



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY NOTICE NO. E 019 & 020 OF 2019

SHAHID DIAMOND LALJI.....DEBTOR

DIAMOND HASHAM LALJI.....DEBTOR

AND

SPIRE BANK LIMITED.....CREDITOR

RULING

By a certificate of Urgency application dated 13th February 2020, filed on 14th February 2020, the Debtor/Applicants urged the court to be heard on priority basis on the following grounds;

a) The Creditor served the Debtors with a statutory Demand dated 26th September 2019, on 24th January 2020. The twenty-one (21) days' notice expired on Friday, 14th February 2020 and the Creditor would advertise at any time thereafter in contravention of express provisions of the **Insolvency Act No. 18 of 2015**. Such advertisement would cause irreparable damage to the Debtors and companies where they are Directors.

b) The Creditor's calling up of the Debtors' Personal Guarantee and thereafter commencing of the present bankruptcy proceedings is premature, unlawful and in bad faith. It is only intended to abuse the Court's process and for embarrassing the Applicants.

c) That it contravenes the express agreements between the Creditor herein on the one hand and Maize Milling Company Limited, Trident Insurance Company Limited and Capital Second Limited, being its Principal Debtors and Chargors, on the other hand.

d) The debt being demanded is the subject of Nairobi **HCCC No. 324 of 2017 (Maize Milling Company Limited & Another –vs- Spire Bank Limited & Another)** and **Machakos HCCC No. 24 of 2019 Maize Milling Company Limited & Another –vs- Spire Bank Limited & Another)** which are active, the applications having progressed substantially and Rulings Delivered by the Hon. Justice George Odunga and Lady Justice Maureen Odero.

e) The Creditor is fully secured and, issued Statutory Notices against the Chargors for the very same debt. Pursuant to its Auctioneer's advertisement in the Daily Nation Newspaper which states that it is auctioning "PART" of the secured Property, it proceeded to sell, by public auction, the entire of **Floor No. 2 Capitol Hill Towers** on Property L. R. NO. 209/9769, at **Ksh 61,600,000 Million** being half the amount indicated on its own undervaluation of the said property, stated as Ksh 120,000,000/- (see Amended Statutory Demand). In a valuation commissioned by the Debtor dated 6th June 2019, by Lloyd Masika, the Property was valued at Ksh 140,000,000. This illegal sale is not disclosed in the Amended Statutory Demand or affidavit in support thereof.

f) **Rule 16(2) of the Insolvency Regulations 2016** provides that, **"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."**

In the application to set aside Statutory Demand pursuant to the **Insolvency Act and Rule 16 of the Insolvency Regulations 2016**, the Debtors/Applicants sought for Orders;

a) That there be a stay of proceedings, including any advertisement, pending the hearing and determination of this application.

b) That the statutory demand dated 26th September 2019 be set aside.

REPLYING AFFIDAVIT

The application is opposed vide an affidavit of John Wageche, Legal Officer at Spire Bank Limited - the Creditor/Respondent (the Bank). He stated that the Personal Guarantors/Applicants herein had filed the application in bad faith as they had maliciously and intentionally misled this Court by concealing material facts.

He averred that pursuant to a facility letter dated 20th May 2013, the Bank advanced credit facilities to Maize Milling Company Limited. The Principal amount advanced was **Ksh 146,413,000.00** excluding interests. Marked **JW1** is a copy of the said facility letter dated 20th May 2013.

The said loan facility was secured by various securities including a charge over a portion of Floor No. 2 of Capitol Hill Towers situated on L.R. No. 209/9769 and over L.R. No. 19841 (I.R 20136/29) located in Mavoko.

He asserted that the said loan facility was also secured by personal Guarantees of **Diamond Hasham Lalji** and **Shahid Diamond Lalji** (the Applicants/Personal Guarantee herein) who duly executed a deed of Guarantee and indemnity dated 2nd May 2013. Marked "**JW2**" is a copy of the said deed of Guarantee and Indemnity dated 2nd August 2013.

