



**Muraya v Spire Bank Limited (Insolvency Cause E007 of 2018)  
[2023] KEHC 21540 (KLR) (Commercial and Tax) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 21540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E007 OF 2018  
DO CHEPKWONY, J  
JUNE 27, 2023  
IN THE MATTER OF INSOLVENCY ACT, 2015**

**BETWEEN**

**RE PETER KIARIE MURAYA ..... DEBTOR**

**AND**

**SPIRE BANK LIMITED ..... CREDITOR**

**RULING**

1. The Creditor issued a 21 days' statutory demand dated May 23, 2019 to the Debtor over a debt of Kshs 204,774,989.30. In response, the Debtor filed an Application dated May 10, 2019 seeking:-
  - a. Spent;
  - b. stay of proceedings including the intended advertisement;
  - c. set aside the statutory demand dated April 23, 2019 and addressed to Peter Kiarie Muraya;
  - d. Costs of the application.
2. This Ruling is in respect to the said Application dated May 10, 2019 which is supported by the Affidavit of Peter Kiarie Muraya, the Debtor sworn on the same day and the grounds on the face of the application.
3. The Debtor holds that the debt in question arose from a loan facility by the Creditor given to Tiara Villas Limited which secured by legal charge over property Number LR No 3734/531. The debtor holds that the Creditor sought to exercise its statutory power of sale to which it filed Nairobi HCCC No 299 of 2019, Tiara Villas Limited v Spire Bank Ltd & Joseph M Gikonyo t/a Garam Auctioneers



and case Nairobi HCCC No 336 of 2018, Luka Njeru & Others v Tiara Villas Ltd, Spire Bank Ltd & Garam Auctioneers to challenge the sale.

4. The Debtor contends that the court in that suit issued conditional injunctive orders in HCCC No 336 of 2018 preserving the charged property and that the matter is almost ready for hearing. The debtor argues that in this petition, the creditor's advocates are the same ones in those suits and therefore they are aware of the injunctive orders in place.
5. The Debtor also contends that it has made several settlement proposals to the Creditor and does not understand why the Creditor opted to file this parallel process. According to the Debtor, he is a Director of other Companies, thus the Insolvency proceedings will adversely affect the financial positions of the companies and he will suffer irreparable harm. The Debtor holds that it has sufficient assets to settle the debts due. The Debtor further argues that the Creditor ought to have lodged the proceedings against its principal debtor, Tiara Villas Ltd.
6. The Debtor urges that the issuance of a statutory demand was in bad faith, an abuse of the court process and should therefore be set aside.
7. In response, the Creditor filed Replying Affidavit sworn by John Wageche on August 19, 2019 opposing the application. It holds that through the letter of offer dated April 27, 2015 it advanced Tiara Villas Limited a facility of Kshs 175,000,000.00 which was guaranteed by its Directors. It contends that Tiara Villas Ltd defaulted in payments and it issued issues Notice of Intention to Sale.
8. According to the Creditors, some of the purchasers of the project filed suit No HCCC No 336 of 2018 and the court issued injunctive orders on March 12, 2019 stopping the sale. The Creditor holds that the outstanding debt is Kshs 218,755,539.80 which continues to accrue interest and default penalty charges on a daily basis.
9. The Creditor then contends that it was justified to issue the statutory demand since the Debtor is a guarantor of Tiara Villas Ltd and was to be held liable for the repayment of the debt once the principal borrower defaults. Therefore, since the creditor has multiple remedies for debt recovery, it has opted for bankruptcy proceedings owing to the purported purchasers' interest in the property. It then holds that the Debtor has not satisfactorily shown why the statutory demand should be set aside and therefore the application should be dismissed with costs.
10. On June 20, 2019, the parties were directed to canvass the application by way of written submissions and on November 15, 2022, only the Creditor's counsel had filed their submissions. As at the time of writing this Ruling, only the Creditor had filed its submissions dated September 22, 2022.

### **Analysis and Determination**

11. In determining the application, I have read through the affidavits in support and in rebuttal thereof, alongside the Creditor's submission and find the issue for determination being whether the application is merited or not.
12. It is trite that a statutory demand is ordinarily issued where a company has been 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."

13. The Grounds for setting aside a statutory demand and the procedure to be followed once it has been issued are laid out under regulation 16 and 17 of the [Insolvency Regulations, 2010](#) which states,

- "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."

14. In this case the Debtor raised an issue that there are injunctive orders in place in respect to the property in question and that the Principal borrower of the debt owed is Tiara Villas Limited and not the Debtor himself. This court finds these being substantial issues which would warrant a consideration to establish whether or not the demand should be set aside.

15. The court is in agreement with the Creditor, that although the Debtor claims that the debt has been overstated and is exorbitantly high, the Debtor ought to have complied with the demand pursuant to



Section 17(7) of the Act by either paying the Creditor the correct amount plus costs and taking those steps of payment within the time period specified in the demand.

16. However as it has been stated by the Creditor, the loan facility was granted to the Company and not the Debtor in person although he was one of the guarantors by virtue of being a Director of the Company. It would therefore be unfair to condemn the Debtor for the actions of the Company when they are different legal persons for all intents.
17. The court also finds that it is a draconian for the Creditor to institute these proceedings against the Debtor personally for the actions of the Company being Tiara Villas Limited which would amount to piercing the corporate veil without sufficient cause. The court in the case of *Kolaba Enterprises Ltd – v- Shamsudin Hussein Varvani & Another* (2014) e KLR held that:-

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd V Salomon* [1897] AC 22 HL that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities”.

18. It is trite that the purpose of liquidation of companies is to show that a company is unable to pay its debts as and when they are due. The purpose is not to exert pressure upon companies to pay their debts as this would amount to abuse of the court process. In this regard, the Court of Appeal in the case of *Matic General Contractors Limited Vs Kenya Power and Lighting Company Limited* (2001) eKLR 3493 had this to state:-

“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 dishonourable. 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”.

19. In the case of *Peter Munga Vs African Seed Investment Fund LLC* [2017] Eklr the court outlined the grounds for setting aside the statutory demand as follows:-

“It is certainly not possible to foresee all the instances which may properly fall under paragraph (d) of Regulation 17. My view is that, when asked to set aside a demand on any other ground other than the grounds stated under paragraphs (a), (b) and (c), the question then becomes whether the applicant-debtor can show a substantial reason akin



to the reasons under the preceding three paragraphs. .... The test, which is not necessarily conclusive, is whether it would be unjust for the statutory demand to give rise to insolvency proceedings in the particular case.”

20. In this court’s opinion, since there are injunctive orders over the property and that the Tiara Villas Limited being a separate entity from the Debtor, it would be unjust for the court to allow the statutory demand to give rise to the insolvency proceedings against the Debtor only.
21. For those reasons, the application dated May 10, 2019 is found to have merit and allowed in the following terms:-
  - a. The statutory demand dated April 23, 2019 issued and addressed to Sue Wacheke Muraya be and is hereby set aside.
  - b. Costs are hereby awarded to the Debtor.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27<sup>TH</sup> DAY OF JUNE, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Mululu holding brief for Mrs. Karanu for Creditor

No appearance for and by Debtor.

Court Assistant - Martin

