



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**INSOLVENCY CAUSE NO. E018 OF 2019**

**DEVELOPMENT BANK OF KENYA LIMITED.....CREDITOR/RESPONDENT**

**VERSUS**

**HON. SAMUEL KAZUNGU KAMBI.....DEBTOR/APPLICANT**

**RULING**

**Background**

1. The Debtor herein, **Hon. Samuel Kazungu Kambi**, was a director of Riva Oils Co. Ltd (Borrower) that borrowed an aggregate sum of Kshs 250,000, 000/= from the Creditor. The Debtor personally guaranteed full repayment of the debt.
2. The Borrower defaulted and the Creditor filed a case against the Borrower and its guarantors including the Debtor herein, being HCCC No. 59/2013. On 2<sup>nd</sup> June 2016, a consent judgment was entered in the said case for the Creditor against the Debtor for kshs 305,000,000/-. The Debtor has paid Kshs 30,000,000/- leaving a debt of Kshs 275,000,000/= demanded in the statutory demand dated 11<sup>th</sup> October 2019. The Debtor was served with the statutory demand 15<sup>th</sup> November 2019 and he brought this application on 20<sup>th</sup> January 2020.
3. The Creditor attempted to exercise its statutory power of sale over L.R. No. 12785 Kilifi North being a security given by Giriama Ranching Co. Ltd to secure the debts of Riva Oils Co. Ltd but the said Giriama Ranching Co. Ltd files several suits contesting the validity of the charge while alleging forgery of its title and claiming that persons who executed the charge and passed the Resolution to guarantee debts of Riva Oils Ltd were not its officials. The suits are Malindi ELC No. 155 of 2019, Mombasa HCCC No. 57 OF 2018 and HCCC No. 117 of 2018. Interlocutory injunctions were granted in both Malindi ELC No. 155 of 2019 and Mombasa HCCC No. 57 of 2018.
4. This ruling is in respect of two applications namely, the application dated 17<sup>th</sup> January 2020 wherein the Debtor seeks to stay further insolvency proceedings against him, to set aside the statutory demand and to strike out the entire insolvency proceedings AND, the application dated 18<sup>th</sup> August 2020 wherein he Debtor seeks to transfer this Insolvency Cause to Mombasa for hearing alongside HCCC No. 57 of 2018 and 117 of 2018.

**Application dated 18<sup>th</sup> August 2020.**

5. The application to transfer the entire proceedings herein to the High Court at Mombasa for hearing alongside Mombasa HCCC No. 57 of 2018 and HCCC No. 117 of 2018 between Giriama Company Ltd and Development Bank of Kenya Ltd is premised on the grounds that: -

***1. That the Insolvency proceedings herein are premised on a consent Decree issued on 2<sup>nd</sup> February 2016 in Milimani HCCC No. 59 of 2013: Development Bank of Kenya Limited –vs- Riva Oils Limited & 3 Others.***

***2. That the suit had been filed by the Creditor/Respondent (hereinafter “the Respondent”), in order to recover a debt owed by Riva Oils Company Limited, which debt had been guaranteed by the applicant as well as by three (3) other co-guarantors by way of personal Guarantees dated 3<sup>rd</sup> August 2007. The respondent has not pursued Insolvency proceedings against the said co-guarantors at all, but has initiated Insolvency proceedings only against the applicant herein.***

***3. That the said debt is also secured by way of a charge and further charge over all that property known as L.R. No. 12785 Kilifi North, West of Bamba, Voi River, Kilifi County measuring 26,745 hectares registered in the name of Giriama Ranching Company Limited (“the said property”). The said property is currently valued at approximately Kshs 1.3 million and is still charged to the respondent as collateral for the said debt.***