He stated that contrary to the Applicants' allegations, **Nairobi HCCC No. 324 of 2017 (Maize Milling Co. Ltd & Another vs Spire Bank Limited & Another)** was withdrawn with costs on 4th July 2019. In the said matter, Maize Milling Company Limited had sought injunctive orders against the Bank to restrain the statutory sale of the charge portion of Floor No. 2 of Capitol Hill Towers Situated on L. R. No. 209/9769 (security property) but failed to secure the said orders.

Following the said failure to secure the injunctive orders; the bank proceeded to advertise for sale of two properties given as collateral by the Applicants therein (Maize Milling Company Limited) and on 5th November 2019, sold only one of the secured property (the portion of floor No. 2 of Capitol Hill Towers situated on L. R. No. 209/9769) for a value of Ksh 61,600,000.

Subsequently to the failure of the aforesaid suit (**Milimani HCCC No. 324 of 2017**), Maize Milling Company Limited filed another suit, Milimani **E 249 OF 2019 – Maize Milling Company Limited & Capitol Second Limited –vs- Spire Bank Limited & Another** wherein the Applicant sought injunctive reliefs *inter alia* restraining the Bank from selling the Applicants' charged property.

He stated that the aforesaid suit despite being still active in court, the substratum of the matter is already overtaken by events as the charged property subject of the suit was already sold on 5th November 2019.

He stated that the Principal Debtor, Maize Milling Company Limited was fully aware of the circumstances and the true position in regard to the statutory sale of the portion of floor number two of Capitol Hill Towers situated on L. R. No. 209/9769. Indeed, there was no suit filed to challenge the said sale or set it aside.

Further that the alleged suit in **Machakos HCCC No. 24 of 2019 – Maize Milling Company Limited & Another vs Spire Bank Limited** was similarly substantially overtaken by event as the trial court on 9th September 2019 dismissed the Notice of Motion application by Maize Milling Limited that sought *inter alia* injunctive reliefs restraining the bank from exercising its statutory right of sale over the Mavoko property (the second security) which is currently valued at approximately Ksh 25,000,000 a trivial amount compared to the current accrued debt of **Ksh 164,808,531.90** (as at February 2020).

He stated that upon depletion of the secured properties aforementioned, the bank would still be precariously positioned and thus impelled to recover the outstanding amount of Ksh 164,808,531.90 from the personal Guarantors, including the Applicants herein.

The Personal Guarantor was truly indebted to the Bank and the Bank was fully entitled to recover the said debt. The Application herein is a misguided ploy by the personal Guarantor to evade his obligation to pay the debt owed to the Bank and thus derail the Bank's process of recovery of this said debt.

He stated that the Bank had a right to lodge a bankruptcy petition against the Applicants herein/Personal Guarantors because despite having been served with the amended statutory demand to settle the outstanding debt, they were yet to settle the same or compound it to the satisfaction of the Bank.

SUPPLEMENTARY AFFIDAVIT

The Debtors in response to the Replying Affidavit by the Creditor, filed a supplementary affidavit dated 11th March 2020, averred that they had made full disclosure in their application and also attached relevant documents. That the Creditor's Amended Statutory Demand was malicious, unlawful and in bad faith as evidenced by the contents of the Replying Affidavit.

In its amended Statutory Demand, the Creditor claimed that Floor No. 2 of Capitol Hill Towers situated on property L. R. 209/9769 is valued at Ksh 120,000,000/-. Paragraph 8 of Creditor's Replying Affidavit now alleges that it was only a portion of the Floor, which was sold on 5th November 2019 at Ksh 61,600,000 Million, which was charged to the Bank. This unlawful sale, was at a gross undervalue and below the forced sale value, was done after the filing **Milimani E 249 OF 2019 – Maize Milling Company Limited & Capitol Second Limited –vs- Spire Bank Limited and Another**, and not before as alleged.

