



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**INSOLVENCY NOTICE NO. E031 OF 2020**

**CORAM: D. S. MAJANJA J.**

**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**AND IN THE MATTER OF**

**PHILIP MUTURI MWANGI (A DEBTOR)**

**BETWEEN**

**PHILIP MUTURI MWANGI ..... DEBTOR/APPLICANT**

**AND**

**PAULINE WANJIRU NYAMU ..... CREDITOR/RESPONDENT**

**RULING**

### **Introduction and Background**

1. The Creditor filed and issued an undated Statutory Demand to the Debtor on 9<sup>th</sup> July 2020 seeking payment of KES. 4,295,124.98 within 21 days after service of the Demand which the Creditor states is owed to her as at 7<sup>th</sup> July 2020 pursuant to Loan Agreements entered into by the parties on 30<sup>th</sup> August 2016, 23<sup>rd</sup> April 2018 and 15<sup>th</sup> January 2019.

2. The Debtor has filed the Chamber Summons dated 27<sup>th</sup> July 2020 under **section 22(1), 23, 26** of the **Insolvency Act, 2015** and **Regulation 16(3) and 17** of the **Insolvency Regulations 2016** seeking to set aside the Statutory Demand and an order restraining the Creditor from proceeding to file the intended application or advertising the same. The application is supported by the Debtor's affidavit sworn on 27<sup>th</sup> July 2020. The Creditor opposes the application through her replying affidavit sworn on 17<sup>th</sup> August 2020. The parties agreed that I should determine the matter based on the material on record.

### **The Application**

3. The Debtor states that his business has suffered massively in light of the ongoing COVID 19 global pandemic. He states that the first instalment was due on 30<sup>th</sup> June 2020 but the pandemic was announced in March 2020. He specifically refers to the ban of international flights which have prevented him from travelling to Somalia where his business is domiciled and thereby stalling his project. He further states that he is ready and willing to pay off the debt and has proposed a payment plan as a basis for negotiating payment despite the prevailing tough conditions.

4. The Debtor depones that Creditor's demand is inordinately high and factors in an over-the-top rate that is not legal or otherwise acceptable through the legal mediums of lending therefore the same is disputed due to its overstatement and therefore invalidates the demand. He states that he will suffer irreparable loss and damage unless this application is granted and that it is in the interest of justice that this court does restrain the Creditor from filing the bankruptcy petition and does stay the statutory demand

### **The Creditor's Reply**

5. The Creditor avers that through various loan agreements signed between the parties within the period between 2016 and 2019, the Debtor owes the Creditor a principal amount of KES. 2,500,000.00 and that it was a term in the said agreements that the Debtor would repay the Creditor an agreed amount as installments within the agreed duration so as to settle the principal amount. Further, that failure to remit the agreed installment would result in a default interest rate being applied to the installments payable.

6. The Creditor contends that the Debtor failed to remit the installments leading to the principal amount being outstanding for some time now with no action from him. She stated that despite granting the Debtor indulgence last year to have this matter settled amicably, the Debtor remained elusive and ignored her calls and emails. She recalls that the Debtor finally came around on 7<sup>th</sup> February 2020 and gave a payment proposal. He promised to settle the outstanding amount in three instalments, with the first installment payable on 30<sup>th</sup> June 2020 and the balance towards the end of June 2020. The Creditor contends that there is no payment plan in place since the Debtor failed to adhere to the payment plan. She urged that if the Debtor is serious, he should take steps to settle part of the outstanding amount.

7. The Creditor rejects the Debtor's contention that the amounts demanded are inordinately high and excessive and asserts that the amount demanded is due under the various loan agreements and she reserved the right to demand full payment of the loan amount and any accrued interest if any installment remained unpaid for a period of 30 days. She reiterated that the KES. 4,295,124.98 demanded has been computed factoring in the accrued interest and penalties outstanding as at 30<sup>th</sup> June 2020.

