



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**INSOLVENCY CAUSE NO.E027 OF 2019**

**SPIRE BANK LIMITED.....CREDITOR/RESPONDENT**

**VERSUS**

**NANAK SINGH BANSAL.....DEBTOR/APPLICANT**

**RULING**

1. The Debtor herein, **NANAK SINGH BANSAL**, filed the application dated 16<sup>th</sup> July 2019 under Section 17 of the Insolvency Act seeking orders to set aside the statutory demand dated 23<sup>rd</sup> May 2019. He further prays that the Request for Issuance of the Insolvency Notice dated 16<sup>th</sup> May 2019 and the Statutory Demand including the entire insolvency proceedings herein be struck out.

2. The application is supported by the Debtor's affidavit sworn on 16<sup>th</sup> July 2029 and is premised on the grounds that:

*1. That by way of a Guarantee and Indemnity dated 23<sup>rd</sup> June 2011 for the sum of Kshs 176, 000, 000, 00 the applicant alongside one Mr. Kirpal Singh Bansal undertook to Guarantee loan advances and financial facilities to be granted to Messrs. Associated Construction Company (Kenya) Limited (hereinafter " the Principal Debtor") by the respondent.*

*2. That subsequently, the principal debtor has continued to make payments in service of the facilities granted by the respondent and in various instances, following proposals agreed between the principal debtor and the respondent, the principal debtor has offered for sale several of its assets as well as pledged various contract award sums to the respondent to reduce the outstanding balances owed by it.*

*3. That in fact as at September 2015, by a letter dated 3rd September 2015, the respondent confirmed having recovered a sum of kshs 162, 000, 000, 00 from the sale of the principal debtor's properties L.R. No. 209/3601- Melili Road and L.R. No. Kisumu/Wathorego/2540 thereby liquidating a half of the outstanding loan and leaving an outstanding balance of Kshs 217,581,422.59 taking into account the aforesaid recovered sum.*

*4. That by the same letter, the respondent indicated that it was still marketing another property in the name of the principal debtor known as L.R. No. Kakamega/Municipality Block 2/258. The respondent further sought an update from the principal debtor on some KENHA contract payment funds as well as some additional Narok contract funds which had been pledged and assigned to the respondent to pay off the outstanding balance.*

*5. That by a further letter dated 11<sup>th</sup> November 2016 from Messrs Kale Maina & Bundotich Advocates, the principal debtor's advocates, the principal debtor acknowledged that by then, the aforesaid L.R. No. as L.R. No. Kakamega/Municipality Block 2/258 had similarly been sold thereby increasing the sums repaid from Kshs 162,000,000.00 to Kshs 186,000,000.00. The letter further indicated that another sum of kshs 19,000,000.00 had also been paid to the respondent from the sale of the principal debtor's equipments.*

*6. That vide the same letter, the principal debtor also provided an update on an apparent proposal that it had made to the respondent and which had clearly been accepted, for settlement of the outstanding loans sums and which indicated that the principal debtor had;*

*a. Completed certificates across Lamu Sewall project and Narok Road project to a tune of Kshs 100 million to be discounted by KCB Bank;*

*b. Been invited for settlement of its claims by KeNHA to a tune of Kshs 1.3 Billion.*

c. Signed an agreement with KCB Bank for restructuring of its debt and other facilities and was also discussing debt-restructuring with Bank of Africa;

d. Been invited by KeNHA to conclude formalities for the release of kshs 70 million committed to the respondent vide a letter dated 16<sup>th</sup> July 2014.

7. That additionally the principal debtor pledged new securities to the respondent being Kakamega Plot L.R. Shikulu/80 valued at kshs 5, 000, 000, 00 and Equipment –Caterpillar Bulldozer D8R valued at Kshs 25,000,000.00. All this was done by the principal debtor in proof of its intention and desire to settle all the outstanding loan sums and the proposals made therein were agreed to by the respondent.

8. That in effect therefore, the principal debtor and the respondent have always had an agreement and/or arrangement that allowed the principal debtor to be able to conduct its construction business and defray the outstanding loan sums from the awards and profits made from the its business.

