



Tulip Trustee Company Limited v Ecobank Kenya Limited (Insolvency Cause E009 of 2021) [2023] KEHC 2077 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E009 OF 2021**

A MSHILA, J

MARCH 10, 2023

BETWEEN

TULIP TRUSTEE COMPANY LIMITED APPLICANT

AND

ECOBANK KENYA LIMITED RESPONDENT

RULING

1. Before the court are two Applications to be canvassed together. The 1st Application is a Notice of Motion dated April 20, 2021 brought pursuant to Sections 1A, 1B and 3a of the [Civil Procedure Act](#), Section 17 (3) of the [Insolvency Act 2015](#) and Regulation 17 of the [Insolvency Regulations, 2016](#) for the following orders;
 - a. The Court to Set Aside the Statutory Demand issued in this cause and dated the 19th Day of March 2021.
 - b. The costs of this Application be awarded to the Applicant.
2. The Application was supported by the sworn Affidavit of Stephen Gichohi who stated that the Respondent bank has commenced these proceedings against the Applicant and exposed it to immeasurable loss and ruin by issuing a Statutory demand against it for the sum of Kshs 483,545,885/-.
3. The debt in respect of the advances made by the Respondent has been wholly settled and the matter rests solely in the hands of the Respondent pursuant to the Orders of the High Court of Kenya in Civil Suit No FI37 of 2018 (OS) [Ecobank Kenya Limited Vs Moru Ridge Limited and Anor](#). The obligations by the Applicant have been wholly extinguished on account of the acts of the Respondent bank in realizing its security.



4. The Applicant added that the debt claimed in these proceedings therefore does not arise and the claim thereof by the Respondent is unmerited and amounts to an extortionate scheme at unjust enrichment. Therefore, the Statutory Demand ought to be set aside as the debt claimed is contested on substantial and merited grounds and the same is wholly unlawful and ought to be set aside entirely.
5. The instrument of guarantee upon which the claim against the respondent is premised was extinguished by the Respondents resolve to purchase the security it held in respect of its advances.
6. The 2nd Application is a Notice of Motion dated November 5, 2021 brought pursuant to Leave Granted by this Court on November 1, 2021, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 1 of the *Civil Procedure Rules* and supported by the sworn Affidavit of Stephen Gichohi for the following orders;
 - a. This Application be heard and determined prior to all other applications pending before this Court in the underlying proceedings.
 - b. The Court to grant leave to the Applicant to enjoin M/s Moru Ridge Limited in these proceedings as an Interested Party.
 - c. Upon the joinder of M/s Moru Ridge Limited, the said Interested Party be granted Leave to Respond to the assertions made in these proceedings by the Respondent Bank touching on the matters in issue before the Court.
 - d. This Court be pleased to make any other Orders it deems just in the circumstances of these proceedings.
 - e. The Costs of these proceedings be in the cause.
7. The Respondent filed Grounds of Opposition dated November 12, 2021 in opposition to the 2nd Application on the following grounds;
 - a. The court has no jurisdiction to “enjoin” Moru Ridge Limited as there is no suit seeking injunctive orders against the purported interested party: To “enjoin,” in law, means to injunct, or to bar a party from doing something. “Enjoinder” means a prohibition ordered by injunction.”- per *in Re Estate of Barasa Kanenje Manyia (Deceased)* [2020] eKLR.
 - b. The application is frivolous and vexatious as the debt has not been paid and the joinder of the principal borrower had no legal basis whatsoever as it has not paid the debt. proceedings.
 - c. The debt is not disputed as it has not been settled by either the borrow or the guarantors.
 - d. The application for joinder is meant to delay the expeditious determination of the Applicant’s Notice of Motion dated April 20, 2021.
 - e. No legal basis has been laid out to demonstrated what stake the intended interested party will have in the proceedings.
 - f. The intended interested party has no right to or interest in the reliefs sought by the Applicant as per *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR
 - g. The ruling in Civil Suit No 137 of 2018 *Ecobank Kenya Limited v Moru Ridge Limited & Ano* is self-explanatory and does not require the joinder of a party to interpret the gist of the ruling.
 - h. The application should be dismissed with costs.



