



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COURT
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT. NO. 403 OF 2016

MAGANLAL MOTICHAND CHANDARIA.....1ST PLAINTIFF

MAHESH MAGANLAL CHANDARIA.....2ND PLAINTIFF

HETUL DINESH CHANDARIA.....3RD PLAINTIFF

DARSHAN MAHESH CHANDARIA.....4TH PLAINTIFF

NEER MAHESH CHANDARIA.....5TH PLAINTIFF

AMIT DINESH CHANDARIA.....6TH PLAINTIFF

BHAVNISH DINESH CHANDARIA.....7TH PLAINTIFF

VERSUS

PARESH KUMAR DODHIA.....DEFENDANT

RULING

Introduction

1. On 6 October 2016 the Plaintiffs filed an application under certificate of urgency seeking to restrain the Defendant from presenting and advertising or petitioning for bankruptcy proceedings against the Plaintiffs. The Plaintiffs also sought a declaration that the Defendant is not entitled to file a bankruptcy Petition in respect of a disputed debt. The Plaintiffs' application was pegged on a plaint also filed on the same day.

2. Both the application and the Plaintiffs' substantive claims were contested by the Defendant, who quickly also filed a notice of Preliminary Objection in addition to a Replying Affidavit and a statement of defence.

Factual background

3. The Plaintiffs are all businessmen. They have a familial relationship by blood. Through their person or

family corporate entities they have had business dealings and transactions with the Defendant. The Plaintiffs state that they have previously advanced monies to the Defendant or to companies associated with the Defendant. The Plaintiffs claim that the Defendant failed to repay the amounts leading to various suits being filed for recovery. In one suit namely HCC. No 431 of 2011 Madhupaper Kenya Ltd –v- Paresh Kumar Dodhia, there is judgment already obtained against the Defendant and the execution process commenced. The judgment was for Kshs. 81,269,274/= . Two other suits, filed by companies associated with the Plaintiffs, await hearing and determination. The suits are HCCC No. 429 of 2011- Chandaria Industries Ltd –v- Sonal Holdings (K) Ltd & Paresh Kumar Dodhia and HCC. No. 430 of 2011 Global Petroleum Kenya Ltd –v- Sonal Holdings (K) Ltd & Paresh Kumar Dodhia.

4. On 7 September 2016, the Defendant’s attorneys addressed a letter to the Plaintiffs demanding payment of a staggering Kshs. 950,000,000/= allegedly arising from a Memorandum of Understanding and Sale of Business Agreement. The rather prolix demand letter warned that if payment was not made within 10 days the Defendant would commence “bankruptcy and or recovery proceedings against” the Plaintiffs.

5. On 8 September 2016, the Plaintiffs’ advocates by way of riposte denied liability, dared the Defendant to file suit and also reminded the Defendant, through his advocates, of the several suits filed by the Plaintiffs and their associate companies against the Defendant.

6. The Defendant’s advocates replied on 13 September 2016 and insisted that the Defendant’s claim was “uncontested and a liquidated debt”. The Defendant’s advocates then made it clear that he had instructions to “issue [sic] bankruptcy notices against each of “ the Plaintiffs. The brief retort from the Plaintiff’s counsel was that they had instructions to accept service of court process. The alleged debt was once again denied.

7. The Defendant took up the challenge to commence proceedings and on 22 September 2016 a statutory demand under the Insolvency Act, No. 18 of 2015 was crafted by the Defendant and served upon the Plaintiffs.

8. It is unclear when the statutory demands were served upon each of the Plaintiffs but it certainly must have been between the 22 September 2016 (the date of the statutory demand) and 6 October 2016 (the date the suit herein was filed).

A brief litigation history

9. The Plaintiffs filed a plaint on 6 October 2016. Alongside the Plaint, and under certificate of urgency, was also filed a Notice of Motion. The intermediary orders sought by the Plaintiffs were to restrain the Defendant from presenting and advertising or petitioning for bankruptcy proceedings against the Plaintiffs for the nonpayment of the alleged debt of Kshs. 950,000,000/=. The Plaintiffs also sought an interlocutory declaration that the Defendant is not entitled to file a bankruptcy Petition.

