Mukiri v Afrian Banking Corporation (Commercial Case E035 of 2020)
[2023] KEHC 20711 (KLR) (Commercial and Tax) (5 June 2023) (Ruling)

Neutral citation: [2023] KEHC 20711 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E035 OF 2020

DO CHEPKWONY, J

JUNE 5, 2023

BETWEEN

AGNES WANJIKU MUKIRI ..... DEBTOR

AND

AFRIAN BANKING CORPORATION ..... CREDITOR

RULING

1. The subject of this ruling is a Notice of Motion application dated 19th December, 2020 filed by the Debtor/Applicant brought under Section 17(1)(d) and Section 17(3) of the *Insolvency Act* Regulation 17 of 2016, Insolvency Regulations. In the application, the Applicant seeks for orders that:-

    a. The Statutory demand issued herein dated 27th November, 2020 be set aside.

    b. The Creditor pays the costs of this application.

2. The application is supported by the grounds propounded on its face and Supporting Affidavit sworn by Agnes Wanjiku Mukiru, the Applicant.

Summary of Applicant's Case

3. The statutory demand, subject of this application is based on a purported bank guarantee issued in favour of the purported Creditor by the Applicant herein and her husband on 5th October, 2017. That the Applicant and her husband are the sole Shareholders and Directors of three Private Limited Liability Family Companies namely, Pemuga Auto Spares Limited, Rajaa Stones Limited and Vision Twenty Thirty Dreams Homes which moved to Industrial Area where they were approached by the Creditor's Agents with a view of extending banking facilities to them and their Companies at competitive rates.

4. The Applicant claims that the Creditor/Respondent lured them into a scheme where they provided services such as drafting borrowing resolutions applications for facilities, letter of acceptance and guarantees which they signed and purported to have taken legal advice whilst they not. That they were offered more competitive prices for their products from those they had had from their other bankers such as KCB, Equity and HFCK. Thereafter they handed over the signed letters for the bank to prepare facility letters.

5. It is the Applicant's contention that this same procedure applied to the signing of the Company Resolution, seeking them and the application applied to the facility letter and the documents accompanying it save for where an advocate was required to witness a document, the Applicant arranged for the same and hey informed Mr. Muniu that they were ready for collection and the Creditors Officers would collect the resolutions and applications for loan from them and they would send them an offer of facilities accompanied by acceptance of loan and purported guarantees for them to sign.

6. According to the Applicant, the Respondent's agents never supplied with draft facilities letters and or purported commercial instruments for review or allow them time to seek independent legal advice before signing the same for execution. It is hence the Applicants contention that they were dealing with experienced bank officers in making offers and facilities and knew the legal significance of the documents which its legal advisers prepared for them and as such there was an inequality in the bargaining process with the Applicant being in a weak bargaining position with want of skill in drafting the application for facilities, guarantees board resolutions and securities.

7. On 13th August, 2015, the Creditor granted to Pemuga Autospares and Vision Twenty Thirty Dreams Homes facilities in the sum of Kshs.20 Million, which was working capital and a letter of credit of Kshs.25 Million. That the banking facility extended to Pemuga Autospares being Kshs.20 Million and letter of credit. That went into importation of Spare Parts while the banking facilities extended to Vision Twenty Thirty Dreams Homes went into purchase of land at Thika which was charged to the bank, namely Thika Municipality Block 13/523, 13/525, 14/981 and 14/973. The two latter plots are the subject of a suit in the nature of disputed ownership at the Thika Environment and Land Court whereby the Respondent/Creditor herein has filed a defence to defend their right in the securities.

8. On 15th June, 2017, the Creditor issued a Statutory Notice to the Directors of Pemuga, the Directors of Vision Twenty Thirty Dreams Homes and to the Directors of Rajaa Stones Limited respectively but thereafter restructured the loans into one in September, 2017. And again, as had happened in 2014, the final document for the restructuring was also issued to the Debtors for their signature without the benefit of independent legal advice which the Applicant holds to be the unfair and fraudulent procedure as previously resorted to by the bank in the former facilities obtained.

9. The Respondent opposed the application vide the Replying Affidavit of Louis Omukhulu sworn on 3rd May, 2022 by Louis Omukhulu on the 3rd May, 2021. The facts therein are that the Applicant and her husband run the family business vide three Companies namely Pemuga Autospares Limited, Vision Twenty Thirty Dreams Homes Limited and Rajaa Stones Limited, where they serve as Directors. It is averred that on diverse dated from the year 2014 and 2017, the Debtor/Applicant approached and requested the Creditor for various banking facilities and after negotiations, the Creditor/Respondent advanced various credit facilities to two of the three family business, being Pemuga Autospares Limited and Vision Twenty Thirty Dreams Homes Limited which were guaranteed by Rajaa Stones Limited, Peter Mukiri Gateri, the Debtor's husband and the Debtor herself.

