

KENYA HIGH COURT CLARIFIES THE PRIMACY OF INSOLVENCY PROCEEDINGS OVER ARBITRATION CLAUSES

Precedent-Setting Judgment in *Opticom Kenya Limited v. Kenya Hospital Association t/a The Nairobi Hospital* on the Interaction Between Insolvency Law and Arbitration Agreements-Milimani Commercial & Tax Division

CM Advocates LLP successfully acted for Opticom Kenya Limited (Respondent) in opposing an application by the Kenya Hospital Association (t/a The Nairobi Hospital) which sought to stay insolvency proceedings and reference of the matter to arbitration in *HCCOMMIN/E133/2024*.

This decision sets an important precedent in Kenya on the relationship between insolvency processes and arbitration clauses in commercial contracts.

TAKEAWAY

The dispute arose from a statutory demand issued by Opticom Kenya Limited for KShs. 35,219,747.74 relating to contractual works for pedestrian scanning equipment.

The Applicant contended that an arbitration clause in the FIDIC 2017 Red Book contract barred insolvency proceedings and that the matter should be referred to arbitration.

ANALYSIS OF THE COURT

1. Failure to Invoke Pre Arbitral Mechanisms Under FIDIC

The Court reaffirmed that under Clause 21 of the FIDIC Red Book (2017):

- Disputes must first be referred to the Engineer,
- If unresolved, a Dispute Avoidance/ Adjudication Board (DAAB) must be constituted and issue a decision,
- Where a Notice of Dissatisfaction has been issued, both parties shall attempt to settle the dispute amicably before the commencement of arbitration.
- As the Applicant had not activated any of these pre-arbitral steps it was therefore barred from relying on the arbitration clause to oust the Court's jurisdiction.

2. Insolvency Law Context

Under section 384(1)(a) of the Insolvency Act, 2015, a company is deemed unable to pay its debts if it fails to comply with a statutory demand within 21 days.

- Regulation 17(6) of the Insolvency Regulations, 2016 further provides grounds on which a statutory demand may be set aside including if the debtor shows a genuine dispute or a counterclaim equal to or exceeding the amount demanded.

The Court observed that the Applicant had failed to demonstrate a bona fide dispute under Regulation 17(6) and could not rely solely on an arbitration clause to defeat a creditor's statutory rights.

3. Certified Debt as Proof

The Respondent produced Payment Certificate No. 6, issued under the FIDIC contract, confirming the amount due. The Court noted that no counterclaim or set-off had been filed, no Notice of Dissatisfaction had been lodged and no DAAB proceedings had been commenced. Accordingly, the debt stood as an admitted, certified and enforceable obligation.

4. Insolvency proceedings versus creditor rights

The court relied in the case of ***Matic General Contractors Ltd v Kenya Power & Lighting Co. Ltd [2001] LLR 4837 (CAK)*** which held that while liquidation is a drastic measure, the court must weigh this against the statutory rights of creditors.

COURT'S DECISION

- The Court dismissed the Notice of Motion dated 9 July 2024 with costs awarded to Opticom Kenya Limited.
- The Court held that there was no genuine dispute capable of reference to arbitration. Mere assertions of dissatisfaction do not, in the absence of concrete steps or documentation, amount to a bona fide dispute.
- It affirmed that the jurisdiction of the court in insolvency proceedings cannot be ousted by placing reliance on arbitration clauses.

KEY TAKEAWAYS AND IMPLICATIONS

1. FIDIC Contracts: Parties must follow the contractually agreed dispute resolution process.
2. Insolvency Proceedings: The presence of an arbitration clause does not automatically shield a debtor from insolvency proceedings.
3. Certified Payment Certificates: These form strong, enforceable evidence of debt.
4. Commercial Significance: The ruling strengthens creditor rights and deters misuse of arbitration clauses as a delay tactic.

ABOUT CM ADVOCATES LLP'S ROLE

This case reflects the proven capacity of **CM Advocates LLP's Debt Recovery, Restructuring & Insolvency Practice** to deliver strategic, cross-cutting dispute resolution, insolvency and commercial enforcement solutions for clients across the region.

Our team handles:

- Enforcement of statutory demands, winding up petitions and receiverships,
- Cross-border insolvency advice,
- Recognition and enforcement of foreign judgments and arbitral awards,
- Creditor protection strategies, as highlighted in the firm's Debt Recovery, Restructuring & Insolvency Practice profile.

CONTACTS

For expert guidance on insolvency actions, FIDIC contract enforcement, arbitration, and complex commercial disputes:

Head Office Nairobi
I&M Bank House, 7th Floor, 2nd Ngong Avenue
Nairobi, Kenya
T: +254 20 2210978 or +254 716 209673
P.O. Box 22588 – 00505, Nairobi Kenya
E: law@cmadvocates.com

Mombasa Office
Links Plaza, 4th Floor, Links Road, Nyali
Mombasa, Kenya
T: +254 041 447 0758 / +254 41 447 0548
P.O. Box 90056 – 80100, Mombasa Kenya
E: mombasaoffice@cmadvocates.com

Departmental Emails:

- **Dispute Resolution Department:** *disputeresolution@cmadvocates.com*
- **Debt Recovery, Restructuring & Insolvency Unit:** *drri@cmadvocates.com*

www.cmadvocates.com

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