



**Intex Construction Limited & 5 others v African Banking Corporation Ltd (Civil Suit E607 of 2021) [2022] KEHC 14521 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14521 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E607 OF 2021  
A MABEYA, J  
OCTOBER 28, 2022**

**BETWEEN**

**INTEX CONSTRUCTION LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
KISHAN SINGH GEHLOT ..... 2<sup>ND</sup> PLAINTIFF  
GEHLOT SAMIT ..... 3<sup>RD</sup> PLAINTIFF  
LEENA GEHLOT ..... 4<sup>TH</sup> PLAINTIFF  
RISHI RAMRAKHA ..... 5<sup>TH</sup> PLAINTIFF  
POORAN SINGH TAK ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**AFRICAN BANKING CORPORATION LTD ..... DEFENDANT**

**RULING**

1. The subject of this ruling is the plaintiffs' notice of motion dated May 31, 2021. The same was brought pursuant to section 3A of the *Civil Procedure Act*, order 40 rules 2(1) and 4 of the *Civil Procedure Rules 2010* and the inherent jurisdiction of this court.
2. The plaintiffs sought to restrain the defendant from instituting and/or advertising any insolvency proceedings or complaints of whatever nature against the plaintiffs as threatened or at all.
3. They also sought to restrain the defendant from instituting any enforcement proceedings against them with regard to the following securities: personal deeds of guarantee and indemnity dated June 9, 2016 issued by Mr Samit Gehlot, Mr Kishan Singh Gehlot and Mr Pooran Singh Takh for Kshs 300,000,000/- each and the personal deeds of guarantee and indemnity dated June 9, 2016 for Kshs 300,000,000/- in the names of Ms Leena Gehlot and Mr Rishi Ramrakha.



4. The grounds for the application were that; in or about August 2014, the defendant advanced to the 1st applicant a number of secured banking facilities. That 3 suits had been filed in relation to the said facilities when the defendant has attempted to realise the securities issued for the facilities extended to the 1st plaintiff.
5. The defendant has since recovered Kshs 281,256,061.90 but has still threatened to institute recovery proceedings including calling up the personal deeds of guarantees and indemnity and lodging proceedings against the 1st plaintiff for the immediate repayment of Ksh 785,130,557.75.
6. In the premises, the plaintiffs are apprehensive that should the defendant commence enforcement action or insolvency proceedings as threatened, it will cause irreparable injury and/or reputational damage to the plaintiffs. That the money demanded by the defendant does not take into account monies released to it from the escrow account.
7. In opposition, the defendant lodged a preliminary objection dated June 10, 2021 and a replying affidavit sworn on June 18, 2021.
8. In the objection, the defendant contended that the court has no jurisdiction to issue the orders sought in the application and plaint. That the application and suit offend the sub judice doctrine by reference to merits and demerits before a competent court and that the application offends regulation 16 of the Insolvency Regulations, 2016.
9. In its replying affidavit sworn by its legal manager, the defendant reiterated the contents of the preliminary objection and averred that the 1st plaintiff was granted the following facilities: -
  - a) Term loan 1 of Kshs 200,000,000/-;
  - b) Term loan 2 of Kshs 100,000,000/-; and
  - c) Overdraft facility of Kshs 30,000,000/-.
10. That the said facilities were secured by a legal charge over property Title Number Nairobi/Block 92/86 for Kshs 100,000,000/-, an informal charge over property Title Number Athi River Block 5/44 for the sum of Kshs 200,000,000/-, personal deed of guarantee and indemnity of intex's directors for Kshs 300,000,000/- each, credit agreement, assignments of contract receivables, demand promissory note and letter of instalment for an aggregate of Kshs 300,000,000/-.
11. That on June 9, 2016, the 1st plaintiff and the defendant entered into an assignment of contract receivables with regard to the 1st plaintiff's project to construct roads under the Kenya Rural Roads Authority. That all proceeds were assigned to the defendant and all payments were to be made to the 1st plaintiff's Account number XXXX held at the defendant.
12. In the premises, the defendant's view was that the application and suit were a ploy to delay the defendant from pursuing the plaintiffs' indebtedness. That the defendant has already instituted insolvency proceedings due to the precarious situation it is in whereby the plaintiffs are significantly indebted to it but the securities currently held are insufficient to offset the same. That the issues raised in the application and orders sought have been sufficiently canvassed in earlier suits before the High Court and Court of Appeal.
13. The court has considered the pleadings, averments and annexures filed in this matter. The court will first consider the objection. The grounds were that the court lacked jurisdiction to issue the orders sought; that the application and suit are sub judice and that the application offends regulation 16 of the Insolvency Regulations 2016.



