



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

INSOLVENCY PETITION NO. E.008 OF 2019

IN THE MATTER OF THE INSOLVENCY ACT NO.18 OF 2015

AND

IN THE MATTER OF THE COMPANIES ACT NO.17 OF 2015

AND

IN THE MATTER OF THE INSURANCE ACT CHAPTER 487 LAWS OF KENYA

BETWEEN

BENSON MULEVU MULWA & 59 OTHERS.....PETITIONERS

VERSUS

INVESCO ASSURANCE CO. LIMITED.....1ST RESPONDENT

INSURANCE REGULATORY AUTHORITY.....2ND RESPONDENT

RULING

(1) By way of a Notice of Motion dated 28th May 2019, INVESCO ASSURANCE COMPANY LIMITED (the 1st Respondent herein), sought for Orders that: -

“1. SPENT

2. The Statutory Demand dated 4th March 2019 and the Petition dated 5th April 2019 be struck out.

3. Costs of this application and the struck out Petition be awarded to the 1st Respondent.”

(2) The Application which was premised upon Section 384(1)(a) of the Insolvency Act, 2015 and Regulation 17(6)(b) of the Insolvency Regulations was supported by the Affidavit of even date sworn by KENNEDY ABINCHA, the Chief Executive Officer of the 1st Respondent.

(3) The Petitioner's opposed the application and in doing so relied upon the Replying Affidavit dated **3rd June 2019** sworn by **BENSON MULEVU MULWA** the 1st Petitioner with the authority of the other 59 Petitioners. The Petitioners also filed a Notice of Preliminary Objection dated **3rd June 2019** seeking to have the Notice of Motion dated **28th May 2019** struck out "**in limine**" on grounds that the same is time –barred by reason of Regulation **16(1)(a)** of the **Principal Regulations 2016**.

(4) The application as well as the Preliminary Objection were canvassed by way of written submissions. The Petitioners filed their written submissions on **11th July 2019** whilst the 1st Respondent filed its submissions on **28th November 2019**.

BACKGROUND

(5) The sixty (60) Petitioners herein are all clients of **Nelson Kaburu and Company Advocates** who all sustained bodily injuries in various road accidents on diverse dates involving motor vehicles which were insured by **Invesco Assurance Company Ltd**, (The Respondent) under the provisions of the **Insurance (Motor Vehicles Third Party Risks) Act CAP 405, laws of Kenya**.

(6) The Petitioner's obtained judgments in their favour from various courts for compensation for the injuries so sustained and called upon the 1st Respondent to pay their claims. However, the 1st Respondent was unable to pay those claims within the statutory 90 days. The Petitioners then filed the Petition dated **5th April 2019**, seeking for the liquidation of **Invesco Assurance Company Limited** in accordance with the provisions of **The Insolvency Act 2015**. The Petitioners in their petition for liquidation rely on the grounds that the 1st Respondent is indebted to the Petitioners in the aggregate sum of **Kshs.72,400,535/=**. Upon service of this Petition the 1st Respondent filed the Notice of Motion dated **28th May 2019** seeking to have the entire petition struck out.

ANALYSIS AND DETERMINATION

(7) In support of its prayer to have the Insolvency Petition struck out the 1st Respondent submits that the Petition is fatally defective as it was not accompanied by a verifying affidavit. The 1st Respondent further submitted the Petition does not meet the threshold of **Section 384(1)(a)** of the **Insolvency Act** as it is not signed by the Petitioners themselves but by a third party. That the amount claimed in the Statutory Demand dated **4th March 2019** was **Kshs.53,284,914.25** whilst the Petition filed on **26th April 2019** raises a claim for **Kshs.72,400,535.00**

(8) The 1st Respondent further submits that not all the petitioners named in the Petition are entitled to enforce a final judgment or order and claims that some of the Petitioners have not supplied the Court with any evidence of a decree issued by a Court of law.

(9) The 1st Respondent submits that the parties had entered into an agreement for payment of the outstanding debt by way of installments which installment payments the 1st Respondent has been making as agreed.

(10) The Petitioners counter that a Preliminary Objection ought to have been raised at the time when the original Petition was filed. That the said Objection is time barred as the Statutory demand was served upon the 1st Respondent on **6th March 2019** thus this application ought to have been made within 21 days as per **Regulation 16(1) of the 2016 Principal Regulations**.

(11) The petitioners insist that they all obtained decrees and deny that they entered into any agreement for payment of the debt by way of installments.

(12) From the foregoing, the following are the issues which arise for determination:-

(i) Is the Preliminary Objection merited"

(ii) Should said Statutory Demand be set aside"

(iii) Is the Petition before Court dated **5th April 2019** competent.