They averred that it was not true that substratum of the suit was "already overtaken by events" and that "there was no suit filed to challenge

the said sale or set aside” as alleged since, from the Creditor’s own affidavits, Auctioneer advertisements and the Amended Statutory Demand, indicate that only a portion of the charged property had been sold. Indeed, the Plaintiffs in the said suit had already lodged an application to amend their Plaint. The Creditor’s deliberate non-disclosures, suppression of information and severe oscillation continue to inflict significant damage to the Debtors’. Marked “SDL” is a copy of the Plaintiffs’ application to amend their pleadings in **Milimani E249 OF 2019 – Maize Milling Company Limited & Capitol Second Limited –vs- Spire Bank Limited and Another.**

The Creditor served its Amended Statutory Demand, filed on 23rd September 2019, upon the Debtors’ advocates on 24th January 2020. This was over four months after filing pleadings. In it, the Creditor did not disclose that it had already unlawfully sold a portion of the Charged property, whose value in the Amended Statutory Demand is placed at Ksh 120,000,000/-, was sold at Ksh 61,600,000/-. No explanation is provided for this glaring illegality.

They asserted that the Creditor, despite being presented with clear evidence, while assuming that it can misuse its stronger position, refused to see that the present proceedings are contradictory and an abuse of this Court’s process.

DEBTORS/APPLICANTS SUBMISSION

The Debtors’ submitted that **Regulation 17 (6) (a, b, c & d) Insolvency Act** provide factors that the Court should consider when determining the application for setting aside the statutory demand.

In **Peter Munga vs African Seed Investment Fund LLC [2017]eKLR**, when referring to **paragraph (d) of Regulation 17 Insolvency Act**, the High Court stated as follows;

“It is evident when one reads paragraph (d) above that the grounds for setting aside of a statutory demand are not limited by statute. Paragraph (d) opens it up and gives the court spacious discretion. It is certainly not possible to foresee all the instances which may properly fall under paragraph (d) of Regulation 17. My view is that when asked to set aside a demand on any other ground other than the grounds stated under paragraphs (a) (b) and (c), the question becomes whether the applicant – debtor can show a substantial reason akin to the reasons under the preceding three paragraphs.... The test, which is not necessarily conclusive, is whether it would be unjust for the statutory demand to give rise to insolvency proceedings in the particular case.”

In **Mwambeja Ranching Company Limited & Another vs Kenya National Corporation [2019]eKLR**, the Court of Appeal agreed with the High Court where it had held, inter alia, as follows;

“That the Respondent therein had an obligation to exercise a duty of care to the charger by obtaining the best reasonable price at the time of sale... and by relying on a valuation report that was more than one year old at the date of sale, a requirement under Rule 11(1) (x) the Respondent breached a statutory duty. Further the Court of Appeal went ahead and stated as follows, ‘Despite the reduction in the market value, the sum did not meet the requirement that the selling price should not be less than 25% of the property’s market value. The relevant provision when exercising the power of sale, are set out in section 97(1) of the Land Act, 2012.

The Debtors submitted that by selling the 2nd Floor of Capitol Hill Towers at Ksh 61,600,000/-, as alleged, when a Valuation Report by Llyod Masika of 6th June 2019 had valued the property at Ksh 140,000,000.00 three (3) months prior to the unlawful sale and its own Amended Statutory Demand places a value of Ksh 120,000,000.00, the Creditor herein breached its’ statutory duty/obligation to obtain the best price reasonably at the time of sale, and hence, the said sale was done in complete breach of the law.

The Debtors submitted that the Creditor claimed that it sold a portion of Floor Number 2 of Capitol Hill Towers on L. R No. 209/9769 on 5th November 2019 and therefore the said property cannot form the substratum of any proceedings before the Court. (paragraph 8 and 10 of the Replying Affidavit). However, in its Amended Statutory Demand dated 26th September 2019, the Creditor stated that it holds a charge over Floor No. 2 of Capitol Hill Towers situated on L.R. No. 209/9769 valued at approximately Ksh 120,000,000.00 as one of the securities over the Debtor. In its Replying Affidavit at paragraph 5 and 8, the Creditor claims that its security comprises of a “... portion of Floor Number 2 of Capitol Hill Towers...”, and that it only sold a portion of the said property for Ksh 61,600,000.00. However, at paragraph 10, it admitted that the charged property was already sold on 5th November 2019. Paragraphs 11 and 12 of the Creditor’s Replying Affidavit best describe the conundrum that has been caused by the Creditor. It does not explain where it took the balance of the charged property, (13,310 – 6498 =6,812 square feet) and does not explain the sale at Ksh 61,600,000/-

