



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

INSOLVENCY PETITION NO. 7 OF 2016

IN THE MATTER OF GEM CM CONSTRUCTION LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT NO. 7 OF 2016

MARTIN KINOTI KINYUA.....CONTRIBUTORY/APPLICANT

-VS-

JAMII BORA BANK.....PETITIONER

AND

GEM-CM CONSTRUCTION LIMITED.....RESPONDENT

RULING

1. The application before Court is dated 1st April 2019 has the following prayers;-

1. That the Mr. Martin Kinoti Kinyua be granted leave to enjoin, file and serve the Application herein as a contributory herein to the company.
2. That the contributory's advocate be granted leave to file and serve notice of appointment /change of advocate upon all parties and the same be deemed as properly placed on record.
3. That this Honourable Court be pleased to order a stay execution of the Ruling dated 2nd November 2018 pending hearing of this Application.
4. That the Court be pleased to rescind/review the liquidating Order against GEM-CM Construction Company Limited made on the 2nd November 2018.
5. That the costs of this application be provided for.

2. These proceedings, which is an Insolvency Petition, were presented to Court on 28th October 2016. Jamii Bora Bank Limited (Jamii Bora) sought that GEM CM Construction Limited (**the Company**) be wound up by order of Court for failing to pay or satisfy the sum of Kshs.13,126,050.00 as at 28th June 2016.

3. Upon hearing the Petition, the Court made a Ruling on 6th July 2018 in which it concluded as follows;-

5. Given that liquidation of a Company is really the death knell of a Company and is obviously a drastic Order, this Court is reluctant to make such an Order unless it is certain that it is the only appropriate Order to make. So as to satisfy myself fully as to which way to go, I direct that the parties furnish this Court with affidavit evidence as to whether item 7 of the Consent referred to in paragraph 3 herein was effected and whether the debt owed by the Company to the Bank is secured. And if so, the nature and details of the security and why they have not been enforced. The Court shall thereafter make its final orders on the Request for liquidation.

4. Parties herein filed further affidavits whereupon the Court made another Ruling on 2nd November 2018 allowing the liquidation of the company. As would be clear from the decision, one of the reasons the Court made that drastic order was because there was no evidence that the Company's debt to the Bank had been secured.

5. The Motion before Court is brought by Martin Kinoti Kinyua who is a contributory to the company. He explains that on lodging a complaint about this matter with Central Bank, the Bank wrote to Central Bank confirming that the facility was secured by a first legal charge over property No. LR. 4953 V /31 in the name of Gatoka Limited. In turn Central Bank passed this information to the lawyers of the company.

6. The Bank responded to the Application through a Replying Affidavit sworn by one Erick Akumu. The Bank reiterated that the facility is unsecured and insisted that the issue had been litigated upon and determined in the Ruling of 2nd November 2018.

7. In a further affidavit of 23rd September 2019, Mr. Akumu displays a copy of the charge registered on 16th October 2012 over LR. No. 4953/V/31 and makes the following averments;

7. Indeed, the documents produced by the Applicant being the offer letter dated 25th August 2015 and a copy of the search confirm the Bank's position that there is no charge to secure the Company' debt with the Bank for the following reasons:-

a) It is clear from the offer letter dated 25th August 2015 intended to have a Charge of Kshs.10,000,000.00 over LR 4953 owned by Gatoka Limited supported by consent of the Land Control Board, a fresh valuation, director's guarantee for Kshs.10,000,000.00 and a corporate guarantee from Gatoka Limited supported by extract of minutes containing the board resolution to guarantee the above loan.

b) However, no such documents were provided contrary to the intention of the parties. Indeed, for a facility to be secured by a third party charge, the owner of the property must consent and Gatoka Limited being a company, they had to present extract of minutes containing Board Resolution.

c) The offer letter dated 25th August 2015 referred to a charge of Kshs.10,000,000.00 but the registered existing charge by Gatoka Limited is for Kshs.12,000,000.00 registered in the year 2012. A copy of the charge dated 16th October 2012 is at page 1 to 25 of the exhibit and the Borrower is not the Company in liquidation.

d) If a security was to be registered to secure the Company's facility, a further charge or a variation of charge would have been registered to vary the Borrower and amount of the charge and being a third party security, the owner of the property did not provide guarantees and any board resolution that their property would serve as security.