(i) **Preliminary Objection dated 3rd June 2019**

(13) The definition of Preliminary Objection was given in the case of **MUKHISA BISCUIT MANUFACTURING CO. LTD –VS- WEST END DISTRIBUTORS LTD [1969]: -**

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message.

(14) The Petitioners submit that the Notice of Motion dated **28th May 2019** is time-barred as the same was not filed within 21 days from the date of service of the Statutory Demand and as such runs afoul of **Regulation 16(1)(a)** of the **Principal Regulations 2016**. **Regulation 16(1)(a)** provides that an application to set aside a statutory demand must be filed

“Within twenty-one days from the date of service on the debtor of the statutory demand; or if the demand has been advertised in a newspaper from the date of appearance, whichever is earlier”

(15) **Regulation 16(1)(a)** of the **Principal Regulation** falls under Part V under the heading **“PERSONAL BANKRUPTCY.”** As such it is only applicable to individuals in bankruptcy cases. The same does not apply to companies. Accordingly, the Preliminary Objection dated **3rd June 2019** is misplaced. The same has no merit and is hereby dismissed in its entirety.

(ii) Validity of the Statutory Demand

(16) The Statutory Demand dated **4th March 2019** addressed to the 1st Respondent has been annexed to the Petition filed on **26th April 2019 (Annexure “A”)**. The 1st Respondent submits that said statutory demand is invalid as it was not signed by the Petitioner’s themselves, but was instead signed by **Nelson Kaburu Advocate**. The Petitioners on their part submit that the **Insolvency Act, 2015** does not limit the definition of a creditor to exclusively mean the Creditor himself. **Section 2** of the Act defines the term **“Creditor”** to include a person entitled to enforce a final judgment or final order.”

(17) **Halsbury’s laws of England 4th Edition Volume 7(2) Paragraph 1446** outlines the ingredients of a valid statutory demand as follows: -

“The Statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditors behalf...” [own emphasis]

A lawyer duly instructed by the Creditor is certainly a person authorized to make a demand on behalf of said Creditor.

(18) Likewise **Section 384(1)(a)** of the **Insolvency Act** provides thus:-

“(a) If a Creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shilling 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 twenty –one days afterwards failed to pay the debtor to secure or compound for it to the reasonable satisfaction of the creditor..”[own emphasis]

(19) A common reading of the above provision particularly the words **“by assignment or otherwise”** clearly denotes that it need not be the actual creditor who must claim from the company. An assignee of the Creditor such as his Advocate may make such demand on his behalf. Therefore, I find and hold that a statutory demand may be signed either by the Creditor(s) himself or by a person duly authorized by such creditor to make the demand on his behalf which means and includes an Advocate duly instructed by the Creditor.

(20) Accordingly, the statutory demand dated **4th March 2019** which was served upon the 1st Respondent on **6th March 2019**, which

demand was duly served by the Petitioners' Advocate was valid and does meet the threshold of **Section 384(1(a)** of the **Insolvency Act, 2015**

(iii) Should the Statutory Demand be set aside

(21) A statutory demand may be rescinded in the following circumstances:-

- (a) The amount stated in the demand is in dispute or is less than **Kenya Shillings One Hundred Thousand (Kshs.100,000/=)**
- (b) The Creditor holds security equaling or exceeding the debt;
- (c) The debtor is paying by installments and have not reneged on any payments;
- (d) The debtor owed money by the creditor;
- (e) The demand was made in error;
- (f) The creditor failed to use the correct forms and/or required method of serving the demand.

(22) The 1st Respondent in their Notice of Motion dated **28th May 2019** sought to have the Statutory Demand dated **4th March 2019** struck out on grounds that the demand made was erroneous given that the Petitioners failed to use the correct forms or required method of service of the Demand. I am not persuaded by this argument at all. The Statutory demand was served upon the 1st Respondent on **6th March 2019** as evidenced by their official stamp affixed on the letter. The 1st Respondent has not denied the authenticity of that stamp nor have they denied receipt of the said statutory demand.

(23) The demand gave the 1st Respondent 21 days to clear the amount due. The 1st Respondent did not do so. The 1st Respondent submit that an agreement was reached to clear the outstanding amount by way of installment payments (this is vehemently denied by the Petitioners). There exists no written evidence of any such agreement between the parties. Annexed to the Supporting Affidavit of **Kennedy Abincha** dated **28th May 2019** are credit slips demonstrating remittances (payments) made to the Petitioner's Advocates as follows:-

16th February 2017 Kshs.500,000/=

28th June 2018 Kshs.500,000/=

29th August 2018 Kshs.200,000/=

20th May 2019 Kshs.200,000/=

20th May 2019 Kshs.300,000/=

21st May 2019 Kshs.159,334/=

21st May 2019 Kshs.340,666/=

22nd May 2019 Kshs.300,000/=

22nd May 2019 Kshs.200,000/=

(24) These payments were not made in a consistent manner at all. Indeed it is only after **20th May 2019** following the filing of this Petition on **26th April 2019** that remittances picked up. The Respondent made casual payments as and when it felt like. There was no commitment beforehand to clear the debt. The Statutory demand gave the 1st Respondent 21 days within which to pay the amount due and they failed to comply with that statutory demand.