The Debtors submitted that the Creditor was in a bind and was intentionally misrepresenting facts in order to pursue its otherwise unlawful agenda. This Court in view of the clear breaches, is left with no choice but to set aside the offending Amended Statutory Notice which contravenes various legal provisions. In **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] EKLR**, the Court of Appeal at paragraph 28 stated and held as follows;

“A party cannot change the nature and character of the suit property and then plead the change as a defence to an action in relation to the said property; this is more so when the party had actual knowledge of existing claims to the property. We hold that the registration of L.R. No. 6324/10 in the name of the Respondent under the Registered Land Act cannot be used to defeat any claims that existed prior to the creation and registration of this title. Tracing is an equitable remedy and equity shall trace the suit property for ends of justice to be served. The notion that the suit property no longer exists is not tenable. We find that the suit property exists and is presently registered as L.R. No. 6324/10 in the name of the Respondents. All and any orders made by this court shall and are hereby declared to be in respect to the property now known as L.R. No. 6324/10 in the name of the Respondent. The Respondent in supporting the Judgment by the High Court is admitting and acknowledging that the suit property is L. R. No. 6324/10.”

In Insolvency Petition No. 9 of 2018; in Re Sucasa at Mombasa Road Limited [2019]eKLR, at paragraph 35, after evaluation the constituents of a valid statutory demand, at paragraph 34 of the Ruling, the High Court stated that a statutory demand can be set aside if it was made in error.

The Amended Statutory Demand Contravenes Mandatory Provisions of Law

Rule 15(5) of the Insolvency Regulations provides that

“The statutory demand specified in sub regulation (3) shall be served on the debtor at least twenty-one days before the filing of the petition.”

The Amended Statutory Demand was not served on the Debtor as required by this mandatory regulation. In Re Sucasa at Mombasa Road Limited [2019]eKLR, the Court, at paragraph 38 noted that

“... the requirement of a statutory demand is mandatory. Therefore, the non-compliance therefore renders the petition invalid.”

The Statutory Demand was issued prematurely

The Debtors submitted that the Creditor issued the statutory demand prematurely with the aim of frustrating the Debtors. This is because the Creditor was fully secured and had already commenced the sale of second properties, commencing with the impugned sale at undervalue.

Further, there are two ongoing cases over the security properties. The Creditor acknowledges that Milimani E249/2019 – Maize Milling Company Ltd & Capitol Second Limited vs Spire Bank Limited & Another is still active in court where the Debtor is challenging the sale of Floor No. 2 of Capitol Hill Towers on L. R. No. 209/9769. Indeed, the Plaintiff in that suit has filed an application to amend its Complaint therein as shown in the Supplementary Affidavit of the Debtor herein. At the time of filing these submissions, the Amended Complaint had been filed, seeking to inter alia, set aside the illegal auction. The Defendant also filed its Amended Defence.

CREDITOR’S WRITTEN SUBMISSIONS

a) Whether the Respondent is entitled to recover debt arrears from the Debtor

The Creditor submitted that the Debtors alleged that the Creditor had prematurely, unlawfully and in bad faith commenced bankruptcy proceedings against the Debtors. The Creditor’s action against the Debtor is purely within the prisms of law and devoid of any *mala fides* as alluded to by the Debtor.

The Debtor voluntarily and willingly duly executed a Deed of Guarantee and Indemnity binding himself to pay on demand any amount due and owing from the Principal Debtor to the Creditor.