4. That the respondent has now commenced the process of exercising its statutory powers of sale over the said property and at the same time instituted these Insolvency proceedings against the applicant herein over the very same debt.
5. That the exercise of the respondent's statutory powers of sale over the property was subject of the suit before this court, the same being; Milimani HCCC No. 304 of 2018; Giriama Ranching Company Limited –vs- Development Bank of Kenya Limited.
6. That on the strength of an application by the respondent's the said suit was transferred on 19<sup>th</sup> February 2019 by the Honourable Mr. Justice James Makau to the High Court in Mombasa for hearing and determination. The same is now Mombasa HCCC No. 117 of 2018; Giriama Ranching Company Limited-vs- Development Bank of Kenya Limited and is still pending for hearing and determination.
7. That on the other hand, there also exists another suit over the very same debt and the said property, the same being Mombasa HCCC No. 57 of 2018; Giriama Ranching Company Limited –vs- Development Bank of Kenya Limited. The suit is also pending for hearing and determination and is being heard alongside Mombasa HCCC No. 117 of 2018 aforesaid by the same court.
8. That on 14<sup>th</sup> February 2020, the applicant filed a further affidavit sworn on even date in this matter, detailing the history of the two (2) suits aforesaid and how they relate to the proceedings herein and the applicant adopts and relies on the entire averments in the said affidavit and all the annexures thereto in further support of this application.
9. That in the circumstances, it is clear that the subject matter herein is directly and substantively related to the suits aforesaid and it is therefore imperative and proper that these proceedings be transferred to the same court hearing the said suits in Mombasa in order to enable the court effectively and substantively determine all the issues between the parties without the risk of issuing conflicting orders and determinations on the same subject matter by courts of concurrent jurisdiction.
10. That it is apparent that the respondent is pursuing parallel recovery proceedings in different courts over the same debt contrary to law and it is therefore very likely that the two (2) courts may issue conflicting orders and decisions on the same subject matter thereby subjecting the integrity of this Honourable court's process of embarrassment and ridicule.
11. That the suits aforesaid as well as the applicant's application herein dated 17<sup>th</sup> January 2020 raise common issues of law and facts that will require to be interrogated by the same court and it would be in the best interest of the parties that the issues regarding the mode of realization of the debt allegedly owed to the respondent if at all determined by one court.
12. That the applicant stand to be grossly prejudiced in the event that the respondent is successful in the Mombasa Court and therefore at liberty to exercise its statutory powers of sale over the said property whose value far exceeds the debt allegedly owed to the respondent, while at the same time the respondent proceeds before this court with the Insolvency proceedings against the applicant when time for determination by both this court and the Mombasa Court is not known and cannot be ascertained as of now.

**Application dated 17<sup>th</sup> January 2020.**

6. The application to stay the further insolvency proceedings, to set aside the statutory demand and to strike out the insolvency proceedings is supported by the Debtor's affidavit and is premised on the following main grounds: -

1. That by way of a Consent Decree obtained on 2<sup>nd</sup> February 2016 and issued on 12<sup>th</sup> April 2016 in Milimani High Court Civil Case No. 59 of 2013; Development Bank of Kenya Limited –vs- Riva Oils Company Limited & 3 Others, the said suit was marked as withdrawn and the four (4) defendants therein; Riva Oils Company Limited; Ezekiel Karisa Kitsao, David Komen Tuitoek and the applicant jointly ordered to pay the respondent herein a sum of Kshs 305,000,000.00 in instalments.
2. That it was a condition under Clause 5 of the said Decree that in the event of default of payment on the dates of the said instalments and in the sum ordered, the respondent herein would be at liberty to execute for the said outstanding sums.
3. That on the other hand, Section 17(3) (b) of the Insolvency Act No. 18 of 2018 stipulates that a debtor for purposes of Insolvency proceedings appears to be unable to pay a debt if a debt is payable immediately and execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part.
4. That however, contrary to the aforesaid Decree issued on 12<sup>th</sup> April 2016 and contrary to the provision of the Insolvency Act No. 18 of 2015 aforesaid, the respondent prematurely moved this Honourable Court by way of a Request of Issuance of statutory demand dated 10<sup>th</sup> September 2019 claiming that the applicant is personally indebted to the respondent in the sum of Kshs 275,000,000.00 being an outstanding installment as per the Decree aforesaid.
5. That the respondent has not demonstrated any evidence of having attempted execution against all the four (4) Judgment Debtors as per the Decree aforesaid as well as whether the Decree in its favour has been returned unsatisfied either wholly or in part against the four (4) Judgment Debtors in accordance with Section 17 (3) (b) of the Insolvency Act No. 18 of 2015 in order to warrant issuance of the statutory demand herein.

7. The respondent/Creditor opposed the application through the Replying affidavit of its Manager **Ms Doreen Kimori** who avers that despite

the fact that the Creditor obtained judgment against the Debtor in Milimani HCCC No. 59 of 2013 for the sum of Kshs 304,906,835.40 on 2<sup>nd</sup> April 2013, the Debtor has refused to settle the said decretal sum thus necessitating the filing of bankruptcy proceedings against him in Bankruptcy Cause No. 2 of 2015 wherein the debtor was ordered to pay the decretal sum.