10. That, as at 25th March, 2017, the two Companies had defaulted on facilities with an outstanding debt amount of Kshs.35,486,859.00 and Kshs.38,799,973.00 leading to the creditor issuing demand letters dated 19th April, 2017 to Pemuga Autospares Limited and Vision Twenty Thirty Dreams Homes.

11. That on 15th June, 2017, the creditor issued statutory Notices with regard to the properties registered in the names of Pemuga Autospares Limited, Vision Twenty Thirty Dreams Homes Limited and Rajaa Stones Limited. That this led to Pamuga Autospares Limited and Vision Twenty Thirty Dreams Homes Limited approaching the Creditor/Respondent for a restructure of their facilities, which request the Creditor agreed to and amalgamated the facilities given to Pamuga Autospares Limited and Vision Twenty Thirty Dreams Homes into one and a new facility was given to Pamuga Autospares Limited vide a letter of offer dated 28th September, 2017, which was duly signed by the Debtor/Applicant and her husband for a term loan limit of Kshs.79,970,304.00 at an interest rate of 14% pa, with a default rate interest at 20% per month and they also executed personal deeds guarantee/indemnity in favour of Pemuga Autospares Limited.

12. On 15th February, 2018, the Creditor/Respondent issued a statutory Notices with regard to the properties as listed therein. And by 21st May, 2018, the Debtors had continued defaulting and the outstanding loan amount was at Kshs.85,404,690.73. On 23rd May, 2018, the Creditor issued statutory Notices under Section 96 of the *Land Act*, 2012. The Creditor requested for additional security to no avail, and on 7th February, 2020, it conducted valuations on the securities it held.

13. Subsequently, it could not find any successful/potential buyers for two of the properties while the other two properties of the four secured properties are subject of a suit, being Thika Environment and Land Court Case No.216 of 2018, where ownership is in dispute. As a result of all, the Creditor has not been able to realize the security and the debt amount which continues to accrue interest, stood at Kshs.126,369,610.73 as of 30th June, 2020. It is in light of this that the creditors Bank issued a demand letter dated 9th June, 2020.

14. On 4th July, 2022, parties were directed to canvass the application by way of written submissions. The Debtor/Applicant's submissions are dated 30th august, 2023 while the creditor/Respondent's submissions are dated 4th November, 2022. I have read through them for determination of the application filed herein.

Analysis and Determination

15. Having read through the grounds upon which the application dated 19th December, 2020 is premised alongside the Replying Affidavit sworn by Louis Omukhulu and the submissions filed by both sides, it is this Court's view that the main issue that falls for determination is whether the Applicant has raised sufficient grounds to warrant the statutory demand issued herein to be set aside.

16. A statutory demand is a kind of a written warning from a Creditor of a Company to a Debtor and that they either pay or make arrangements to pay their debt as a first step towards commencement of bankruptcy proceedings.

17. The application herein is based on Section 17(1) of the *Insolvency Act*which provides that:-

> " [17]. Creditor may apply for bankruptcy order in respect of debtor-
>
> (1) One or more Creditors of a Debtor may make an application to the Court for a bankruptcy order to be made in respect of the

Debtor in relation to a debt or debts owed by the debtor to the Creditor or Creditors.

And Section 17(2) of the same Act which provides:-

"[17]. (2) Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made—

a. the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;

b. the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the Applicant Creditors, either immediately or at some certain, future time, and is unsecured;

c. the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and,

d. there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts.

18. In this case, the Applicant/Debtor has issued a statutory demand dated 27th November, 2020 of the Respondent/Creditor which she seeks be set aside. The law on setting aside of statutory demand is set down under Regulations 16 and 17 of the Insolvency Regulations of 2016.

Regulations 15(1) of the Insolvency Regulation 2016, provides that:-

"(1) For the purposes of Section 17 of the Act, the procedure Creditor may apply for complying with or setting aside a demand is as provided Regulations 16 and 17.

Regulation 16 states:-

[16].

(1) The debtor may, apply to the Court for an order to set aside the statutory demand—

a. within twenty-one days from the date of the service on the debtor of the statutory demand; or

b. if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier.

(2). Subject to any order of the Court under Regulation 17(7), time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the Court.

(3). The debtor's application shall be in Form 7 set out in the First Schedule and shall be supported by an affidavit, which shall be in Form 8 set out in the First Schedule.

(4). The affidavit referred to under Paragraph (3) shall—

a. specify the date on which the statutory demand came into the debtor's possession;

b. state the grounds on which the debtor claims that it should be set aside; and

c. annex a copy of the statutory demand.

Regulation 17 provides:-

[17].

(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, bet-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 or 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.