8. On the question of the Debtor's business being affected by *Covid 19* pandemic, the Creditor states that she is aware that the Debtor has been receiving payments from the National Treasury for the lending he has done to civil servants on a check-off basis and that he received payment for goods supplied and financed by the money he borrowed from her. The Creditor maintains that the *Covid- 19* pandemic cannot be an excuse to avoid legal obligations that arose before the pandemic particularly when the Debtor had the whole of 2019 to settle the outstanding amount but failed to do so.

9. In response to the Debtor's deposition that his consultancy work in Somalia being affected by the *Covid-19* pandemic, the Creditor states at no point did the Debtor intimate to her that he was being affected.

10. The Creditor contends that the Debtor's application is only meant to delay the matter as the Debtor has unclean hands and in view of the foregoing, it is in the interest of justice that the application be dismissed with costs to the Creditor.

#### **Analysis and Determination**

11. The substance of the Debtor's plea is for setting aside the Statutory Demand under **section 26** above which grants the court discretion to stay an application by a creditor on such terms, and for such period, as the Court considers appropriate. Further, **Regulations 16** and **17** of the **Insolvency Regulations, 2016** that have been invoked by the Debtor provides in part as follows:

##### **16. Application to set aside statutory demand**

*(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.*

*(3) The debtor's application shall be in Form 7 set out in the First Schedule and shall be supported by an affidavit, which shall be in Form 8 set out in the First Schedule.*

*(4) The affidavit referred to under paragraph (3) shall—*

*(a) specify the date on which the statutory demand came into the debtor's possession;*

*(b) state the grounds on which the debtor claims that it should be set aside; and*

*(c) annex a copy of the statutory demand.*

##### **17. Hearing of application to set aside statutory demand**

*(1) On receipt of an application under regulation 16, the Court may, if satisfied that no sufficient cause is shown for granting the statutory demand, dismiss the application without giving notice to the creditor.*

*(2) The time limited for compliance with the statutory demand shall commence from the date on which the application is dismissed.*

*(3) If the application is not dismissed under paragraph (1), the Court shall fix a date and venue for it to be heard, and shall give at least seven days' notice to—*

(a) the debtor or, if the debtor's application was made by an advocate acting for him, to the advocate,

(b) the creditor; and

(c) any other person who is named in the statutory demand as the person whom the debtor may enter into communication with in reference to the statutory demand or, if more than one person is named, the first person to be named.

(4) Where the creditor responds to the application, the creditor shall serve the response upon the debtor and the Court at least three days before the date of hearing of the application.

(5) On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.

(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.

.....

(9) If the Court dismisses the application, it shall make an Order authorising the creditor to present a bankruptcy application either immediately or on or after a date specified in the Order.

(10) The Registrar of the Court shall, after the Court has made an order under paragraph (8), send a copy of the Order to the creditor. [My Emphasis]

12. **Regulation 17(6)** above outlines the grounds upon which the Debtor's application may be allowed. From his deposition, the Debtor seems to dispute the debt amount owed by claiming that amount is overstated and way on the higher side and not in accordance with any written law or legal lending measures. However, looking at the totality of the depositions and supporting evidence before the court, I find that this ground lacks merit as the ground disputing the debt is not substantial. I say so because, the Debtor has largely admitted the debt. He places more reliance on the difficulties brought about by the Covid-19 pandemic in settling the debt rather than the fact that the debt is overstated.

13. Indeed, looking at the series of email exchanged by the parties, the Debtor does not at any point dispute the debt owing on the ground that it is overstated. In fact, in his email of 29<sup>th</sup> June 2020, the Debtor expressly admits that "there is no dispute as to the amount owed to you and what am pleading for is for an extension of time". That the Creditor indulged the Debtor and accepted his proposed payment plan is not in dispute nor is the fact that he did not honour it, leaving the debt unpaid.

14. For the reasons I have outlined, I find and hold that the Debtor has failed to demonstrate that the debt is disputed on substantial grounds.

#### **Conclusion and Disposition**

15. The application dated 27<sup>th</sup> July 2020 lacks merit and is therefore dismissed with costs.

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of MAY 2021.**

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of MAY 2021.**

**JOHN M. MATIVO**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Kivuva instructed by Mckay and Company Advocates for the Creditor.

Mr Mutahi instructed by K. Macharia and Company Advocates for the Debtor.