8. She avers that upon being served with the Bankruptcy Notice, the Debtor took out proceedings challenging the entry of the said judgment in HCCC 59 of 2013 whereupon the court set aside the judgment and allowed him to defend the suit but that through a consent judgment recorded in court on 2<sup>nd</sup> February 2016, the Debtor agreed/offered to pay the Creditor a reduced total sum of Kshs 305 million after which the Debtor and his co-defendants paid the first deposit of Kshs 30,000,000 thereby leaving an outstanding balance of kshs 275 million which has not been paid to-date.

9. She states that the Creditor is not aware of any assets belonging to the Debtor or his co-defendants that can be sold to recover the decretal sum. She further states that the Debtor does not deserve the orders sought herein and adds that the instant application is a delaying tactic intended to muddy the pure streams of justice.

10. The Creditor's deponent also swore a supplementary affidavit dated 28<sup>th</sup> September 2020 wherein she states that the Debtor's obligation to settle the debt of Riva Oils Company Ltd was long settled by the consent judgment of 2<sup>nd</sup> February 2016 in HCCC 59 of 2013 which consent has not been challenged by the Debtor.

11. She further states that the Debtor has not demonstrated that he has made any efforts to settle the judgment debt but tries to deflect his liability to his co-defendants and further blames the Creditor for not recovering the debt from him through other means. She further avers that the subject debt, having crystallized in the consent judgment recorded on 2<sup>nd</sup> February 2016. She avers that the security that the Debtor seeks to rely on is the charge executed by Giriama Ranching Company Ltd to secure the debts owed to the Creditor by Riva Oils Company Ltd and registered over L.R. No. 127785 Kilifi North and adds that the validity of the said charge is contested by Giriama Ranching Company in several suits namely: -

*i. Malindi ELC No. 155 of 2019 bought by Chengo Voi Wanje & 434 Others vs Development Bank of Kenya Ltd & 6 Others.*

*ii. Mombasa HCCC No. 57 of 2018 brought by Giriama Ranching Company Ltd –vs- Development Bank of Kenya Ltd.*

*iii. Mombasa HCCC No. 117 of 2018 brought by Giriama Ranching Company Ltd –vs- Development Bank of Kenya Ltd.*

12. She avers that there are orders of injunction issued against the Creditor restraining it from exercising its power of sale over the said LR No. 12785 Kilifi North in Malindi ELC No. 155 of 2019 and Mombasa HCCC No. 57 of 2018. She states that the Debtor, who is a Director of Riva Oils Company Ltd, personally guaranteed to repay the debt of the company and that he was served with the Statutory Demand Notice on 15<sup>th</sup> November 2019 but only filed the application on 20<sup>th</sup> January 2020.

13. Parties canvassed both applications by way of written submissions which I have considered.

#### **Analysis and determination**

14. I have considered the pleadings filed by the parties and the rival arguments over the two applications. I will determine the application dated 18<sup>th</sup> August 2020 first because it's determination will have a bearing on whether or not this court should determine the application to set aside the Statutory Notice. This is to say that should the court find that the instant cause should be transferred to Mombasa for hearing and determination, then it will not be necessary to delve into determining the issue of whether the Statutory Notice should be set aside as that would then be an issue for determination before the Mombasa court.

#### **Transfer of suit.**

15. Section 18 of the Civil Procedure Act (CPA) stipulates as follows regarding transfer of suits.

***“18. Power of High Court to withdraw and transfer case instituted in subordinate court***

***(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—***

***(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or***

***(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter— (i) try or dispose of the same; or***

***(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or***

***(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.***

*(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”*

16. In *Kithita Ngeana v Mwaniki Kisume* [2018] eKLR the court stated that: -

*“As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction....it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused....”*

17. The principle emerging from the above cited provision and decision is that a party who seeks orders to transfer a suit from one court to another ought to satisfy the court that such transfer should be granted.

18. In the present case, the Debtor seeks the transfer on the basis that the subject matter herein is substantially related to the suits in Mombasa; that the Creditor is pursuing parallel recovery proceedings in different courts over the same debt thus leading to the possibility of conflicting orders; that the suits raise common issues of law; that the Debtor stands to be greatly prejudiced in the event the Creditor is successful in the Mombasa court and that there is a suit over the same debt between the Creditor and the company that had been transferred to Mombasa.