14. The court will first determine whether it lacks the jurisdiction to issue the orders sought.
15. The plaintiffs prayed that the defendants be restrained from instituting and/or advertising any insolvency proceedings against the applicants. The court notes that the defendant has already issued the plaintiffs with statutory notices dated June 10, 2021.
16. Since the statutory notices have already been issued, the proper court that should have been approached to stay insolvency proceedings should have been the court exercising Insolvency jurisdiction. In this regard, I hold that this court has no jurisdiction to entertain matters touching on insolvency unless its insolvency jurisdiction was invoked, which is not the case.
17. Rule 16 of the *Insolvency Rules* provides that a debtor may apply to the Insolvency Court for an order to set aside the statutory demand. Under rule 16(2), the time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the court.
18. In this regard, under our insolvency laws, there exists a mechanism for the applicants to have the statutory demands set aside. That remedy cannot be obtained from this court.
19. The next issue is whether the application is sub-judice. The defendant argued that the cases referred to by the plaintiffs are in active litigation before competent courts and that the plaintiffs are delving into the merits of these suits in an attempt to establish whether they prove the grounds of abuse of court.
20. The plaintiffs argued that the present suit does not seek to determine the merits of the other suits nor does it involve a similar cause of action and that the plaintiffs are only seeking to invoke the jurisdiction of this court to prevent an abuse of the court process by the defendant.
21. Section 6 of the *Civil Procedure Act* provides for the doctrine of sub-judice. On reading the application, the court's opinion is that the plaintiff's reason for mentioning the previous suits was to convince the court that the defendant had instituted other suits and was therefore abusing the court process.
22. In HCC Number 282/2017, the defendant sought the release of the funds held in escrow at Stanbic Bank in order to pay off the loan amount. In Miscellaneous Civil Suit Number 430/2017, the defendant sought to be allowed to sell the property title number Athi River Block 5/44, in the name of the 1st plaintiff in order to recover the outstanding loan facilities. Lastly in HCC Number 104/2018, the 4th and 5th plaintiff as guarantors of the 1st plaintiff, sought to restrain the defendant from selling one of the charged properties.
23. It is clear from the foregoing that, the suit and application are not sub-judice.
24. The next issue is whether the court should issue an order to restrain the defendant from instituting any enforcement proceedings.
25. The plaintiffs prayed that the respondent be restrained from instituting any enforcement proceedings against them with regard to the personal deeds of guarantee and indemnity issued by the 2nd-5th plaintiffs.
26. It was argued that should the defendant commence enforcement action it would cause irreparable injury and reputational damage to the plaintiffs. Further, that the amount owing from the 1st plaintiff to the defendant is in dispute therefore the insolvency proceedings would be baseless.
27. The court has already determined that it has no jurisdiction to stop the insolvency proceedings as they have already commenced.



28. As for the enforcement of the personal deeds of guarantee, the court refers to the case of *Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others & another [2013] eKLR*, where the Court of Appeal held: -
- ' The general rule is that a secured creditor is not obliged to resort to his security. He can claim repayment by the debtor personally and leave the security alone. He can sell the charged securities or set off or combine accounts. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.'
29. In this case, it is not in dispute that the 1st plaintiff remains indebted to the defendant despite the fact that the amount due is disputed. There is also no doubt that part of the securities held by the defendant for the loan are the personal guarantees issued by the 2nd-5th plaintiffs.
30. In, *Ecobank Kenya Limited v Francis Tole Mwakidedi [2018] eKLR*, the court stated: -
- ' A creditor is free to choose from which debtor and what method to use to recover the debt. The debtor has no luxury nor right of choosing for the creditor who amongst the debtors, to pursue and failure to pursue all debtors at once is not fatal to the creditor's petition. In view of the above, I find no merit in ground number (b) of the objection. I find also that the petition is not premature nor an abuse of the court process as the creditor is not obliged to exhaust other recovery mechanisms available to it before bringing up an application for bankruptcy'
31. I concur with the foregoing authorities. A secured creditor may pursue any of the securities given at any given time, at once or one after the other. Further, a creditor is not precluded from pursuing insolvency proceedings to recover its debt before exhausting other recovery mechanisms.
32. I therefore find no justifiable reason to stop the defendant from pursuing enforcement proceedings against the plaintiffs.
33. In the premises, I find the application dated May 31, 2021 to be without merit and dismiss the same with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2022.**

**A MABEYA, FCIArb**

**JUDGE**