Applicant's Case

8. The Applicant contended that Moru Ridge Limited is the principal borrower and beneficiary of the advances leading to the present proceedings. Further, that the Respondent Bank has on its own accord successfully instituted proceedings against Moru Ridge Limited in Civil Suit No 137 of 2018 *Ecobank Kenya Limited Vs Moru Ridge Limited and Anor* obtaining leave to purchase the security it holds in respect of the financial advances made to Moru Ridge Limited thereby settling the debt owed in its entirety and effectively extinguishing the guarantee by the Applicant herein. The Respondent Bank has spectacularly capitulated from its position in Civil Suit No 137 of 2018 *Ecobank Kenya Limited Vs Moru Ridge Limited and Anor* and in affidavits filed before this Court in these proceedings has disavowed its own actions in its quest to enforce the long-extinguished guarantees by the Applicant.
9. It was the Applicant's case that Moru Ridge ought to be enjoined as interested party to this suit since it was the main party in other proceedings touching on the subject matter of this case and that most importantly, they are the principal borrower to the Petitioner.
10. The Applicant argued that their active participation in these proceedings will help the Court in reaching a just and fair decisions as it will provide critical information pertaining to the loan agreement advanced to it by the petitioner. It is only right therefore that Moru Ridge Limited be enjoined in these proceedings to enable it attest to the aforesaid matters especially as surprisingly set out in the Replying Affidavit of Edith Wanjiku sworn on July 5, 2021 in which she depones to matters touching on the Respondent Banks advances to Moru Ridge Limited and unilaterally disavows the bank's own acts in Civil Suit No 137 of 2018 Ecobank Kenya Limited Vs Moru Ridge Limited and Anor.
11. The evidence by Moru Ridge Limited is therefore absolutely critical to demonstrate that as asserted by the Petitioner in these proceedings that the subject debt is disputed and the Statutory Demand upon it is unmerited and ought to be struck down.
12. In determining whether Moru Ridge should be admitted into these proceedings as an Interested Party the Applicant was guided by the *Mumo Matemo* case where the Court held:

“ [An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

Respondent's Case

13. It was the Respondent's submission that the Applicant together with others executed a Letter of Guarantee and Indemnity dated March 16, 2018 where they guaranteed to pay on demand all money and discharge all obligations and liabilities owed to the Bank by the principal debtor. In the said Guarantee, the Applicant guaranteed to pay on demand the principal sum of Kshs 483,545,885.00 to which would be added interest, fees, commission, costs, charges and expenses.
14. The obligation of each guarantor under the guarantee was to make payment to the Bank and any statement of account of the principal debtor signed as correct by a duly authorized officer of the Bank shall be conclusive evidence against the guarantor of the indebtedness of the principal debtor to the Bank.



15. The Petitioner called up the 4 Guarantors vide a demand letter dated November 30, 2020. Despite demand having been made, the Applicant has failed, refused and/or neglected to pay the guaranteed sum. The Guarantee has not been discharged yet and remains enforceable against the Applicant.
16. The Petitioner herein discharged his obligation upon giving notice of default on November 30, 2020. Default has been established and a formal demand issues, the security cannot be defeated and the Applicant ought to settle the debt owed to the Bank. The Applicant has not approached the Bank in an effort to settle the debt owed by the principal debtor and therefore, the letter of guarantee and indemnity is still enforceable against the Guarantors. Pursuant to the terms of the guarantee, the Guarantors are liable to pay on demand to the Bank the amount owed by the Borrower to the Bank, the sum of Kshs 483,545,885.00 together with the accrued interest, fees, commissions, costs, charges and expenses.
17. A creditor who holds an array of security is not duty bound to take one particular line first and this was stated by the Court of Appeal in *Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others* [2013] eKLR.
18. Similarly, in the case of *Peter Munga v African Seed Investment Fund LLC* [2017] eKLR, the court held that a creditor has a free hand, when to act and on which security, without any direction by the debtor, sureties or the court, unless parties have expressly agreed to the contrary and the security documents themselves stipulate the agreement.
19. Contrary to the assertions by the Applicant (paragraph 10 of the affidavit by Dan Awendo), the charged property has not been sold yet and as per the latest valuation of the property dated May 11, 2020, the forced sale value stands at Kshs 525,000,000.
20. As per the statements of account dated April 26, 2021, the debt has escalated and outstripped the value of the property and now stands at Kshs 938,592,267.44 as at April 26, 2021. The debt continues to accrue interest at the Bank's Commercial interest until payment in full.
21. The exercise of the Chargee's statutory power of sale under the *Land Act* does not discharge the Guarantor of its obligations under the Letter of Guarantee and Indemnity as the duty of the guarantor is created by the guarantee document itself and not the terms of the underlying contract. In any case, the property is yet to be sold despite being advertised for sale on several occasions.
22. The statutory notice dated March 19, 2021 issued to the Applicant is in compliance of Section 384 (1) *Insolvency Act* and emanates from default of payment of debt of the by the principal debtor. The Statutory Notice intimated that unless the Debtor paid the decretal amount in 21 days from date of service of the Notice, the Respondent would proceed to file for a liquidation order against the Applicant Company.
23. Regulation 17 of *Insolvency Regulations* that the Applicant relies on is not applicable with regard to liquidation of Companies but for bankruptcy matters. The grounds for setting aside a statutory demand in liquidation matters were laid out in *Oldonyo Nairasha Estates (Narok) Limited v OCP Kenya Limited* [2021] eKLR
24. The Applicant has not tendered any evidence to prove that the amount owed is incorrect or that the debt is not owed. The Applicant bears the burden of establishing that the debt is not bona fide and is disputed on valid grounds. No valid grounds have been adduced before this Court. For a statutory demand to be set aside, the applicant bears the burden of proving that the debt is not bona fide and is disputed on valid grounds. No valid grounds have been adduced by the Applicant in this regard.