The Court of Appeal in the case of Robert Njoka & Another vs Barclays Bank of Kenya Limited & Another [2017]eKLR, defined a guarantee as follows;

“A guarantee by definition is a pledge by a person (guarantor) other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance.” The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty.” emphasis ours.

The High Court in Ebony Development Company Ltd vs Standard Chartered Bank Ltd (2008) eKLR, when deciding on the obligation of a guarantor:-

“The obligation of guarantor is clear. It (sic) becomes liable upon default by the principal debtor ... it is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.”

The Court of Appeal landmark case of Mwaniki wa Ndegwa vs National Bank of Kenya Ltd & Another [2016] eKLR, quoted the Halsbury’s Laws of England 4th Edition Vol. 20 paragraph 194 page 124 where the obligation of a guarantor is clearly and succinctly posited as thus:

“On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal...” emphasis ours.

In the case of Ecobank Kenya Limited vs Francis Tole Mwakidedi [2018]eKLR, in dismissing the Debtor’s Application to set aside a statutory demand, this Court stated as follows;

“15. 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 mechanism available to it before

bringing up an application for bankruptcy, nor can a creditor under section 14 of Insolvency Act move the debtor who is insolvent to seek an alternative to bankruptcy as indeed it is the duty of the debtor who is insolvent to seek alternative to bankruptcy. I therefore find no merit in ground (b) of the Preliminary Objection.”

See also Peter Munga vs African Seed Investment Fund LCC [2017]eKLR. As was stated by the Court of Appeal in Barclays Bank of Kenya Ltd vs Kepha Nyabera & 191 Others [2013]eKLR,

“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.” [emphasis added]

42. I agree with this general rule that a secured creditor is not obliged to resort to his security for recovery of the debt. Indeed, the above broad proposition in law is sound and makes commercial sense. No creditor would otherwise carry the business of secured lending if he was to be liable to the borrower or any sureties on the order of security to resort to. The creditor ought to have a free hand, when to act and on which security, without direction by the debtor, sureties or the court.” Emphasis ours.

In addition to the submissions above, court have in numerous decisions ruled out personal service where a party by their own action depict knowledge of the order or document required to be served upon them. In the case of Basil Criticos vs Attorney General and 8 others [2012] eKLR, Hon. Lenaola J. pronounced himself as follows;

“...the law changed and it stands today knowledge supersedes personal service...where a party acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary.”

DETERMINATION

After consideration of the pleadings and submissions by parties the issue is whether the (amended) statutory notice ought to be set aside and the instant proceedings stayed or not.

The Applicants, Diamond Hasham Lalji & Shahid Damond Lalji personal guarantors of the principal debtor, Maize Milling Company Ltd executed personal and continuing deed of guarantee on 2nd August 2018, binding themselves to pay on demand all money due and owing and discharging liabilities owed to the Bank by the Company. They do not challenge validity of the guarantee.

The statutory demand served to Diamond Hasham Lalji & Shahid Damond Lalji through the advocates on record dated 26th September 2019 indicated the outstanding debt at Ksh 195,556,594.26. The Creditor secured the debt by charge over Floor No 2 of capitol Hill Towers situate on LR 209/9769 valued at Ksh 120,000,000.00 and over LR 19841 located in Mavoko whose value I Ksh 30,000,000. The unsecured amount is Ksh 45,556,594.26.

Section 384 (1) Insolvency Act [also Regulation 77b of Regulations 2016] provides;

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.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company’s assets is less than the amount of its liabilities (including its contingent and prospective liabilities).

The principal debtor, Maize Milling company defaulted in servicing the loan facility advanced by the Creditor Bank as shown by demand & notice to enforce personal guarantee of 25th February 2019. The Creditor, Sphire Bank sought to realise its debt through statutory power of sale over charged property

Floor No 2 of Capitol Hill Towers situate on LR 209/9769 valued at Ksh 120,000,000.00 and over LR 19841 located in Mavoko whose value at Ksh 30,000,000.