9. That the principal debtor has further been making cheque payments to the respondent in service of its said loan with the latest payment being on 12<sup>th</sup> April 2019 and in the circumstances, it is clear that the principal debtor is still able and willing to make payments in service of the loan owed to the respondent for as long as it remains in business.

10. That recently, the principal debtor and the respondent have been engaged in deliberations with a view to agreeing to a proposal for payment of the outstanding loan sums out of the current contracts that the principal debtor is engaged in with various entities and in fact, the last meeting had been scheduled for 6<sup>th</sup> May 2019 but could not take off since the principal debtor's official were engaged in an arbitration hearing until 15<sup>th</sup> May 2019. The principal debtor has since been making efforts to try and reschedule the meeting and remains hopeful to this end.

11. That in the circumstances, it is evident that the principal debtor has not defaulted on repayment of the loan facilities guaranteed by the applicant who is one of its Directors and that instead, the principal debtor and the respondent have had an arrangement that has worked out very well and are in the process of agreeing on another proposal for payment which would similarly work in the interests of all parties.

12. That on the other hand, should the respondent initiate Insolvency proceedings against the applicant, this would ultimately make it impossible even for the principal debtor to secure any future contracts on the basis of requirements for prequalification and this would by extension affect both the principal debtor's as well as the applicant's ability to repay the outstanding loan facilities altogether, to every party's prejudice. As such, the orders sought herein should therefore be granted in the interests of justice and of the parties herein.

3. The creditor/respondent opposed the application through the replying affidavit of its Legal Manager, **John Wageche**, who avers that the Principal Debtor is indeed truly indebted to the Creditor and has defaulted in servicing the loan facility since May 2018 when it made a deposit of Kshs 500,000 only after the Creditor indicated its intention to take legal action against it.

4. He avers that it was an express term of the Deed of Guarantee and Indemnity dated 23<sup>rd</sup> June 2011 signed between the parties that the Debtor would unconditionally and irrevocably indemnify the Creditor against all losses, payments, costs, claims, liabilities and expenses in relation to the debt owed by the Principal Debtor.

5. He further states that the Principal Debtor made several but unfulfilled promised to settle the debt thereby leaving the creditor with no option but to petition for the Debtor's bankruptcy in order to recover the debt. He states that the Debtor is capable of settling the full debt and is simply ignoring to settle the same.

6. He further states that the creditor has suffered losses due to the outstanding debt which debt continues to accrue interest and that it is in the interest of justice that the Insolvency proceedings be allowed to continue.

7. Parties canvassed the application by way of both written and oral submissions which I have carefully considered. Counsel agreed, by consent that the submissions and ruling in this case will apply to a related case being Insolvency Petition No. E30 of 2019. I find that the main issue for determination is whether the Applicant/Debtor has made out a case for the setting aside of the statutory demand.

8. Section 17 of the Insolvency Act stipulates as follows:

**7. Creditor may apply for bankruptcy order in respect of debtor**

**(1) One or more creditors of a debtor may make an application to the Court for a bankruptcy order to be made in respect of the debtor in relation to a debt or debts owed by the debtor to the creditor or creditors**

**(2) Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made**

**(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;**

**(b) the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the**

*applicant creditors, either immediately or at some certain, future time, and is unsecured;*

*(c) the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and*

*(d) there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts*

*(3) For the purposes of subsection (2)(c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—*

*(a) the applicant creditor to whom the debt is owed has served on the debtor a demand requiring the debtor to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least twenty-one days have elapsed since the demand was served, and the demand has been neither complied with nor set aside in accordance with the insolvency regulations; or*

*(b) 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) For the purposes of subsection (2)(c), a debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable and—*

*(a) the applicant to whom it is owed has served on the debtor a demand requiring the debtor to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due;*

*(b) at least twenty-one days have elapsed since the demand was served; and*

*(c) the demand has been neither complied with nor set aside in accordance with the insolvency regulations.*

