



REPUBLIC OF KENYA

IN THE HIGH COURT -MILIMANI

COMMERCIAL & TAX DIVISION

HCCC E026 OF 2020

IN THE MATTER OF INSOLVENCY ACT. NO 18 OF 2015

INSOLVENCY (AMENDMENT) REGULATIONS

SHIELD INVESTMENTS CO.....APPLICANT

VERSUS

SIMON NGUGI GACHOMO.....RESPONDENT

RULING

STATUTORY DEMAND

The Respondent, Simon Ngugi Gachomo filed and served the Company, Shield Investments Company Ltd a Statutory Notice to pay Kshs. 1,851,000 plus interest within 21 days from service of the Notice.

The Respondent annexed e-mails and correspondence between the Parties on payment of instalments to settle the debt.

APPLICATION

By Certificate of Urgency dated 3rd August 2020, the Company through its advocates filed Application seeking the following orders;

- a. The Court to issue an order restraining the Defendant from proceeding to file the Petition for insolvency of the Company.
- b. The Statutory Demand be set aside and/or vacated and restrain the Respondent from obtaining a liquidation order.
- c. The Court to order the Respondent to render & deliver to the Applicant true, accurate and correct statements of Account for the Applicant's loan account held by the Respondent.

The Application is based on the following grounds;

- a. The Applicant borrowed and received from the Respondent moneylender through mobile transfer services, on 25th January 2017 Ksh. 1,000,000/-
- b. The Applicant paid Ksh. 1,260,000/- and interest as specified by **Clause 5.1 of the Loan Agreement** annexed to the Application.
- c. The fact that the entire loan is yet due, the Respondent served the Applicant with Statutory Demand on 10th July 2020 requiring payment of the indebted sum by the Respondent.

REPLYING AFFIDAVIT

The Respondent relied on the Loan Agreement which confirmed the Loan of Ksh 1,000,000/- at 3% of the disbursed funds at any given time as agreed by Clause 3 of the Agreement and incase of delay 1% will accrue on unpaid interest and funds in addition to the interest being accrued on disbursed funds. The Loan and interest were repaid as follows;

- a. 28/4/2017 – Ksh 90,000/- - accrued interest.
- b. 31/7/2017—Ksh 90,000/---accrued interest.
- c. 13/11/2017-Ksh60,000/- --loan repayment.
- d. 22/12/2017--Ksh 30,000/- --loan repayment.
- e. 11/2/2018--Ksh 90,000/- ----loan repayment.
- f. 20/2/2018—Ksh100,000/----loan repayment.
- g. 25/8/2018- Ksh 50,000/-----loan repayment.
- h. 28/8/2018-Ksh 200,000/----loan repayment.
- i. 21/6/2019-Ksh 200,000/----loan repayment.
- j. 16/10/2019-Ksh350,000/---loan repayment.

The Company failed to make any repayments thereafter to the time of filing the Application in Court. The amount paid was/is Ksh 1,260,000/- against the amount due and owing Ksh 2,702,508/- and hence the balance is Ksh 1,442,508/-

SUBMISSIONS

The Applicant submitted that it had paid Ksh 1,260,000/- and contends the import of **Clauses 3.3 & 3.7** on expiry of the contract after payment of the entire debt /disbursed funds and undisputed interest.

The Applicant contested the import of **Clause 3.5** on interest as interest imposed in **Clause 3.3 & 3.4**.

The Applicant relied on the cases;

Margaret Njeri Muiruri vs Bank of Baroda (Ky Ltd) 2014 eKLR

Where the Court of Appeal indicated that it would interfere and refuse to enforce an unconscionable contract which results from contract terms that are unduly harsh, commercially unreasonable and grossly unfair given the existing circumstances.

Pius Kimaiyo Langat vs Cooperative of Kenya (2017) eKLR

Where the Court of Appeal observed that it was not the business of Courts to rewrite contracts between parties, they are bound by terms of their contracts unless coercion, fraud, undue influence are pleaded and proved.

The Respondent relied on **Clause 5.1** of the Loan Agreement on the validity, extension and termination of the said Agreement which is upon repayment of entire undisputed interest and disbursed funds.

The Respondent relied on the **Clauses 3.2; 3.3; 3.7** and indicated that the loan and interest as contracted was due and owing and it is a straight forward agreement with clear terms. The Applicant failed to pay the Loan amount plus the accrued interest and penalties at the stipulated time.

DETERMINATION

From the parties' pleadings and submissions, the issue that emerges for determination is whether the Statutory Demand should be upheld or should be set aside.

Section 384 (1) Insolvency Act provides;

384. The circumstances in which a company is unable to pay its debts (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.