25. The Applicant urged the Court to set aside the statutory demand because the heading reads “In the matter of Home Afrika Limited”. The same was a typographical error that does not warrant the setting aside of the statutory demand. The Statutory demand is addressed to Home Afrika Communities Limited and complies with the law.
26. The Applicant alleged that the debt did not arise as the Bank exercised its statutory power of sale in respect of the security provided by the principal debtor, thus extinguishing the guarantee issue by the Applicant. No evidence has been tendered to support that averment. On the other hand, the Bank has tendered evidence to show that it has in past put up the property for public auction without success as the reserve price could not be attained.
27. The Bank established that the amount is due and owing and is therefore lawfully entitled to recover from the applicant as guarantor of the principal debtor. The Guarantor is bound by the terms of guarantee and it cannot ask this Court to discharge it from obligations that it agreed to be bound to.
28. It was the Respondent’s submission that the Court has no jurisdiction to enjoin Moru Ridge Limited as there is no suit seeking injunctive orders against the purported interested party. The Applicant’s contention that it is only Moru Ridge Limited that can properly attest to the assertions made by the Respondent in Civil Suit No 137 of 2018 does not prove that the said party has a stake in the proceedings. The court in the said suit reached a decision having taken into account all relevant laws and legal arguments.
29. It is not sufficient for a party to state that he has an interest he must convince the court that his participation in the suit is crucial and will be necessary to assist the court in making a determination of the suit. The Applicant has not proved that the interested party has an identifiable stake in the matter before the court.
30. The Respondent further submitted that this Court has no jurisdiction to “enjoin” Moru Ridge Limited as there is no suit seeking injunctive orders against the purported interested party. It was the Applicant’s contention that it is only Moru Ridge who can properly attest to the assertions made by the Respondent Bank in Civil Suit No 137 of 2018 *[Ecobank Limited -vs- Moru Ridge Limited & Another](#)*. The Applicant further contends that the proceedings in the said suit extinguished the guarantee executed by it.
31. It was the Respondent’s response that the contention does not prove that the said party has a stake in the proceedings. The Court in the said suit reached a decision having taken into account all relevant laws and entertained legal arguments and principles brought to light in the Courtroom by the parties to the suit.
32. Courts have from time to time held that an interested party is one who has a stake in the proceedings. The Interested Party must demonstrate that it is necessary for him to be joined as a party to enable the court to settle all the questions involved in the suit. It is not sufficient for a party to state he has an interest he must convince the court that his being enjoined in the suit is crucial and will be necessary to assist the court in the determination of the questions involved in the suit.
33. Interestingly, the Respondent argued that the ruling in Civil Suit No 137 of 2018 *[Ecobank Kenya Limited v Moru Ridge Limited & Another](#)* is self-explanatory and does not require the joinder of a party to interpret the gist of the ruling. Thus, the Applicant herein has not proved whether the intended interested party has an identifiable stake in the matter before the court and whether non-joinder will cause prejudice to the intended interested party or the Applicant.



34. In the present circumstances of the case, it would be improper to join the intended interested party to this suit. The Principal Borrower's presence in this matter will not aid or assist the court in the determination of the pending application which seeks to set aside the statutory demand issued by the Bank.

Issues For Determination

35. The Court has considered the Applications and the written submissions and frames the following issues for determination;
- a. Whether the Statutory Demand dated March 19, 2021 should be set aside?
 - b. Whether leave should be granted to the Applicant to enjoin M/s Moru Ridge Limited in these proceedings as an Interested Party?

Analysis

36. The Debtor herein relied on Section 17 (3) of the [Insolvency Act](#) and Regulation 17 of the Insolvency Regulations which provide;

"Section 17(3)

- 3) For the purposes of subsection (2)(c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—
 - (a) the applicant creditor to whom the debt is owed has served on the debtor a demand requiring the debtor to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least twenty—one days have elapsed since the demand was served, and the demand has been neither complied with nor set aside in accordance with the insolvency regulations; or
 - (b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part."