*(5) This section is subject to sections 18 to 20.*

*(6) 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.*

*(7) A debtor complies with a demand that overstates the amount owing by—*

*(a) taking steps that would have complied with the demand had it stated the correct amount owing, such as by paying the creditor the correct amount owing plus costs; and*

*(b) taking those steps within the period specified in the demand for the debtor to comply.*

9. The debtor submitted that the court has wide and unfettered jurisdiction and direction to set aside a statutory demand. To fortify this argument, reliance was placed in **Peter Munga –v- African Seed Investment Fund LLC [2017]eKLR** which it was held:

*“The court’s power to set aside the statutory demand issued under the Insolvency Act 2015 is founded under the residual powers of the court and also under Regulations 16 and 17 of the Insolvency Regulations 2016. In particular paragraph 6 of the Regulation 17 states as follows:*

*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 neither paragraph (6) is not complied 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.*

10. It was further submitted that the Principal Debtor and the Creditor are engaged in discussions geared towards settling the debt.

11. On its part, the Creditor maintained that the instant application is an attempt by the Debtor to deny it the remedy provided under the Insolvency Act (hereinafter “**the Act**”) and to frustrate a valid court process under the said Act. It was submitted that Sections 32 and 33 of the Act allows the Creditor to make an application to the court for an order adjudging the Debtor bankrupt.

12. It was submitted that the Debtor consciously executed the Deed of Guarantee and Indemnity in favour of the creditor which entitles the Creditor to the option to redeem the debt from the Guarantor/Debtor herein should the Principal Debtor be unable to make good the debt.

13. The Creditor submitted that since the Principal Debtor’s indebtedness is not disputed, there was no justifiable cause for setting aside or stopping the intended insolvency petition.

14. On its part, the Debtor argued that the Principal Debtor is an on-going concern, there was no basis for initiating the Insolvency case against the Guarantor and that the statutory demand had been issued for an ulterior motive to exert pressure on the company.

15. It was submitted that under Section 18 of the Act, a Statutory Demand can only be issued if the Debtor appears to be unable to pay the debt. For this argument, counsel cited the case of **Invesco Assurance Company Ltd V Dama Charo Nzai & 57 Others**[2019] eKLR wherein it was held:

***“The subsection (2)(c) referred to in subsection (3) provides that an application to the court for a bankruptcy order can only be made if at the time the application is made” the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay.”***

16. I note that it is not disputed that the Principal Debtor is truly indebted to the Creditor and that the Debtor herein to the tune of Kshs 172,646,620.59 as at 15<sup>th</sup> April 2019 and that the Debtor executed a Guarantee and Indemnity Deed on 23<sup>rd</sup> June 2011 wherein he undertook to unconditionally and irrevocably Indemnify the Creditor against all losses payments, claims and liabilities in relation to the Principal Debtor’s debt.

17. I note that even though the Debtor contends that the Principal Debtor is an ongoing concern capable of settling the debt and that there were ongoing talks between the parties geared towards such settlement, no material was placed before this court to show that any attempts had been made by the Principal Debtor to settle the debt even after the service with the notices which debt automatically continues to accrue interest.

18. Guided by the decision in **Peter Munga** (supra) I find that the power granted to this court to set aside statutory demand is a residual/discretionary power also recognized under Regulation 16 and 17 of the Insolvency Regulations. It is trite law that discretion any powers must be exercised judicially and only in the most deserving case.

19. In the present case, the Principal Debtor conceded that the Principal Debtor is capable of settling the debt, however, no material was placed before this court to prove such capability.

20. In the circumstances of this case and having regard to the findings and observations that I have made in this ruling I find that no reasons have been presented by the debtor to warrant the setting aside of the statutory demand or to stop the intended insolvency proceedings.

21. In sum, I find that the application dated 16<sup>th</sup> July 2019 is not merited and the order that commends itself to me is the order to dismiss it with costs to the Creditor. This ruling will apply to the related case, being E30 of 2019.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of May 2020 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. Kinuthia for Nyachoti for the applicant

Miss Kamunya for respondent.

Court Assistant: Sylvia