10. The Plaint largely consisted of a denial that the Plaintiffs owe the Defendant any monies. Instead, the Defendant was alleged to owe the Plaintiffs and the Plaintiffs’ associate companies. The Plaint went to great lengths to demonstrate that the bankruptcy notice served upon the Plaintiffs by the Defendants was full of mala fides and intended to circumvent the Defendants obligations already adjudicated or to be adjudicated in various cases filed against the Defendant.

11. A notice of Preliminary Objection was filed on 2 November 2016. A Replying Affidavit was also filed on the same date by the Defendant. The Replying Affidavit, in extenso, also sought to prove that the Kshs. 950,000,000/= debt was due to the Defendant from the Plaintiffs.

12. The notice of Preliminary Objection however took issue with the court for entertaining a fatally defective application and suit. It was stated that the suit disclosed no reasonable cause of action. It was also stated that the application offended the mandatory provisions of Section 17 of the Insolvency Act, No. 18 of 2015 (“ **the Act**”)and Regulations 16 and 17 of the Insolvency Regulations (“the Regulations”) . The court, the Notice of Preliminary Objection stated, lacked the jurisdiction to entertain both the suit

and application.

13. Then on 18 November 2016, the 1st Plaintiff filed a Supplementary Affidavit. Once again, the Plaintiffs sought to lay down the claim that the Kshs. 950,000,000/= debt was contested.

14. Additionally, the Defendant also lodged his statement of Defence on 30 November 2016. The Defence statement largely sought to demonstrate that the Plaintiffs were truly indebted to the Defendant in the sum of Kshs. 950,000,000/= pursuant to Memorandum of Understanding and Agreement for the Sale of shares in a company controlled by the Defendant.

15. In the meantime, the court had on 10 October 2016 heard the Plaintiffs' counsel ex parte. The court raised issue with counsel on the jurisdiction of the court. The court (Farah Amin J) however proceeded to exercise its inherent jurisdiction under Article 159 of the Constitution as well as Sections 1A, 1B and 3A of the Civil Procedure Act to grant an injunctive order extending beyond the prescribed 14 days. The court reasoned that the extended period was necessary to enable the parties place before the court "all facts and matters necessary to hear and decide this matter...[and] considered this[to be] a more efficient use of court time".

16. With directions on the hearing of the Preliminary Objection by way of written submissions having been given on 4 November 2016 and the parties having filed their respective written submissions (the Plaintiffs on 2 December 2016 and the Defendant on 23 December 2016), the Plaintiffs then filed an application for leave to amend their plaint on 9 February 2017.

17. I gave directions that the Preliminary Objection and the application to leave to amend the plaint be heard simultaneously on 9 February 2017 for the basic reason that one of the principles the courts have copiously followed over the years when faced with an application to summarily dispose of a suit is that where there is a chance that life may be injected in the suit or it is curable by amendment it ought not to be struck out: see **DT Dobie & Company Limited vs Muchina [1982] KLR 1**.

18. The application for leave would perhaps give the Plaintiffs the chance to redeem their claim if I was to find that it pointed towards or lacked a reasonable cause of action.

The Submissions

19. Mr. Mugo urged the Defendant's case.

20. Mr. Mugo submitted that the suit as well as the notice of motion was hopelessly bad in law for having been filed contrary to the express provisions of Section 17 of the Act as well as regulations 16 and 17 of the Regulations. Counsel stated that where the law provided for a specific procedure for dispute resolution then it was the availed avenue to be strictly followed. For this proposition, Mr. Mugo referred to the case of **Samson Chembe Vuko vs. Nelson Kilumo & Another [2016] eKLR**. Counsel then added that the insolvency laws were very comprehensive and left no room for the imitation of the Civil Procedure Rules or the courts inherent jurisdiction. For this latter proposition counsel referred the court to the case of **In Re Blue Bird Aviation Ltd [2016] eKLR**.