The Creditor issue Statutory Notice on the provisions of **Section 384 of the Insolvency Act**, whereby if the debt of disbursed funds and interest are not settled then the Respondent should be granted leave to file petition for Winding Up.

This Court considered the Application by the Applicant and the Respondent's Statutory Notice and have observed as follows;

1. The Creditor did not disclose under what legal entity or legal regulatory framework that funds were disbursed i.e. is this a legal money lending outfit whose interest rates are regulated by Central Bank of Kenya specifically under **Section 44 of Banking Act**?
2. The advocate who drew the Loan Agreement and witnessed its execution is the one representing the Applicant who is drowned in repayments of the borrowed loan/dispursed funds by overwhelming interest on disbursed funds.
3. The Interest is stipulated as follows;

a. Clause 3.2 The interest shall only accrue on the disbursed funds at any given time to the extent that if the Funds are disbursed to the Borrower by way of instalments then instalments shall be computed and based on funds disbursed to the Borrower at any given month and not the aggregate or cumulative funds disbursed.

b. Clause 3.3 The Funds or any part thereof shall be repaid by the Borrower to the Lender at the expiration of the Contract.

c. Clause 3.4 The interest shall be payable to the Lender in cash quarterly in arrears on the last business day 3 months, 6 months ,9 months and 12 months from date of the Agreement.

d. Clause 3.5 in the event of late of payment of repayment of funds under Clause 3.3 or interest due under Clause 3.4 a monthly interest of 1% will accrue on unpaid interest and funds, in addition to the interest being accrued on disbursed funds. The interest shall not accrue in a situation where the default in payment is not attributable to the acts or omissions of the Borrower.

The Court has outlined the various Clauses on repayment of the disbursed funds and interest so as to delve into the following issues;

- a. If repayments were to be paid under **Clause 3.3**, the disbursed funds or any part thereof to the Lender at the expiration of the Contract, why would interest be visited on the disbursed funds monthly at 3% Ksh. 30,000/- yet the disbursed funds were due at the close of 12 months?
- b. If the Company made Loan Repayments as listed above, and logically and reasonably the debt of disbursed funds reduced, why would interest be 3% of the original disbursed funds? Interest ought to be 3% of the outstanding amount and not the original disbursed amount which has reduced by loan repayments.
- c. Consequently, the 1% interest on unpaid interest and outstanding debt of disbursed funds ought to be calculated on the reducing debt from repayments made by the Company.
- d. If interest remains fixed at 3% of the original disbursed funds yet there has been repayment thus reducing the outstanding debt, the Company will never complete loan repayments coupled with interest 3%, 1% & penalties. This is clearly unconscionable.

4. The Court considered that the Company assets were not provided or listed /disclosed so as to enable this Court make an informed decision that between the debt outstanding and the assets the Company is unable to pay its debts.

5. There is also an avenue for the Respondent to sue for money had and received by the Company as opposed to liquidation of the Company at this stage it seems from the limited /scanty facts deposed on the Company, the liquidation seems to be premature and it is normally the last resort.

6. For the above observations, the debt is disputed on substantial grounds whereas the **Insolvency Rules 2016 Rule 17 (6)** that where the debt is disputed as shown above then the Court may not grant the onset of process of liquidation of the Company.

In **Re Matter of Rumoth Group of Companies Ltd [2016] eKLR & Kenindia Assurance Co Ltd vs Administrator Nakumatt Holdings & Anor [2018] eKLR** the court stated that;

“It is the finding of this court that the debt herein is disputed on some substantial grounds, that is, whether or not the alleged debt is due as alleged, or at all. It is my position that winding up court ought not to be preferred in a case where the Petitioner has a remedy if filing a claim in court against the company for such alleged debt.”

Also in the case of **Kenindia Assurance Company Limited vs Administrator Nakumatt Holdings Ltd & Another [2018] eKLR**, the court stated; -

“Having made that finding, it becomes clear that the threatened winding up of the Plaintiff could not proceed until the

determination of that issue is made. This is because those debts are disputed.”

DISPOSITION

The Application by the Applicant Company is granted and the Statutory Demand is stayed on the following conditions,

- a. Reconciliation of accounts and more so with regard to interest imposed on the total amount instead of outstanding debt.
- b. The Company seemed to make regular payments until 2019 and stopped by 2020. The Court judicially notices the adverse economic impact of Covid-19 pandemic. Therefore, in light of these circumstances restructuring ought to be considered.
- c. The Applicant to resume reasonable repayments of the outstanding debt as interest is revised and/or negotiated within 90 days from today.
- d. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

APPLICANT N/A

RESPONDENT N/A

COURT ASSISTANT: TUPET