



**Family Bank Limited v Mak'Ojuando (Insolvency Cause
2 of 2020) [2022] KEHC 3030 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
INSOLVENCY CAUSE 2 OF 2020
FA OCHIENG, J
APRIL 28, 2022**

BETWEEN

FAMILY BANK LIMITED APPLICANT

AND

PAUL ODALO MAK'OJUANDO RESPONDENT

RULING

1. The application before me is dated 14th August 2020; and it was brought by Paul Odalo Mak'ojuando (who shall hereinafter be referred to as "Paul")
 1. The application seeks the striking out or the dismissal of the Petition.
 2. The application is premised on the following grounds;
 - (a) Lack of service of a Statutory Notice;
 - (b) The alleged debt is also the subject of a pending civil proceeding, before the Chief Magistrate's Court, Kisumu;
 - (c) The Petitioner is a Secured Creditor;
 - (d) The Petition is simply intended to coerce Paul into admitting a disputed debt;
 - (e) The Petition is scandalous, frivolous and vexatious;
 - (f) The Petition is an abuse of the court process.

Statutory Notice

3. The Applicant insisted that he had never been served with the Statutory Notice.
4. However, the Bank exhibited an Affidavit of Service, indicating that Paul was served with a Statutory Demand on 16th August 2018.



5. At first glance it would appear that this is a situation in which the two parties have made irreconcilable statements. I mean; if the bank caused the Statutory Demand to be served on Paul, it cannot be true that Paul was not served.
6. It would require an opportunity for the parties to provide the court with more information, to enable the court make a determination.
7. For instance, Paul might try to cross-examine the process server, with a view to exposing him as a liar.
8. On the other hand, the bank might want to cross-examine Paul, to try and prove that the process server did actually serve him.
9. In other words, at this stage, the Court has insufficient evidence, upon which it could make an informed determination on the issue of service of the Statutory Demand.
10. The said issue cannot therefore be the basis upon which the Petition should be dismissed or struck out.
11. But I must say that I found it baffling, that the Affidavit of Service which was sworn on 16th August 2018, has the particulars of this “Insolvency Petition No. 2/20”.

Secured Creditor

12. Although Paul suggested that the bank is a secured creditor, I find that there is no evidence which he has provided to back up his said assertion.
13. If anything, I find that Paul had, in the pleadings filed in Paul Odalo Mak’ojuando Vs Family Bank Limited, KSM CMCC NO. 540 OF 2016, filed a Supporting Affidavit on 11th October 2016, stating inter alia, as follows;

“ 8. That I know of my knowledge that
the vehicles sought to be attached were
not part of the security offered for
advancement of the overdraft facility
and not chattels mortgage was executed
and/or registered as regards these
motor vehicles.”
14. In the light of that deposition, it was incumbent upon Paul to provide this court with particulars of the security which he has talked about in paragraph 10 of his affidavit filed on 19th August 2020. However, this court has not been made aware of any such security.
15. Furthermore, I note that Paul’s said Supporting Affidavit, (which was filed on 19th August 2020), was sworn on 14th August 2018. That would imply that the affidavit was sworn almost 2 Years before the Petition herein was lodged in court!
16. For the moment, I say no more concerning the fact that the affidavit pre-dated the Petition.

Disputed Debt

17. The issue of the debt is said to be the subject matter of pending proceedings at the Chief Magistrate’s Court, Kisumu.



18. Therefore, Paul perceives this Insolvency Petition as a deliberate attempt by the bank to coerce him to admit a disputed debt.
19. In effect, these proceedings are deemed to be an abuse of the court process.
20. First, I note from the Plaint in CMCC No. 540 of 2016 that Paul made reference to one facility; the Overdraft of Kshs 750,000/=.
21. It was in relation to that facility that Paul sought a permanent injunction to restrain the bank from attaching, repossessing, seizing, alienating, selling, auctioning and/or interfering with the vehicles Registration Numbers KAY 606C, KBS 497V and KBS 492V.
22. Paul also sought a declaration that the intended attachment of those vehicles was illegal.
23. In his considered view, the amount being claimed by the bank, on account of the overdraft facility, could only be sought by way of recovery of the relevant security; which he cited as being the very same vehicles in respect to which he asked the court to grant a permanent injunction!
24. The Plaintiff, in that case, also sought an order directing the bank to render accounts. He believed that a facility for Kshs 750,000/= could not have ballooned to Kshs 4,069,559.93, which the bank was claiming.
25. To the extent that there was a dispute about the quantum of the money due and payable by Paul, under the overdraft facility, it can be said that the parties are not reading from the same page.
26. At paragraph 19 of the Plaint in CMCC No. 540 OF 2016, the Plaintiff made reference to another case, being KSM CMCC No. 126 OF 2014. This case was said to be in relation to a Loan facility which the bank had accorded to Paul.
27. At page 43 of his application, Paul annexed a copy of the letter dated 2nd August 2016, which the bank had written to Alfred Kaiya Trading As Pavement Auctioneers. The said letter cites the following sums as due and payable by Paul;
 - a. (a) Loan Balance – Kshs 11,732,689;
 - b. (b) Overdraft – Kshs 4,069,559.93
28. By exhibiting the letter dated 2nd August 2016, Paul can be said to have been aware of the contents thereof, from as early as August 2016.
29. Whilst Paul was asserting that there was a pending unresolved dispute over the overdraft facility, he is noticeably silent about the loan facility.
30. But, on the other hand, it was the bank who, in its Defence dated 28th November 2016, who stated that both the Loan and the Overdraft were secured.
31. At paragraph 4 of the Defence , the bank said that the Loan was secured by a Registered Chattels Mortgage over 2 new FAW 20 Ton Tipper Trucks. The particulars of the said trucks were given as;
 - (i) KBS 497V; and
 - (ii) KBS 492V.
32. Meanwhile, the bank indicated, at paragraph 5 of the Defence that the Mortgage facility was secured by a Chattels Mortgage over Toyota Hilux Double-cab, Registration KAY 606S.