21. Counsel concluded his submissions by stating that the Plaintiffs failure to comply with procedural requirements in challenging the statutory demand meant that the jurisdiction of the court was lacking. For completeness, Mr. Mugo stated that the Plaintiffs suit disclosed no reasonable cause of action.

Plaintiffs' submissions

22. Mr. James Singh argued the Plaintiffs' case.

23. Mr. Singh contended that the Plaintiffs' claim was not hopelessly bad and could be amended. Submitting that amendments ought to be freely allowed, Mr. Singh submitted that the court ought to be averse to striking out claims and instead encourage determination on merits. According to counsel, the

intended amendments explain further and detail the Plaintiffs' causes of action which include malicious prosecution, undue influence and harassment.

24. Mr. Singh contended that the Preliminary Objection was also not well founded as the Defendant had not shown that he was a creditor for purposes of the Act and that was why the Plaintiff had lodged an ordinary suit which included claims in tort.

25. Mr. Singh urged the court to allow the intended amendments so that the Plaintiffs' claim could be better amplified.

Determination

The law

26. While the legal position and principles guiding amendment of pleadings is relatively clear, the law on preliminary objections seems to have lately taken another turn.

27. In **Hassan Ali Joho & Another vs. Suleiman Said Shabhal & 2 Others [2014]eKLR**, the Supreme Court of Kenya stated as follows:

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

28. Subsequently in **Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others [2015] eKLR** the Supreme Court of Kenya stated thus:

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis is mine]

29. The approach is markedly different from the age old **Mukisa Biscuits Co Ltd –v- West End Distributors Ltd [1969] EA 696** where Newbold P expressed himself as follows in relation to preliminary objections.

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

30. Clearly, the focus is no longer to be on the nature but purpose of the Preliminary Objections. And thus where *“the purpose of the objection assists in saving the scarce judicial time and militates against profligate deployment of time, then the court will entertain a preliminary objection even where it appears some factual aspect of the case may come under scrutiny”*: see **Bia Tosha Distributors Ltd –v- Kenya Breweries Ltd & 4 Others No. 2 [2016] e KLR** and also **Lady Justice Kalpana Rawal & Another –v- Judicial Service Commission & Others [2016] eKLR (SCK)**.

31. I form the view that the Preliminary Objection by the Defendant which effectively seeks to shut off

the suit by the Plaintiffs meets the yardstick. Mr. Singh's muted contention that the Preliminary Objection invites the court to interrogate facts and thus should not be entertained as a preliminary objection is thus not well founded.

32. With regard to amendments, the principles under which the court will allow the amendment of pleadings may be rehashed as follows. Amendments to pleadings sought before the hearing should be freely allowed if the application for amendment is made timeously and the amendments may be made without injustice to the other side: **Eastern Bakery vs. Castellino [1958] EA 461** , **Beoco Ltd vs. Alfa Lawal Co Ltd [1994] 4 All ER 464**. The power to allow amendments is however a discretionary one and can be exercised by the court at any stage of the proceedings, however late the amendment is sought, but provided it is made in good faith and provided also that costs would adequately compensate the other side. A party will ordinarily not be allowed to amend the pleadings if it will substantially alter or substitute the cause of action or would deprive the Defendant of his right to rely on limitation: see also **Ochieng & Others –v- First National Bank of Chicago CACA No. 149 of 1991**.

33. I will return to these principles once I have also laid out the law on insolvency in so far as it is relevant to this case.

34. The law on insolvency in Kenya is now consolidated under the I-Act. The I-Act repealed the Bankruptcy Act (Cap 53) and also parts VI to XI of the Companies Act (Cap 486) which dealt with insolvency of natural persons and incorporated companies respectively. The I-Act consolidated the law relating to insolvency generally.