(25) The 1st Respondent has also submitted that the amount being claimed is not clear. They cite the fact that the statutory demand dated **4th March 2019** makes a claim for **Kshs.53,284,914.25** whilst the Petition filed on **8th April 2019** claims an amount of **Kshs.72,400,535.00**.

(26) **Regulation 17(6)** of the **Insolvency Regulations** provides that the Court may grant such an application if

“(b) the debt is disputed on grounds which appear to the court to be substantial.”

(27) In the case of **PETER MUNGA –VS- AFRICAN SEED INVESTMENT FUND** it was held:-

“It is important to point out that the mere overstatement of amount claimed in a statutory demand does not perse invalidate the demand. The debtor is obligated to contest the amount and within the requisite period and additionally it must be such as to cause prejudice and injustice to the debtor if the demand was allowed to subsist.”

(28) Finally on this point in **Re: Global Tours and Travels Limited [2001] EA 195**, the learned Judge concluded 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.”[own emphasis]

(29) Finally, the 1st Respondent challenges the statutory Notice on grounds that some of the Petitioners do not have a judgment or decree against the 1st Respondent. However this allegation has been disproved by the Petitioners who have annexed to the petition the said Court Decrees.

(30) In **Re Kipsigis Stores Limited [2017] eKLR**, Justice **J.L ONGUTO** held that,

“Clearly, an application to set aside or vacate a statutory notice on the basis of invalidity should be looked at in the light of the full circumstances of the case. The notice should not be set aside on the basis of a mere technicality. Rather regard should be had to all the circumstances including but not limited to whether the debt is owed as well as whether the overriding objective would be defeated by setting aside the notice. If not injustice flows from the consequences of non-compliance, then it would serve no purpose to set aside a statutory demand and to cause the statutory demand to be served again at cost.”[own emphasis]

Based upon the foregoing, I find that no persuasive reasons have been advanced to warrant the striking out of the Statutory Demand dated **4th March 2019**. I hereby decline to grant **prayer (2)** of the Notice of Motion dated **28th May 2019**.

(iv) **Should the petition be struck out'**

(31) As discussed above this court has found the statutory demand to be proper and valid. In arguing for dismissal of the Insolvency Petition dated **5th April 2019**, the 1st Respondent submits that the same was not accompanied by a verifying Affidavit rendering the Petition fatally defective.

(32) **Regulation 77B (1)** of the **Insolvency Regulation** states thus: -

“For the purposes of Section 425 of the Act an application for liquidation shall be:-

(a) By way of a petition in Form 32C as set out in the First Schedule and

(b) Accompanied by a verifying affidavit in Form 32D as set out in the First Schedule

(2) The petition for liquidation shall be accompanied by the following documents-

(a) A statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and

(b) A statement of financial position in Form 32 as set out in the First Schedule where necessary.

(33) In the case of **EAST AFRICA CABLES LIMITED –VS- SMB BANK (K) LIMITED** [2010] eKLR, Hon Justice David **Majanja** held as follows:-

“I have studied the petition and I am satisfied that it complies with the Form 32C. Although it is not accompanied by a verifying affidavit, it is accompanied by a “supporting affidavit” setting out the facts in the petition supported by documents in support of the averments. Admittedly the supporting affidavit is not in the form set out in Form 32 but I do not think this fatal to the petition.”

The Court further held that:-


“The purpose of the verifying affidavit is to verify on oath the contents of the petition. Form 32D contains one paragraph stating that, “The several statements in the said petition are within my own knowledge and true. “The supporting affidavit on the other hand, sets out the facts of the petition and concludes at paragraph 10 that, “What is deposed is true to the best of my knowledge, information and belief.” I therefore find and hold that in substance the contents of the petition are verified on oath. Further, I find and hold that the Company does not suffer any prejudice.” [own emphasis]

(34) I am persuaded by the above finding and I note that notwithstanding the absence of a verifying affidavit the Petition dated 5th April 2019 does have annexed to it a Supporting Affidavit sworn by the 1st Petitioners **Benson Mulevu Mulwa** as well as an Authority granted to the said deponent by the other 59 Petitioners. Accordingly, I find that this petition is not fatally defective and is not for striking out. The same should proceed for hearing and determination by the Court.

(35) Finally, I dismiss in its entirety the Notice of Motion dated 28th May 2019 and award costs to the Petitioners.

Dated in Nairobi this 29th day of May, 2020

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Justice Maureen A. Odera

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