33. According to the bank, both the chattels mortgages had been duly registered, in the names of both the Plaintiff and the Defendant.
34. Therefore, although Paul had not provided this court with proof of the securities, the bank made available the particulars thereof.
35. If the bank is holding securities, it would be improper for it to simultaneously canvass proceedings geared towards having the borrower declared bankrupt.
36. Pursuant to Section 17 (2) (b) of the *Insolvency Act*, a Creditor may make an application for a Bankruptcy Order if the debt owed by the debtor is unsecured. It therefore follows that provided the Petitioner is holding a security for the sums which it is claiming from the debtor, it cannot be allowed to canvass an application for a bankruptcy order.
37. To that extent, the Petitioner is hereby told, in no uncertain terms, that provided it still holds the securities in respect of the overdraft and the loan, it cannot be permitted to canvass the Petition herein.
38. Section 18 (1) of the *Insolvency Act* makes it clear that the court can be called upon to make a bankruptcy order, on an application of a secured creditor if;

“ either

(a) the application contains a statement by the person having the right to enforce the security that the creditor is willing, in the event of a bankruptcy order being made, to give up the security for the benefit of all the bankrupt’s creditors; or

(b) the application is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the application of the security for the secured part of the debt.”

39. In this case the Creditor has neither offered to give up the securities, nor provided information concerning the value of the debt which is covered by the securities.
40. In the circumstances, I reiterate that the bank cannot canvass the Insolvency proceedings whilst still unconditionally holding the securities in respect to the debts.
41. But, I also find it necessary to state that there is no indication from Paul that he believes that he is not indebted to the bank.
42. He only appears to be disputing the quantum of the debts.
43. Pursuant to Section 17 (6) of the *Insolvency Act*;

“ An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless –

(a) the debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing; and

(b) the debtor makes that notification within the period specified in the demand for the debtor to comply with it.”

Conclusion

44. (i) The court is unable to make a summary determination on the question as to whether or not the Statutory Demand was served upon the debtor.



45. More material would need to be provided by the parties, so that the court can thereafter make an informed decision.
46. (ii) Although there is a pending case at the Chief Magistrate's Court, Kisumu, I find that the said case was not disputing the indebtedness of the debtor.
47. If anything, the debtor appears to only be challenging the Creditor's right to realize the security, as the debtor asserts that the security in question did not relate to the Overdraft facility.
48. (iii) The debtor has not provided this court with any material upon which the court could determine whether or not there was any dispute about the Loan facility.
49. If the Loan was still outstanding, it could form a sound foundation for a Petition for Insolvency.
50. (iii) Whilst the Creditor now asserts that it is not a secured Creditor, the pleadings in CMCC No. 540 of 2016 tell a completely different story.
51. On the basis of the said pleadings, I find that the Creditor is a secured creditor.
52. Therefore, pursuant to the provisions of Section 17 (2) (b) of the *Insolvency Act*, the Creditor cannot be permitted to canvass the insolvency petition herein.
53. (v) However, if the Creditor wished to canvass the petition, it would have to comply with the provisions of Section 18 (1) of the *Insolvency Act*.
54. (vi) Meanwhile, it is not lost on this court that whilst the debtor was shouting himself hoarse, about the fact that the creditor was a secured creditor; in CMCC No. 540 of 2016, the debtor actually insisted that the creditor did not hold any security, in respect to the Overdraft facility.
55. (vii) I decline to strike out or to summarily dismiss the Petition at this stage.
56. The Creditor would, however, have to make an election pursuant to Section 18 (1) of the *Insolvency Act*, if it still wishes to canvass the Petition herein.
57. (viii) If the Petition proceeds to hearing, one of the issues that the Court would have to determine is whether or not the Creditor served a Statutory Demand upon the debtor.
58. (ix) The costs of the application dated 14th August 2020 shall be in the cause. If the Petition is prosecuted successfully, the costs of the application shall be paid by the debtor.
59. However, if the Petition is unsuccessful, for any reason, the Petitioner will pay to the debtor, the costs of the application herein.

DATED, SIGNED AND DELIVERED AT KISUMU This 28th day of April 2022

FRED A. OCHIENG

JUDGE