19. I have perused the instant Insolvency Cause and I note that it involves the issuance of Statutory Demand Notice against the Debtor herein in respect to the execution of the decree passed against him and his co-defendants in Milimani HCCC No. 59 of 2013 and 2<sup>nd</sup> February 2016. It was not disputed that the decree passed by the court in HCCC 59 of 2013 has not been challenged/or set aside and is therefore ripe for execution. The Mombasa suits on the other hand relate to the challenge by the company over the validity of the charge on the company’s land.

20. My finding is that since, the consent judgment entered in case No. 59 of 2013 has not been set aside or varied, the case between the Creditor and Debtor is concluded and the Insolvency Cause is merely in execution of the decree in the said concluded case. I therefore find that in the circumstances of this case, transferring this case to Mombasa court will not serve any useful purpose and that the application for transfer does not meet any of the conditions set out in *Kithita Ngeana* case(supra) for transfer of suits.

21. I also find that there is no relationship between the company’s claim that the charge was not valid, with the Debtor’s admission of indebtedness through the consent judgment.

22. My further finding is that having entered into a consent judgment to pay the debt, the Creditor is at liberty to elect any mode of execution and is not under any obligation to execute against all the defendants, but can elect to execute against them either jointly or severally.

23. I find that the balance convenience favours the Creditor herein who has been waiting to reap the fruits of its judgment since February 2016.

24. I am therefore not satisfied that the application for transfer of suit is merited and I therefore dismiss it with costs to the Creditor.

#### **Setting Aside the Statutory Demand Notice.**

25. Regulation 16(1) (a) of the Insolvency Regulations stipulate as follows: -

*The debtor may, apply to the court for an order to set aside the statutory demand within twenty on days from the date of the service on the debtor of the statutory demand.*

26. In the present case, it was not disputed that the Statutory Demand Notice was served on the Debtor on 15<sup>th</sup> November 2019 and the instant application filed on 20<sup>th</sup> January 2020, 65 days after service with the said Notice. In other words, the application was not filed within the 21 days period provided for under the above cited Regulation. I find that the application is, on account of late filing without leave, fatally defective and is only good for striking out.

27. My finding on the late filing of the application would have been sufficient to determine the application but I am still minded to consider if the Debtor made out a case for the setting aside of the Statutory Demand Notice in the face of the uncontested fact that a consent judgment was recorded in favour of the Creditor against the Debtor for the payment of Kshs 305 million.

28. Paragraph 6 of Regulation 17 of the Insolvency Regulations provides for the circumstances under which a Statutory Demand may be set aside as follows: -

*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 in grounds which appear to the court to be substantial.*

*c) It appears the creditor holds some security in respect of the debt claimed by demand, and either paragraph (6) is not complied with 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 debt ought to be set aside.*

29. In the present case, I note that the Debtor does not state that it has a counterclaim, set off or cross demand which equals or exceeds the debt in question. The debt is not disputed and the Creditor does not hold any Security for the debt.

30. I have perused the consent judgment that is the subject of execution in these proceedings and I note that it was worded as follows at paragraph 3 thereof:

*i) Kshs 30,000,000/- (Thirty Million) on or before execution of the said consent letter;*

*ii) Kshs 275,000,000/- (Two Hundred and Seventy-Five Million) to be paid in full within six months of execution and filing in court of the Consent letter.*

*iii) The firm of Hamilton Harrison and Mathews to remit the sum of Kshs 30,000,000/- (Thirty Million) to the account Riva Oils Account No.2007422001 held in Development Bank of Kenya. The Swift address being DEVKKENA.*

31. Having regard to the clear terms of the consent judgment, I find that the Debtor cannot fault the Creditor for executing the decree against him through these proceedings as the decree did not state that it must be executed against all the defendant jointly in which case, the Creditor is at liberty to elect who to execute against.

32. For the above reasons, I find that the application to set aside/strike out the Statutory Demand Notice is not merited and I therefore similarly dismiss it with costs to the Creditor.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 18<sup>th</sup> day of March 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Nyachoti for Debtor/Applicant

Miss Achieng for Ojiambo for Creditor/Respondent.

Court Assistant: Silvia