35. Part III of the Insolvency Act which deals with insolvency of natural persons was operationalized on 30 November 2015. The I-Act provides that bankruptcy occurs when the court makes an order adjudicating as bankrupt a natural person (debtor) who owes money to one or more creditors where the creditor has made an application or the debtor himself has made the application. Only a creditor or the debtor may make the bankruptcy application but the debtor must then be not only domiciled in Kenya but also personally present in Kenya when the application is made or had been during the preceding three years carried on business in Kenya or ordinarily resided in Kenya.

36. The court also has powers not only to dismiss the bankruptcy application where the requirements of Part III of the I-Act or the Regulations have not been complied with but also to stay the proceedings when there is non-compliance.

37. The creditors' application is deemed compliant where the creditor at the time of the application; the debt owed is equal to or exceeds the bankruptcy level, is a liquidated amount which the debtor appears either unable to pay or there is no reasonable prospect of being able to pay and no application to set aside the statutory demand is pending. Under the I-Act a debtor is deemed unable to pay a debt when a liquidated judgment amount is not settled despite an execution process or where the liquidated debt remains unpaid or unsecured at least 21 days after a statutory demand was served on the debtor, the statutory demand is not yet set aside.

38. Once the court is satisfied that there is compliance, it may make the bankruptcy order. The court however has general powers to stay the creditors' application on such terms as the court deems appropriate particularly as well the court may stay the bankruptcy application where the alleged debt is disputed by the debtor.

39. While the I-Act avails the substantive law on insolvency, the Regulations provide an exhaustive procedure to be followed in insolvency proceedings and process. Regulation 10 stipulates that applications to court made pursuant to provisions of the Insolvency Act must be by way of a Notice of Motion unless it is a winding up petition or bankruptcy petition. The Applicant must then state in the motion the provision of the Insolvency Act pursuant to which the application is made besides the fact that it is made in the matter of the Insolvency Act. He must also avail details of all the parties (names and addresses) including of the applicant himself.

40. The regulations also provide for applications to set aside statutory demands. An application to set aside a statutory demand (demand for payment of liquidated debt) must be made within 21 days of the date of service or advertisement and upon the application being lodged in court the time for compliance with the statutory demand ceases to run. A format of the application is set out in the schedule as Form 7 complete with the format of the Supporting Affidavit (Form 8). The application may be heard and determined (dismissed) even in the absence of the creditor but may ordinarily be allowed if there is a counterclaim or the debt is disputed on substantial grounds or the creditor has security or on any satisfactory ground.

41. I have attempted to extensively (not wholly) lay down the law and procedure as may be retrieved from the I-Act and Regulations relating to creditors and challenges to the initial stages of insolvency. This is what constitutes the core of the preliminary objection by the Defendant.

42. As I understand it, the Defendant contends that the court has no jurisdiction to entertain the instant suit and application for injunction by the Plaintiffs. Further the Defendant contends that the form of approach to court is faulty and fatally so.

43. There is no doubt that the I-Act was a comprehensive overhaul in nearly a century of the insolvency laws of Kenya. It was not only a consolidating measure but also sought, as supplemented by the Regulations thereunder, to lay down a timely and more orderly process of distribution or salvage of the debtor's property or indeed the restoration of the debtor through administration. As it is not an objective of the insolvency law to rush and cause the harassment of debtors, the Regulations and the I-Act itself recognize the need for initial challenges to the bankruptcy process through an application to set aside the statutory demand. It is the statutory demand that triggers the entire process of bankruptcy. The Regulations recognize the fact that the challenge to the statutory demand has in-built effects including, but not limited to, staggering the demand itself once the challenge is filed in court.

44. *In casu*, the Defendant argues that the Plaintiffs suit is basically a challenge or an application to set aside the statutory demand. Counsel for the Plaintiff conceded this much but added that the intended amendments extend the Plaintiffs' claim. The Defendant then argues that the Plaintiffs are not before the "correct" court.

45. Both the I-Act as well as the Regulations define a court for purposes of the Act to mean "the High Court, and if there is an insolvency division of the court, [means] that division".

46. It is common ground that there is no Insolvency Division of the High Court. The appropriate forum where the insolvency petitions and applications related thereto may be lodged is thus the High Court [this court]. Practice directions of 18 November 1997 by A.M Cockar CJ which led to the establishment of the Commercial and Tax Division of the High Court and classification of commercial matters are relevant. Any challenge to a statutory demand may only be filed in the High Court's commercial division. Reference, by the Defendant's counsel Mr. Mugo, to the cases of **Samson Chembe Vuko vs. Nelson Kilumo & 2 Others [2016] eKLR** and **Mutanga Tea and Coffee Company Ltd vs. Shikara Ltd & Another [2015] eKLR** is not particularly relevant as the two cases dealt with situations where it was alleged that a suit had been filed in the Environment and Land Court instead of the High Court. There are two separate forums. In this case there is only one forum.

47. The second limb of the Preliminary Objection was that even if the Plaintiffs' are before the appropriate forum or court, the Plaintiff was filed in utter disregard of the prescribed procedure and form.

48. Both the I-Act and the Regulations provide the procedure to be followed where a debtor challenges a statutory demand. The form to be used is also prescribed: see **Regulations 16 and 17 of the Insolvency Regulations**. A debtor is to come to court by way of a Notice of Motion supported by an affidavit exhibiting, amongst other documents, the impugned statutory demand. The Plaintiffs ignored all these and came to court by way of a plaint.

49. The accepted legal principle is that where there is a clear procedure for redress of a grievance

prescribed by Parliament through the Constitution or Act of Parliament the procedure is to be strictly followed. Thus in **Speaker of National Assembly vs. Njenga Karume [1992] KLR 21** orders granted by the High Court in judicial review proceedings rather than in a Petition as required by law were summarily stayed by the Court of Appeal. See also **Kones vs. Republic & Another Ex p Kimani Wa Nyoike & 4 Others [2008] 3 KLR 296**.

50. In both **Mariba vs. Mariba [2007] 1 EA 176** and **Ngati Farmers Cooperative Society Ltd vs. John Ledidi & 15 Others [2009] KLR 331**, the Court of Appeal departed from its earlier decision in **Bwana vs. Said [1991] KLR 454**, to hold that a suit commenced by way of plaint instead originating summons was not fatally defective as the relevant procedural rules allowed the court in an appropriate case to continue the proceedings commenced by originating summons as though they had been commenced by plaint.

51. Githua J in **National Bank of Kenya Ltd vs. Tom Muteti t/a Tom Muteti Advocates [2016] e KLR** when faced with a similar objection as to want of due institution, found and held that Order 52 of the Civil Procedure Rules allowed parties moving under the said order to institute suits either by way of plaint or originating summons. Once a party had made the choice it was up to the court, applying Article 159(2) of the Constitution and the overriding objective principle to uphold the suit rather than strike it out.

52. The I-Act and Regulations do not however avail the debtor with any options. There is provided only one procedure. Likewise, the Regulations do not avail the court the option of continuing the process notwithstanding the alternative procedure adopted. Instead, the regulations make it mandatory that the debtor comes to court by way of a prescribed format of the Notice of Motion and Supporting Affidavit.

53. My view is that the procedure prescribed under the I-Act was intentionally crafted to ensure that both expedition and justice is attained. Under the prescribed procedure there is no need to seek injunctive relief at least at the initial stages. The filing of the application to set aside the statutory demand automatically leads to a stay of the process: see section 17(2) & (3) of the I-Act and Regulations 16 & 17 of the Regulations. This is the exact contrast of what the parties have had to endure in the instant case.

