



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**INSOLVENCY CAUSE NO.7 OF 2017**

**JOSHUA MBITHI MWALYO.....DEBTOR**

**VERSUS**

**SILVYA WANJIRU MERIE.....CREDITOR**

**RULING**

The Applicant filed this application seeking to set aside Statutory Demand dated 20<sup>th</sup> July 2017 plus costs of this application. Grounds on the face of the application are as follows;

1. That the debt was contracted by a Limited Liability Company in which the Applicant is a Director but not by the Applicant as an individual;
2. That the Applicant has never acknowledged owing the Creditor Kshs. 16,170,000 as alleged in the Statutory Demand notice
3. Thirdly that the Statutory Demand is not valid as it neither signed by the Creditor nor the person authorized to make demand on her behalf as required by Section 384 of the Insolvency Act and Regulation 16 and 17 of Insolvency Regulations (LN 47 of 2016).
4. That no liquidated judgment has been issued to him and the 21 day demand has not crystallized prior to Statutory Demand.

In response the Creditor Sylvya Wanjiru merie filed replying affidavit sworn on 26<sup>th</sup> September 2017. she averred that by memorandum of understanding dated 3<sup>rd</sup> June 2015 she advance a sum of Kshs. 13,000,000 to the Applicant and Seven Fourteen Limited jointly. She averred that she dispatched the money in two instalments of Kshs. 5,000,000 on 3<sup>rd</sup> June 2015 and Kshs. 8,000,000 on 1<sup>st</sup> July 2015. she averred that under the terms of memorandum the Applicant agreed to pay Kshs. 18,500,000 within 120 days, by 3<sup>rd</sup> September 2015 but failed to pay on due date and requested for extension of time and in consideration for extension of time the Applicant agreed to pay additional sum of 4,260,000 being interest on the outstanding debt. She averred that on 10<sup>th</sup> April 2017 they entered into another agreement that the debt outstanding was 15,820,000 and was to pay by installments of 2million, 3.5million, 5million and 5.32 million which he failed to honour. She further averred that by a deed of acknowledgment the Applicant acknowledged having borrowed Kshs. 1,600,000 and further acknowledged that the amount due as at 10<sup>th</sup> April 2017 was 1,350, and undertook to pay the amount by 15<sup>th</sup> may 2015. She added that the Applicant paid 1million leaving a balance of 350,000. she averred that she demanded that money through Kefa ombati and co. Advocates and that the Applicant failed to pay as agreed. She averred that the

Applicant is truly indebted to the Applicant to the tune of Kshs. 16,170,000. She averred that default since 2015 is sufficient reason for inability to pay. She averred that liquidated judgment is not requirement prior to Statutory Demand. She averred that the Statutory Demand was issued on account of unpaid debt not to serve or achieve political agenda as she is not a politician and has no interest in politics.

Counsel for the Applicant Mr. Kisaka submitted that the Applicant who was a Director of Seven Fourteen Limited should not be liable for liabilities of the Company. He submitted that the Applicant did not acknowledge owing Kshs. 16,170,000. He submitted that the Applicant has filed documents which were not filed before. He submitted the acknowledgment was for Kshs. 1.6M and it's clear that the Creditor misled the Court while applying for statutory notice

Counsel also submitted that the notice is invalid for not being signed either by Creditor or authorized person as required by Section 384 of Insolvency Act or Regulation 17 of Insolvency Regulations. He said the notice is endorsed by the deputy registrar but it is not signed by Creditor or authorized person. He submitted that in the Replying Affidavit the Creditor acknowledged that the money was given to the Company but relies on Memorandum of Understanding that the Applicant would also be liable. He submitted that the Company is still in business and for some malice the Respondent has decided to pursue the Applicant. He submitted that one should not be allowed to commence insolvency proceedings where the debt is disputed. He submitted that the intention of the drafters of the Insolvency Act was for one to issue statutory notice when the debt has crystallized and there is a valid decree but it was never meant to substitute the Civil Procedure Act. He submitted that Insolvency proceedings is another way of execution. He submitted that the Applicant is now a member of parliament and the aim of insolvency proceedings is to embarrass him. He submitted that the amount is disputed and statutory notice should be set aside.

The Respondents Counsel submitted that the statutory notice complies with Rule 15(3) and the form is in form 6 as set out in first schedule. He submitted that the debt was issued to the Applicant and in the MOU, he signed as Joseph Mbithi and it is not indicated anywhere that he is signing for the Company. He said there are 3 parties in the agreement, the Applicant, Creditor and the Company and the intention was joint liability and that in the agreement they are referred as borrowers. He submitted that in the acknowledgment of debt the Applicant signed twice. He submitted that the Creditor can pursue each Creditor individually. He said they have also sent a statutory notice to the Company. He submitted that debt of Kshs. 15,820,000 was acknowledged and the debt crystalized when default occurred on 10/5/2017 when the first installment fell due and Applicant failed to honor. He said subsequently the Applicant borrowed 1.6million which is a separate transaction and paid 1million leaving outstanding balance of 350,000. He submitted that Kshs. 350,000 and 15,820,000 adds up to the amount demanded, he submitted that insolvency proceedings is an option for Creditor pursue debt but not supplementary to recovery of debts. He submitted that the debt is outstanding and that Counsel for Applicant is apprehensive of bankruptcy proceedings which they intend to pursue. He prayed that the application be dismissed.

In response, Counsel for the Applicant submitted that parties are bound by documents that they filed when they came to Court and that the Respondent should not introduced new documents. He reiterated that the Applicant the documents attached as Director and that he has not indicated anywhere that he is acknowledging debt as individual. He submitted that the debt was contracted by the Company and not the Applicant. Counsel for Respondent denied having introduced new documents in Replying Affidavit and urged Court to see annexure FW1 where the Applicant signed in two capacities.

I have considered rival submissions by Counsels. I wish to consider whether the Statutory Demand is valid. I note that the Statutory Demand in the Court file was signed by deputy registrar and at the back by the Creditor's agent. At the body of the Statutory Demand, the Creditor indicated the name of the agent and it is signed by the agent named. I however note it is worded to the effect that a judgment was obtained. It notice also gives the debtor 7 days to pay the debt. Section 17(a) under Division 2 of Insolvency Act provide for circumstances under which a Creditor may apply for bankruptcy order; one being where the debtor appear unable to pay the debt or has no reasonable prospects of paying the debt. Section 17(3) explain inability to pay debtor as debt owed and give 21 days' period after demand to pay or apply to set aside is made.

The Statutory Demand attached gives the debtor 7 days to either pay or satisfy Court that he has a counterclaim, set-off or cross demand. Besides the demand giving the debtor 7 days instead of 21 days, it also refer to judgment obtained. Though Section 17(3) does provide for judgment to be obtained prior to applying for bankruptcy order, the wording of the Statutory Demand is misleading. Under the above provision the Creditor could opt to apply for bankruptcy proceeding even if judgment has not been obtained but the debtor should be given 21 days' notice and not 7 as in the Statutory Demand issued. The amount owing and whether arising from judgement should be clear to enable the debtor respond.

As to whether demand should be to the Applicant, I have perused the documents annexed to the letter addressed to the Deputy Registrar. The letter dated 4<sup>th</sup> July 2017 indicate amount owing as Kshs. 350,000, same to the letter dated 21<sup>st</sup> June 2017. The deed for acknowledgment is for Kshs. 1,350,000. Agreement dated 10<sup>th</sup> April 2017 refer to borrowers and the amount to be paid by 30<sup>th</sup> November 2017 was 18,500,000. The repayment period was extended in consideration of Kshs. 4,260,000 being interest. Kshs. 6,940,000 was paid the same day leaving a balance of Kshs. 15,820,000 which was to be paid as stated in clause 2 of the agreement. I note from the agreement that the Applicant signed as the borrower and he also signed for Seven Fourteen Limited as Director. The agreement clearly show that the borrowers were two. Amount owing from the Applicant individually should have been brought out clearly.

There is no doubt that the Applicant acknowledged of Kshs. 350,000.

In respect to Kshs. 15,820,000 the extent to which the Company and the Applicant are separately liable is not clear. There is no indication as to whether the Applicant intended to guarantee the Company. I find it unfair to proceed against the Applicant on the whole amount of Kshs. 15,820,000. Counsel for the Applicant has indicated that the Company is a going concern; it would be more appropriate for the Creditor to institute civil proceedings against the two, Applicant and the Company jointly and let the Court decide on the extent of their separate liability.

As concern the Applicant there is no doubt that Kshs. 350,000 is owing from him individually.

Regulation 17(6) provide as follows;

***“An overstatement in a Statutory Demand of the amount owing by the debtor does not invalidate the demand”***

I have found above that the amount that is not disputed as owing from the Applicant individually to the debtor is Kshs. 350,000 and noting that the amount exceed the minimum amount of debt required to apply for bankruptcy order, I will not set aside the Statutory Demand but direct that the correct amount owing from the Applicant individually be clearly stated in Statutory Demand and 21 days' notice be issued as is provided in Regulation 17 of Insolvency Act.

Each party to bear own costs in respect of this application.

**Dated and Delivered at Nairobi this 24<sup>th</sup> day of...October, 2017**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT

.....COUNSEL RESPONDENTS