8. Emerging from the arguments presented by Counsel for the parties herein is that this Court would be entitled to review its Ruling of 2nd November 2018 if in fact there was discovery of a new issue of decisive nature. In that event the provisions of Order 45 Rule 1 of the Civil Procedure Rules would be applicable. It provides;

[Order 45, rule 1] Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

9. I will proceed on that basis.

10. In the first Ruling of 6th July 2018, this Court was explicit that it would be reluctant to declare the Company insolvent if the unpaid debt upon which the plea for insolvency was pegged was a secured debt. The Court then invited parties to provide proof or otherwise of security.

11. In response, the Bank through Christine Wahome deponed as follows:-

“(5) The loan advanced to the company by the Bank is not secured by any charge or debenture whatsoever.

(6) If the loan was secured, the Bank would have already taken steps to enforce the security before seeking to have the company wound up”.

12. On its part the Company, through an affidavit of Martin Kinoti, stated:-

7. The offer letter dated the 7th January 2015 has the last item on the first page titled as “Collateral”. (*Annexed hereto and marked as “MK-3” is a copy of the letter dated 7th January 2015*).

8. Indeed clause 4 under the said heading of “Collateral” patently presents the first line of security which are:-

- a) A fixed deposit of Kshs.20,000,000.00 I.N.O Chania Gardens Limited (owned by Mr. James Gacheru, the then Chairman of Jamii Bora Bank)
- b) A duly executed letter of set off by Chania Gardens Limited in respect to the fixed deposit amount.
- c) Lien over the fixed deposits amounts for the entire period of the facility in favour of the Bank.
- d) Original fixed deposit receipt to be held by the Bank for the entire loan tenor.

13. The Company emphasized that it was expected that the Bank would ensure the securities were in place before disbursing the loan.

14. Satisfied that, although there was intention to create a charge, the evidence available did not reveal actual creation of the charge, this Court proceeded to find in favour of the Bank.

15. So is there new discovery that the debt is indeed secured?

16. On making certain complaints to Central Bank, Central Bank wrote to the lawyers of the company on 14th March 2019. The relevant part is reproduced below:-

The Bank indicates that an amendment of collateral and guarantors was made through an offer letter dated April 15, 2015 signed by the directors of GEM CM Construction Limited and Jamii Bora Bank officials. This in effect substituted the fixed deposit with a first legal charge over property No. LR 4953/V/31 (I.R 7795) Uhuru Street, Thika Town for Kshs.10,000,000.00 in the name of Gatoka Limited. The Bank has also indicated that the fixed deposit period had also expired as it was for three months running from January 2015 to March 2015.

17. Central Bank understood the Bank to be saying that the debt was duly secured. The Bank (through the affidavit of Erick Akumu sworn on 21st May 2019) explains that the communication of Central Bank to the Company was on the basis of its response of 7th March 2019. A letter from the Bank to the regulator which, in my view, is of critical importance. The relevant part reads:-

GEM CM Construction Company applied for an overdraft with Jamii Bora Bank on 7th January 2015. The facility was granted and the loan was secured by;

1. Fixed deposit of Kshs.20,000,000.00 in the name of Chania Gardens Limited supported by:-

- a) Duly executed letter of setoff.
- b) Lien over the FDR to the entire period of the facility.
- c) Original fixed deposit receipt to be held by the Bank for the entire loan tenure.

2. Duly executed corporate guarantee of Kshs.10,000,000.00 by Chania Gardens Limited supported by extract minutes and board resolution to guarantee the said facility.

3. Fixed and floating debentures over the company (GEM CM) and other assets supported by:-

- i Valuation over the company assets.
- ii All risk insurance cover, limited interest duly noted thereupon, by an insurance company acceptable to the Bank and,
- iii Personal guarantee by all Directors of GEM CM Construction Company Limited.

From our investigations we established that on an offer letter dated 15th April 2019, signed by the directors of GEM CM Construction Company Limited, an amendment of Collateral and Guarantors was made as follows:-

· First legal charge over property No. LR 4953/V/31 (I.R 7795) Uhuru Street, Thika Town for Kshs.10,000,000.00 in the name of Gatoka Limited supported by:-

This in effect substituted the fixed deposit, the offer letter is signed by the Bank officials and the Directors of GEM CM Construction Company Limited. This negates the claim that there was a collusion that led to a removal of the FDR as a security for the loan. The FDR period had also expired as it was for three months running from January 2015 to March 2015. (emphasis added)

18. Akumu maintains that this letter merely reproduced the offer letter dated 7th January 2015 which erroneously made reference to existing securities, which he contends did not exist.

19. It is often stated that an Insolvency Court will not permit itself to be used as a debt collector and so if there is a legitimate contestation of a debt then an insolvency order will not be granted. That said, the matter at hand has a slight twist. The Court was told by no less the party (the Bank) which sought the insolvency of the company that:-

“If the loan was secured, the Bank would have already taken steps to enforce the security before seeking to have the company wound up”.

20. The debt was to be secured by “existing securities” which included a “first legal charge over property No. LR 4953/V/31 (I.R 7795) Uhuru Street, Thika Town for Kshs.10,000,000.00 in the name of Gatoka Limited”. The emerging evidence is that as at the date of the letter of offer of 25th August 2015, the existing security over LR 4953/V/31 was a charge to the Bank for Kshs.12,000,000.00 registered on 23rd October 2012. This Court has been shown a copy of the charge. It is dated 16th October 2012 and appears to have indeed been registered on 23rd October 2012.

21. The Bank states that this charge does not secure the debt because of the reasons set out in Paragraph 7 of this decision.

22. Kinoti on the other hand argues that:-

5. That from the search, it is clear that there is a subsisting charge over the property at Jamii Bora Bank at the time registered on the 23rd October 2012, which charge the Petitioner intentionally failed to inform the Court to allow for fair administration of Justice.

6. That normally from practice, where a party with subsisting charge in Bank wishes to access more funds over the same charge, he or she only requires a letter of offer signed with the Bank for as long as the funds he seeks are not over and above the loan limit he had originally charged the property for. The Bank then extends the credit to the person based on the strength of the signed offer letter.

7. That from the above title search, it is clear that the petitioner was not forthright to the Court and deliberately failed to inform the Court that it had indeed extended credit over a subsisting charge registered in 2012 over the property upon which it extended credit to the Respondent in 2015.

23. Whether or not this security, which existed at the time of the facility letter, was the security contemplated in the facility letter and is a proper and sufficient security of the Company’s debt to the Bank is not a call this Court can or should make. Yet it can be argued, for instance, that recital B of the Charge covers the facility to the Company. It reads;

“[B] The Bank has agreed, at the request of the Chargor and/or the Borrower, to make or continue from time to time loans or advances or to grant any financial facilities or other accommodation or to grant time for so long as it may think fit to, or to forbear to sue or demand immediate payment from, the Chargor and/or the Borrower or any person whose liabilities and obligations have been guaranteed by the Chargor” (emphasis mine).

24. Another question that may arise is why the Bank freed the fixed deposit that was the key security if indeed the subsisting charge was not the replacement referred to in the facility letter. These questions could take on some significance when considered in the context of what the Bank told the regulator (Central Bank) that the “amendment of collateral” in effect substituted the fixed deposit.

25. Recalling that the Bank conceded that it would not commence insolvency proceedings if the loan was secured as it would have taken steps to enforce the security and coupled what may seem to be a less than trifle dispute as to whether that security exists, the Court comes to a conclusion that it would be too drastic a step to let the company go into insolvency at this stage. Prior to its ruling, the Court had a deliberately sought clarification from the parties as to whether the loan was secured. It has now turned out that the one sentence disclosure by the Bank that “the loan advanced to the company by the Bank is not secured by any charge or debenture whatsoever” may not have been a full disclosure of the circumstances surrounding this debt. A full disclosure would be nothing short of all information that was shared with Central Bank and a display of the existing charge. Only then would have the Court been able to make an informed judgement as to whether there was a real dispute as to the existence of a security. It is in circumstances such as this that a Court revisits its order even if the application for review is not the conventional Order 44 (Civil Procedure Rules) application.

26. This Court reviews its order of 2nd November 2018 and hereby sets aside the liquidation order. While the Court does not dismiss the Petition, it hereby postpones any decision in that respect until the question as to whether the debt is indeed secured is resolved in an appropriate forum. Any party is at liberty to apply.

27. The Notice of Motion of 1st April 2019 is allowed to the extent of the orders granted above. For now, each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of December 2019.

F. TUIYOTT

JUDGE

PRESENT;

Muchiri holding brief Kimani for Petitioner

No appearance for Applicant

Court Assistant: Nixon