54. I hold the view that any challenge to the statutory demand ought to have been commenced by way of a Notice of Motion filed as a miscellaneous cause in the matter of the I-Act and regulations and in the matter of the impugned statutory demand. Any other mode would be fatally defective.

55. Counsel for the Plaintiffs Mr. James Singh urged me to invoke the courts inherent powers pursuant to the provisions of Article 159 of the Constitution as well as Sections 1, 1A & 3A of the Civil Procedure Rules. While I have no reason to doubt that the court always has residual or hermetical powers to ensure justice is done in the absence of any procedure or by the sheer strict application of the rules or procedure, my view which also resonates with many other judicial determinations is that inherent jurisdiction should not be invoked where there is blatant disregard or substantial non-compliance with prescribed procedure.

56. I return to the application for leave to amend the plaint.

57. I have already outlined the principles to guide the court when confronted with an application to amend pleadings. They are relatively clear.

58. The amendments sought by the Plaintiff touch on both the Notice of Motion as well as the Plaint.

59. The Plaint as originally filed detailed the relationship between the Plaintiffs, the Plaintiffs' associate companies and the Defendant. The Plaint also detailed the claims and counter claims by the parties. It also detailed the transaction leading to the now impugned statutory demand. There were particulars of attempts to arrest and commit the Defendant to civil jail for non satisfaction of a decree. There were allegations of malice on the part of the Defendant and also harassment of the Plaintiffs' by the Defendant in making false claims of the Plaintiffs and lodging unwarranted complaints with the National Police Service.

60. Though the original plaint largely consisted of averments challenging the statutory demand, there were also identifiable stand alone causes of action. There were allegations of harassment. Harassment is an actionable tort. Where a person pursues a course of conduct which amounts to harassment of another and which the person knows or ought to know amounts to harassment of the other, the court may intervene. Thus acts of violence, pestering, persecution by phone calls, verbal threats and consistent falsehoods have all been deemed to amount to actionable harassment: see for example **Wilkinson vs. Downtown [1897] 2 Q B 57,59** and **Burris vs. Azadani [1995]1 WLR 1372**.

61. The proposed amendments in my view seek to only push forth the Plaintiffs agenda on the various causes of action. They in my view add some clarity to the claim *in re* harassment. They do not substantially or in anyway, alter or substitute the substratum of the Plaintiffs' claim. It may be stated that the Plaintiffs were prompted into seeking to amend their plaint but it has to be added that the application was also timeously made. I do not consider it that the amendments will prejudice the Defendant in any such manner as may not be cost-compensated.

62. I have found merit in the application for amendment of the plaint but not of the Notice of Motion which I have already indicated should be a standalone claim under the I-Act and Regulations. Amendment of the Plaint as sought will assist in helping bring forth the real substantial questions as between the parties. The intended amendments to the Notice of Motion even though it was argued will help avoid a multiplicity of claims will only help in further violation of the regulations and provisions of insolvency law and procedure. The court should not be party to such violation or breaches.

Conclusion

63. I conclude by summarizing my findings.

64. The Preliminary objection was well grounded and so too was the application to amend the Plaint but not to amend the Notice of Motion to include a prayer for the challenge to the statutory demand by the Defendant.

65. I find that the Insolvency Act and Regulations provide a solo avenue for processing all matters touching on the insolvency of corporates as well as of individuals. Challenges to statutory demands issued by creditors must be vide a Notice of Motion filed in the matter of the Insolvency Act and in the matter of the impugned statutory demand as a substantive application and not as an intermediary or interlocutory application in a writ of plaint.

66. I also find that, *in casu*, the Plaintiffs have shown that they ought to be granted leave to amend their plaint but not the Notice of Motion which seeks a relief already expressly provided for by law in that once a Notice of Motion is filed under Regulation 17 of the Insolvency Regulations, automatically a stay of the Statutory demand falls in place. Such a stay equates the negative injunction now sought by the Plaintiffs.

67. The Preliminary Objection succeeds only in so far as the Notice of Motion is concerned. It fails with regard to the Plaint.

