that the creditor had tried to realize the security.
4. It was the applicant's assertion that the contract between the parties was for processing refined crude oil and the payments by the creditor were made to Olam Aviv Limited who had not been enjoined



in these proceedings. That the debtor did not receive payment from the creditor and the debtor had recovered USD 160,000 as the cost for refining the oil and USD 149,200 was deposited in the creditors account. It was contended that unless the liquidation proceedings are stopped the operations of the applicant would be affected and there was a risk of losing over 3500 investors and the ongoing projects would be affected.

5. The creditor opposed the application vide a replying affidavit of Njoki Muthuuri sworn on 27/7/2023. She deponed that the application did not meet the threshold for setting aside the statutory demand and the applicant had concealed some facts. That the dispute between the parties had emanated from the agreements dated 20/1/2022 and 11/11/2022. Based on the agreements, the debtor was the supplier and therefore no claim could be conferred to other third parties. It was further contended that the applicant did not show how the calculation in the statutory demand was erroneous.
6. That the creditor did not collect oil worth USD 100,200 from the debtor and that no evidence had been availed to support that allegation. That the legality of the statutory demand had not been disputed and therefore there was no demonstration of why it should be set aside.
7. In its further affidavit dated 28/10/2023 sworn by Ahmed Maalim Osman, the applicant stated that the debt had not been proved to the required standard as no documents had been produced by the respondent to show the money was given to the appellant and similarly no proof of transfer had been provided. The applicant stated that it was not indebted to the respondent at all.
8. The respondent filed a further replying affidavit dated 1/3/2024 sworn by Njoki Muthuuri. She stated that the refining agreement annexed to the affidavit dated 28/10/2023 was forged and meant to mislead the Court. That the debtor issued the creditor with postdated cheques of USD 400,000 where the creditor was advised not to bank since there were no funds in the account.
9. The application was canvassed by way of written submissions which I have considered. The applicant submitted that the debt was not owed by the applicant as no money had been disbursed to it. That the respondent did not have the mandate to institute the liquidation proceedings since it was not a creditor of the applicant.
10. That pursuant to section 425(1)(b) of the *Insolvency Act*, only a creditor could make an application for liquidation of a company. It was the applicant's submissions that there was no proof of payment of the funds to show that the money had been disbursed.
11. I have considered the pleadings and the submissions on record. The issue for determination is whether the applicant has raised sufficient grounds to warrant setting aside the statutory demand.
12. The application is anchored on the ground that the statutory demand omitted parties who were important to the contract between the parties. That the creditor had made payments to a company known as Olam Aviv Limited which had not been enjoined in these proceedings. The applicant denied being indebted to the creditor and faulted the respondent for failing to provide proof of payment.
13. In the case of *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR, the Court of Appeal summarized the position regarding striking out of a petition on account of a disputed debt as follows: -

“The principle as I understand is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent,



otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.”

14. Similarly, in *Re Global Tours and Travels Limited* [2001] EA 195, the court held 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.”

15. Regulation 16 and 17 of the *Insolvency Regulations* provides for the procedure of setting aside a statutory demand. The Court notes that the same applies to bankruptcy of a person and not a company however courts have held that those provisions are similarly relevant in the case of insolvency of a company.

16. A company is deemed to be insolvent if it is unable to pay its debts. Section 384 (1)(a) of the *Insolvency Act* outlines the requisite components of a demand in the case of liquidation of companies. It provides:

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“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 a 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”

17. A statutory demand is a test of solvency which demands or requires the debtor to pay the amount owed. The respondent herein issued a statutory demand on 5/5/2023 for the payment of USD 448,778 and interest. I have perused the record and the two parties signed an offer letter dated 20/1/2022 for a supply chain financing facility for up to USD 400,000. The parties further executed an addendum to the contract on 11/11/2022 where the applicant should have provided the security for the amount borrowed. There is no evidence on record that the security was perfected.

18. The record further shows that the applicant wrote undated cheques in favour of the creditor which cheques did not materialize. The applicant at this stage has no grounds of denying the debt. The contract was as between the two parties before Court. The applicant has failed to dispute the debt on substantial grounds and the Court is satisfied that statutory demand was properly issued.

19. In conclusion, I do find that the Statutory Demand is valid and is hereby upheld. The application for setting aside the same is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE

