



**Githae v Mae Properties Limited (Insolvency Cause 15 of 2016)
[2024] KEHC 69 (KLR) (Commercial & Admiralty) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 69 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
INSOLVENCY CAUSE 15 OF 2016
JWW MONG'ARE, J
JANUARY 11, 2024**

BETWEEN

HON ROBINSON NJERU GITHAE APPLICANT

AND

MAE PROPERTIES LIMITED RESPONDENT

RULING

1. The present petition is based on a statutory demand dated 7th December 2016 seeking payment of Kshs.33,000,000/= all-inclusive within 21 days due and owing from the judgment issued on 30th September 2014 and the Resultant decree of 4th November 2014 in favour of Mae Properties Limited in HCC 770 of 2003.
2. In the petition filed on 27th February, 2017 the Creditor avers the Applicant is indebted to the Creditor in the sum of Kshs.40,167,880.46/= being the amount due plus interest emanating from the consent judgment in HCC no 770 of 2003.
3. Opposing the Petition, the Debtor subsequently filed a Replying Affidavit sworn on 28th August 2020 in which he denies owing the debt and avers that the entire amount as per the decree was settled as follows:-
 - (i) Kshs. 1,000,000/= on 30th January, 2016
 - (ii) Kshs. 901,000/= on 31st May, 2016
 - (iii) Kshs. 4,980,000/= on 16th March, 2017
 - (iv) Kshs. 26,120,000/= On 12th July, 2020



4. The Debtor avers the payments have not been disputed and the only issue in contention is the issue of interest. He contends the Decree herein of Kshs. 33,000,000/= was an all-inclusive and therefore the interest charged by the Creditor is not payable. He urged the court to dismiss the Petition as the entire decretal sum has already been settled.
5. At the hearing of the Petition parties agreed to canvass the petition through written submissions. The Creditors filed their submissions on 2nd July, 2022 through the firm of Kaplan and Stratton while the Debtor through the firm of F. N. Njanja filed submissions and further submissions dated 2nd May, 2022 and 6th October, 2022 respectively.

Debtor's Submissions

6. In his submissions the Debtor argues that the debt is fully settled and it is trite law that where a decretal sum whose amount is all-inclusive that remains as the amount of the debt until the same is satisfied regardless of the nature and the method of recovery that is employed. To support his case, the Debtor cited the decision in the case of *Joshua Odanga v Tim Onyango* (2008) eKLR where the court pronounced itself on the issue of Section 26 of the *Civil Procedure Act* to the effect that no interest can be incurred in the execution of an all-inclusive decree.
7. The Debtor further submitted that the interest charged was an illegal amount which is not allowed by law and cannot be met by the Debtor. It is further submitted that since the debt has been fully paid the petition cannot stand as an application to adjudge someone bankrupt under Section 17 (2) (c) of the *Insolvency Act* 2015, can only be brought if the debtor is unable to pay or have no reasonable prospect of being able to pay, while under Section 25 (2) the court may refuse to adjudge a debtor bankrupt if the debtor can pay the debt and the Creditor has failed to satisfy the requirement specified in Section 17.
8. Counsel for the debtor submitted that the objection to the Statutory demand was consumed by the court by the Ruling date 28th July 2021. Counsel argues that Sections 237(b) and 238 (2) of the *Insolvency Act* as relied on by the Creditor to charge interest are misleading as the sections are applicable after a debtor has been adjudged bankrupt and the court pronounces itself on interest payable.
9. It was further submitted that a presentation of a winding-up Petition is not a convenient and proper way of trying a disputed debt, as held in the case of *New Travellers Chambers Ltd v Cleese and Green* (1874) 70 LT 271 at pg. 272.
10. Counsel further submitted that the petition herein was brought solely to embarrass the Debtor as the Creditor and served no substantive value since the Creditor was fully aware the principle debt being all inclusive had been fully discharged. He urged the court to find the Petition was bad in law and an abuse of the court process.

Creditors Submissions

11. The Creditor refused to agree with the Debtor's averments that he had fully settled the debt and that he argued that the Debtor having abandoned his Application to set aside the Statutory Demand, the debt was still due and owing to the Creditor as per the Petition and that the debtor cannot now come to challenge the amount in the demand. The Creditor has complied with the provisions of Sections 17(3) of the *Insolvency Act* as it has proved the debtor is unable to pay the debt and a demand notice has been served on the debtor requiring him to pay the debt.
12. Counsel submitted that considering the debt has been in existence since 2014 and the debtor had been given several opportunities to pay the debt but failed to do so and therefore he ought to have been adjudged bankrupt within the meaning of Section 17 of the *Insolvency Act*. The Creditor urged the



Court to be guided by the decision in the case of *Martin Gatheca Gaiti v Baniel Kirera Bosire t/a Ongegu and Associates Advocates* (2020).

13. It was the position taken by the Creditor that the Statutory demand for Kshs.40, 167,880.46/- was not inclusive of interest and thus it is disputed the argument by the debtor that the said amount as per the statutory demand has been paid in full. He took the view that since the decree was silent on interest, Section 26(2) of the *Civil Procedure Act* stipulates the interest is deemed to have been ordered. He places reliance on the case of *Dauda v Ahmed & 2 Others* (1987) KLR 665.
14. Further, the Creditor maintained that Section 237 (b) of the *Insolvency Act* allows a Creditor to claim interest up to the date on which bankruptcy commences in the case of judgment debt interest the rate payable on the debt while 238 (2)- provides for a bankruptcy trustee to pay post-bankruptcy interest from and including the date on which the bankruptcy commences to the date in which the debt is paid.
15. He urged the court to find that he had submitted the proof of debt comprises of interest of Kshs 9,068.880.46 which has not been disputed by filing an objection to the same and prayed that the court to allow the insolvency petition as filed.

Analysis and Determination

16. I have considered the petition and the supporting affidavits by the Creditor as well as the Replying Affidavit and Grounds of opposition by the Debtor, the rival by the submissions by both counsels for the Debtor and Creditor in depth. To my mind, the issue for determination is

“whether the Insolvency Petition is has been proved to the required standard to warrant the Debtor being Adjudged bankrupt.”
17. It is not disputed that the amount due and owing by the Debtor emanates from the consent judgment in HCC no 770 of 2003 entered on 30th September 2014. The terms of the consent are as follows:
by consent
 - (i) That judgment be and hereby entered in favour of the Plaintiff, against the Defendants, in the sum of Kshs.33,000,000 (Thirty-Three Million) all-inclusive.
 - (ii) That there be a stay of execution for 6 months Dated at Nairobi this 30th day of September 2014.
18. In the instant case the issue in dispute as I understand it to be is the decretal amount as per the consent judgment of 30th September, 2014. The Debtor maintains that since the Decree indicates the decretal sum of Kshs.33,000,000/= all-inclusive meant that there would be no further calculation of interest levied and charged on the said sum.
19. On the other hand, the Creditor argues that the decree is silent on the issue of interest and as such in respect to Section 26 of the *Civil Procedure Act*, where the order is silent on the interest payable, then the issue of interest is deemed ordered and ought to be paid. Counsel for the Creditor maintains that he has proved that under Section 17 of the *Insolvency Act* that the Debtor is unable to pay the debt despite numerous opportunities to honour the debt in vain and as such the petition ought to be allowed.



20. Section 17(1) of the *Insolvency Act* provides that;

“one or more Creditors of a debtor make an application to the court for an order of bankruptcy to be made in respect of the debtor in relation to a debt or debts owed by the debtor to the Creditor or Creditors.”

21. For a court to adjudge the Debtor as bankrupt it must be satisfied that the Debtor has been unable to pay its debts as per Section 17 (1) in the instant the Creditor’s advocate does not oppose the payment of Kshs 33,000,000/- but what is in contention is that the amount as per the statutory demand has not been settled. According to counsel, the Statutory demand dated 7th December, 2016 is for the sum of Kshs.40, 167,880.46/= which it avers has not been paid despite several opportunities given to the debtor to honour the same. Counsel for the Creditor urges the court to find the Creditor has proved the Debtor is unable to pay the debt as demanded and proceed to adjudge him bankrupt.

22. The Debtor argues that he has adduced sufficient evidence attached to the Replying affidavit to prove the amount of Kshs.33,001,000/= was paid to the Creditor in full and final settlement of the debt. The Debtor maintained that the only issue in contention was interest levied. I have perused the evidence by the Debtor and I do note from the record that the amount of Kshs.33,001,000/= has been paid out to the Creditor which amount is acknowledged by the Creditor.

23. I have perused the decree dated 30th September, 2014 indeed it is not true that the decree was silent on the issue of interest. The decree reads in paragraph 1.

“Judgement be and is hereby entered in favour of the Plaintiff, against the Defendants, in the sum of Kshs.33,000,000/= (thirty – Three Million) all-inclusive.”

In the circumstances, I am inclined to find that the Debtor is not unable to pay his debt as the amount in the decree has been settled in full. In conclusion, this court finds the Creditor has not satisfied the requirement under Section 17 of the *Insolvency Act* to warrant an order of Bankruptcy against the debtor as prayed. The Claim for interest on the decree amount therefore fails.

24. The upshot is that the debt having been paid in full the petition dated 27th February, 2017 is bereft of merit and the same is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JANUARY, 2024.

J.W.W. MONG’ARE

JUDGE

In the Presence of: -

Mr. Kahoya for the Debtor.

No Appearance for the Creditor.