Disposal

68. The circumstances of this case are rather special and dictate that I reflect on the orders to be issued. Without making any definitive finding, I view it that the Plaintiffs appear to be in better stead when they say that the debt the subject matter of the dispute and of the statutory demand is genuinely disputed. There is need for the assertion to be investigated by the court. The agreement upon which the Defendant has pegged his claim is not between the Plaintiffs and the Defendant, even though in the final analysis the court may still have to open up the agreement and determine the persons and shadows behind it. There are also various suits involving the Defendant and the Plaintiffs' associate companies which may concern the subject matters in these proceedings and thus the insolvency allegations.

69. For now, I must be conscious of the fact that insolvency proceedings may be as damaging as they may

be helpful and warranted. The Defendant has a right to bring forth the insolvency proceedings. The Plaintiffs too have an undoubted right to challenge the same. They attempted to do so but through the wrong procedure. They certainly are still minded to challenge the insolvency process. There was apparently a genuine mistake when they moved the court. It is not lost to me that the I-Act and Regulations are just taking shape in our jurisdiction.

70. The judge made rule, that where there is abuse of process pleadings are to be struck out, must not of itself be an instrument of injustice: see the freezing order case of **Brink's MAT Ltd vs. Elcombe [1988] 1 WLR 1350** and also the bankruptcy case of **Re OJSC Ank Yugraneft [2008] EWCH 2614** where the courts considered and held that where appropriate the court had powers to order a discharge and re-grant of an injunction as justice required to prevent the applicants from harm that would have befall them in the absence of any interim order.

71. I have to perform a balancing task. The notice of motion ought to be struck out (and not amended) so that it is a deterrent for parties who want to avoid the prescribed procedure under the I-Act and Regulations for challenging a statutory demand by a creditor. If however, the Defendant advertises the insolvency proceedings or proceeds with the same in any way, the damage to the Plaintiffs if it later turns out that the statutory demand was not well founded may well be done beyond reprieve. On the other hand, there will be hardly any prejudice, if the Defendant has to wait another few days for a merit determination of the challenge to the statutory demand. I must take these into consideration. The circumstances of the case dictate that I invite this court's inherent jurisdiction and intervene for a limited period of time.

72. I would give the Plaintiffs a chance. Justice so dictates.

73. In final disposal, I make the following orders.

- a) Leave is granted to the Plaintiffs to file and serve an amended Plaintiff within the next seven days with corresponding leave to the Defendant to file an amended Defense within seven days of service of the amended Plaintiff.
- b) The Plaintiffs shall alongside the amended Plaintiff also file verifying affidavits or appropriate authority for any one of them to file a verifying affidavit on their joint behalf.
- c) The Notice of Motion dated 4 October 2016 is hereby struck out.
- d) The Defendant and or any advocate agent servant acting on his behalf is hereby restrained for a period of not more than 7 days from the date hereof, from presenting and advertising or petitioning for bankruptcy proceedings against the Plaintiffs or any of them arising from the alleged debt of Kshs 950,000,000/= or any sum arising from the Memorandum of Understanding dated 10 December 2009.
- e) The interim order under (d) above to lapse upon expiry of 7 days or upon the filing and service by the Plaintiffs (whichever is earlier) of any appropriate miscellaneous motion before the Court in the matter of the Insolvency Act challenging the statutory demand issued by the Defendant to the Plaintiffs and dated 22 September 2016.

Costs

74. The Defendant has largely succeeded on his Preliminary Objection. The Defendant has also been inconvenienced, though not necessarily prejudiced, by the amendments now ordered. The Plaintiffs were the authors of the inconvenience. The Defendant deserves costs.

75. I award costs of the Preliminary Objection and Notice of Motions dated 4 October 2016 as well as 8 February 2017 to the Defendant.

Dated, signed and delivered at Nairobi this 27th day of February, 2017.

J.L.ONGUTO

JUDGE