"Regulation 17

Hearing of application to set aside statutory demand

1. On receipt of an application under regulation 16, the Court may, if satisfied that no sufficient cause is shown for granting the statutory demand, dismiss the application without giving notice to the creditor.
2. The time limited for compliance with the statutory demand shall commence from the date on which the application is dismissed.
3. If the application is not dismissed under paragraph (1), the Court shall fix a date and venue for it to be heard, and shall give at least seven days' notice to—
 - a. the debtor or, if the debtor's application was made by an advocate acting for him, to the advocate,
 - b. the creditor; and



- c. any other person who is named in the statutory demand as the person whom the debtor may enter into communication with in reference to the statutory demand or, if more than one person is named, the first person to be named.
4. Where the creditor responds to the application, the creditor shall serve the response upon the debtor and the Court at least three days before the date of hearing of the application.
5. On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.
- (6) The Court may grant the application if—
 - (a) the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;
 - (b) the debt is disputed on grounds which appear to the Court to be substantial;
 - (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
 - (d) the Court is satisfied, on other grounds, that the demand ought to be set aside.
- (7) If the creditor holds some security in respect of his debt and has complied with paragraph (6) in respect of it, and the Court is satisfied that the security is under-valued in the statutory demand, the Court may require the creditor to amend the demand accordingly, without affecting the creditor's right to present a bankruptcy application in respect of the original statutory demand.
- (8) If the creditor holds a security in respect of the debt, the provisions of this regulation shall be deemed to be complied with if the creditor has specified the full amount of the debt, and has specified—
 - (a) in the demand the nature of the security and the value that the creditor puts on it as at the date of the demand; and
 - (b) the amount of which payment is claimed by the demand, which is required to be the full amount of the debt, less the amount specified as the value of the security.
- (9) If the Court dismisses the application, it shall make an Order authorizing the creditor to present a bankruptcy application either immediately or on or after a date specified in the Order.



- (10) The Registrar of the Court shall, after the Court has made an order under paragraph (8), send a copy of the Order to the creditor.
37. The Debtor argued that by a Ruling dated January 22, 2020 the Respondent was granted leave to purchase unit M0014 situated on LR No 29059 IR No 149050 Kiambu in the name of Moru Ridge Limited by private treaty at market price. In the circumstances any debt owed to the Respondent is wholly provided for and is within the control of the Respondent.
38. It is not disputed that the Respondent already moved the court and exercised its right over the security provided. This clearly demonstrates that the Respondent acknowledged that it indeed holds some security in respect of the debt claimed.
39. Taking into consideration the above-mentioned provisions a statutory demand may be set aside if the creditor holds some security in respect of the debt claimed by the demand. The Respondent herein argued that has it has in past put up the property for public auction without success as the reserve price could not be attained and is therefore lawfully entitled to recover from the applicant as guarantor of the principal debtor.
40. In this regard Section 97 of the *Land Act* provides;
- “(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale
- (5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1)”
41. The Court’s understanding of the above provision is that the Respondent is not entitled to any compensation in the event that it is not in a position to recover the sums advanced during an exercise to sell the charged property and in this case the Respondent was granted leave to purchase the charged property. The Respondent cannot therefore purchase the said property and still go after the guarantors to recover the sum owed.
42. The 2nd Application seeks the joinder of an interested party. The court in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, explained when an interested party ought to be enjoined in a proceeding as follows: -
- “A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.



43. Further, in the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR the Supreme Court of Kenya held that;

"(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held: "[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

(23) Similarly, in the case of *Meme v Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) " Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation."

44. It is not disputed that the Respondent had sued Moru Ridge and there is a court ruling touching on the suit property which in the judgment of the Court in Civil Suit No 137 of 2018 *Ecobank Kenya Limited v Moru Ridge Limited & Anor* granted leave to the Respondent to purchase the security to settle the debt owed to it.

45. It is in the Court's view that the presence of Moru Ridge Limited will not help in the complete settlement of this matter and provide protection to the Applicant as the guarantor since there is a court ruling in Civil Suit No 137 of 2018 *Ecobank Kenya Limited v Moru Ridge Limited & Anor* already in place and it clearly discharges Moru Ridge Limited of its duty in this matter.

46. The upshot is that this court is satisfied that the Application for setting aside the Statutory demand is merited while the Application for enjoining the interested party Moru Ridge Limited is found to be devoid of merit.

Findings and Determination

47. For the forgoing reasons this court makes the following findings and determinations

- i. This court finds that the application to set aside the Statutory Demand dated March 19, 2021 has merit and it is hereby allowed.
- ii. The application seeking leave to enjoin M/s Moru Ridge Limited in these proceedings as an Interested Party is found to be devoid of merit and is hereby disallowed.
- iii. The costs of the application be borne by the Respondent.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

HON. A. MSHILA



JUDGE

In the presence of;

Waweru holding brief for Githinji Marete for the Applicant

Muhizi holding brief for Allan Gichuhi for the Respondent

Lucy -----Court Assistant