The process and outcome of the sale of charged properties is in focus in separate proceedings as disclosed by parties Milimani E 249/2019 & Milimani HCCC NO. 324 OF 2017. The Debtors challenge the statutory demands within the ambit of Peter Munga vs African Seed Investment Fund LLC[2017] eKLR supra, that the Court has jurisdiction to consider grounds beyond what is stipulated by **Regulation 17 (d) of Insolvency Regulations 2016**.

The debtors raised breach of statutory notices preceding the impugned sales of charged properties, alleged misrepresentation of facts by Creditor to mislead the Court and gross undervaluation of charged and secured properties as stated in the statutory demand.

The thrust of the Debtor's claim is that the description of charged property sold is contradictory, in part of pleadings/Replying Affidavit what was sold was Floor No 2 of Capitol Hill Towers on LR 209/9769 and in the amended statutory notice it is deponed part of Floor No 2 of Capitol Hill Towers on LR 209/9769 and hence misleading and the issue ought to be settled first on the said sale value and proceeds before the Company is declared insolvent.

These issues relate to execution to recover outstanding debt by the Company through sale of charged/Secured Assets. The issues are the subject of a live matter ***Milimani E249/2019 Maize Milling Company Ltd & Capitol SoundLtd vs Sphire Bank Ltd & Anor.*** It is not prudent for this Court to conduct proceedings the subject of another case fully disclosed to this Court by Parties. Secondly parties have not presented/ produced evidence to aid this Court determine this issue and it is not pleaded in the instant application. The parties shall have an opportunity to canvass and ventilate the issues regarding the notices, sale, value and proceeds of charged suit properties in that case.

In this Court, is the statutory demand legal & valid?

The debtors have not contested debt outstanding by the Company to the Creditor, apart from contesting the process of realization of the debt by Creditor through statutory power of sale over charged properties, the Debtors have not shown how directly or indirectly as directors and guarantors of the Company, they have made efforts to reduce liability, they have not disclosed any payments made by the Company to the Bank to reduce/offset the debt. The court finds that the Company breached the terms of loan facility. In the absence of any evidence of payments proposals for adjustments and/or restructuring; it is basis to confirm, either the Company refused or cannot pay or settle the outstanding debt and hence the statutory demand by virtue of **Section 384 of Insolvency Act** was rightfully issued.

The Debtors contest service of the Statutory Notice 21days before petition is filed/served. The Debtor submitted that the statutory demand was not served in compliance with **Rule 15(5) of Insolvency Regulations** and referred to the case of ***Re Sucasa [2019] eKLR supra.*** Yet in the same breath the Debtor submitted that the statutory demand was issued prematurely with the aim of frustrating the Debtors as the Creditor is fully secured and has proceeded with execution, in terms of the impugned statutory power of sale. So it means that the Debtors were duly served or had knowledge of the matter as the statutory demand was amended and were aware of the statutory demand served earlier. On whether, the issue of the debt being fully secured, the fact is contested as shown by Creditors pleadings;

“the outstanding debt at Ksh 195,556,594.26. The Creditor secured the debt by charge over Floor No 2 of capitol Hill Towers situate on LR 209/9769 valued at Ksh 120,000,000.00 and over LR 19841 located in Mavoko whose value I Ksh 30,000,000. The unsecured amount is Ksh 45,556,594.26.”

The creditor exercised statutory power of sale to realize the debt

The sale is contested and the amount due from the Company remains due and owing. No evidence of payments by the Company to the bank to reduce indebtedness is/was presented.

The Court considers the following cases to buttress the point that proof of indebtedness crystalizes process of execution to realize outstanding debt by legal processes provided by law and under the contract of loan facility and/or guarantee.

In ***Ecobank Kenya Limited vs Francis Tole Mwakideli [2018]eKLR***, the court held as follows;

“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 not an abuse of the court process as the creditor is not obliged to exhaust other recovery mechanism available to it before bringing up an application for Bankruptcy...”

The Court of Appeal in ***Prideinn Hotels & Investments Limited vs Tropicana Hotels Limited [2018]eKLR*** held as follows;

“There is no requirement under the Insolvency Act or the Companies Act which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the Insolvency Act which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellants has been given adequate time, opportunity and indulgence.”

The debtors submitted that the Court has discretion to consider other grounds other than those outlined in **Regulation 17 (6)** as observed by the Trial Court Onguto J in ***Peter Munga vs African Seed Investment Fund LLC supra.*** In the case of ***Kwale International Sugar Co Ltd vs Epc Builders Ltd & 2 Others [2020] eKLR*** held;

“The reason I have set out the aforesaid provisions is to show that to the extent that the Company relied on Regulations 16 & 17 that relates to bankruptcy of natural persons, in the instant application it is incompetent and lacks merit as Regulations 77 & 78 of Insolvency Regulations that are applicable for liquidation of Companies does not contain a corresponding provision for setting aside of statutory demands issued to Companies.”

Regulations 16 & 17 of Insolvency Regulations that set out grounds for setting aside statutory demands are not applicable with regard to liquidation of Companies but for bankruptcy. Without prejudice, the conditions provided by **Regulation 17 (6) of Insolvency Regulations**,

2016 have not been met either by the Debtors. A statutory demand maybe set aside if the Debtor has a counterclaim, set off or cross demand that equals or exceeds the amount of debt in the demand; or the debt is disputed; the Creditor holds some security in respect of the debt claimed in the demand and/or the Court is satisfied on other ground that the demand ought to be set aside.

In the instant case, there is no dispute of debt owed by the Company to the Creditor Bank, the contested issues are with regard to realization of the debt through the impugned statutory power of sale. If interest were contested, the principal amount remains due and owing. It is also admitted by the Creditor and Debtors that Company assets were charged but there is an amount not secured.

The Creditor relied on Clause 1 of deed of guarantee and indemnity that stipulates;

The guarantors will pay to the Bank on demand all money and discharge obligations and liabilities, whether actual or contingent, now or hereafter due, owing or incurred to the bank by principal debtor in whatever currency denominated whether on any current or other account

Clause 10 of Deed of Guarantee stipulates;

The guarantee is in addition to and shall not merge with or otherwise prejudice or affect any contractual right, remedy, guarantee, indemnity security, or judgment and maybe enforced notwithstanding the same or any other bill, note, mortgage, charge, pledge or lien now or hereafter held or available to the bank.

These are provisions of deed of guarantee contracted by the parties and each party is bound these terms and ought to comply.

The deed of guarantee of 2nd August 2018 is duly executed by parties to the guarantee. Loan Facility letter of 20th May 2013 is also annexed by the Creditor. It is duly executed by lender borrower and guarantor (the creditor herein is the present bank's predecessor Equatorial Commercial Bank) There is a letter of demand dated 25th February 2019 against Principal debtor Maize Milling Company Limited from Shire Bank of Ksh 195,556,594.26/-

These documents attest to advancement of loan facility by Creditor to Debtor. The Debtors failed to present evidence of payments made to reduce the debt outstanding. Despite demand before the statutory notice was issued no payment or proposals were made by Debtor to the Creditor. The statutory power of sale of secured properties is challenged in a different forum/court. The Debtors executed the Deed of Guarantee and are bound by its terms. The statutory demand crystallized.

I find no legal basis to set aside the statutory notice.

DISPOSITION

- 1. The debtors application filed on 14th February 2020 seeking statutory notice and debtor's personal guarantee to be set aside is denied/dismissed with costs.**
- 2. The contest/challenge of impugned statutory power of sale of charged properties of the principal debtor shall be dealt with in existing cases Milimani E249/2019 Milimani 324 of 2019.**

DELIVERED DATED SIGNED IN OPEN COURT ON 23RD NOVEMBER 2020

M.W. MUIGAI

JUDGE

**IN _____ THE _____ PRESENCE _____ OF;
MR. OMWENGA FOR THE CREDITOR**

WILBUR ANTONY & CO. ADVOCATES FOR DEBTORS -N/A

COURT ASSISTANT - TUPET