19. In seeking to set out the statutory demand issued upon them, the Applicant appears to hinge her application mainly on Regulation 17(6) of the Insolvency Regulations by arguing that the purported personal guarantees executed by the Debtors herein are disputed vide the Debtor/Applicant's defence and Counter-claim in COMM. ES509 of 2020, *African Banking Corporation Limited –vs- Pemuga Autospares Limited, Vision Twenty Thirty Dreams Homes Limited, Rajaa Stones Limited, Peter Mukiri Gateri and Agnes Wanjiru Mukiri* pending determination. That in that case the Applicant and her husband's defence and Counter-claim is founded on unconsciousable bargain, undue influence the in duplum rule and abuse of court process. She further argues that the purported guarantee was obtained from her and her husband by the Creditor through equitable fraud or undue influence and without requiring them to obtain independent legal advice and explain to them the risks involved in standing as guarantors before execution of the said guarantee. She goes on to state that there was inequality of bargaining power in the entire transaction, hence the dispute in HCCOMM. NO.E509 of 2020. She cited a number of cases to support her argument on this. Further, it is the Applicant/Debtors contention that there being other suits such as HCCOMM. NO.E509 of 2020 in which the creditor has sought similar reliefs as in the instant case, and Thika ELC NO.210 of 2018 in which two properties serving as security are in dispute, the proceedings herein are an abuse of court process.

20. The Respondent on the other hand submitted that there is no dispute that the money was remitted to the Companies belonging to the Debtor and her husband, which money they acknowledge having received. What they are challenging is not having received independent legal advice. According to the Respondent, the Applicant/Debtor and her husband were Directors of three Companies running Multi-million businesses, thus cannot be said to be naïve persons. The Respondent also states that the Debtor/Applicant has acknowledged having dealt with other large bankers such as Equity Bank, KCB and HFCK so that it was not the first time to deal with a bank when they engaged with the Creditor in 2014. In view of all these, the Respondents have contended that the Debtor and her husband being Directors of three Multi-million Companies had wide knowledge in the area of credit transactions, what personal deeds of guarantee entails, their purport and effect and consequence if default and therefore should be allowed to ran away from their contractual obligations. The Creditor also states that the claim that they did not receive legal advice cannot be a substantial ground as envisioned by Regulation 17 of the *Insolvency Act*. In consideration of the arguments by both parties on whether the Creditor obtained the personal guarantees from the Debtor and her husband under undue influence and fraudulent misrepresentation, by failing to advise them to obtain independent legal advice, the

court is alive to the fact that in any negotiation, the bargaining power of the parties is seldom absolutely equal. It is therefore not enough for a party to allege the existe3nce of such inequality but must show that the unconsciounable use of such power by the stronger party. In the case of *LTI Kisii Safari Inns Limited & 2 Others –vs- Deutsche Investitions –Und Enwiklungsgellischaft (Deg) & Others* [2011]eKLR, it was held:-

> " The doctrine of unconscionable bargains is also an equitable doctrine. There are at least three prerequisites to the application of the doctrine, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain reveal conduct which shocks the conscience of the court. Secondly, that the victim must have been suffering from certain types of bargaining processes, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behavior of the stronger party is morally reprehensible".

21. The Applicant alleges that the unconscionable bargain was as a result of failure by the Creditor to advise the debtors to obtain independent legal advice. Reliance has been placed on the case of *Barclays Bank Plc –vs- O' Brien & Another* [1993]All ER 417 to allege fraudulent misrepresentation by the Creditor. The facts of the said case are that the wife had agreed to stand as surety to the husband. The wife went ahead to sign the security documents at the risk that the matrimonial home and herself were potentially liable for the debts of the Company. Accordingly, the bank had constructive notice of the wrongful representation by the husband to the wife and despite the facts, failed to recommend to the wife that she could get independent legal advice.

22. It is clear from the facts of this case, and admittedly so, that both Debtors were acting in their capacity as Directors and Shareholders of their three Companies and had previously dealt with various creditors such as the Respondent herein. Therefore, having engaged in borrowing transactions such as this the Applicants had previous knowledge of credit transactions with banks. Furthermore, through their affidavit-evidence, the debtor stated that "where it was necessary for an advocate to witness a document we arrange the witnessing after which we informed Mr. Muiru that they were ready for collection."

23. Based on the foregoing, the Court agrees with the Respondent that indeed there was an allowance for the Applicants to obtain legal advice accordingly. In any event, it has not been presented that the debtor and her husband were suffering any mental incapacity when they signed the guarantees. In the circumstances, the facts herein do not paint a picture of wrongful misrepresentation as alleged by the Applicant. Thus, it is this Court's finding that the allegation that the two agents of the Creditor had conducted themselves in a morally unconscionably manner towards the borrowers has not been proven on a balance of probabilities.

24. On the second ground, the Applicant has invited this Honourable Court to find that the proceedings herein are an abuse of court process as there is another suit being HCCOMM. E509 of 2020 wherein the Respondent has sought similar reliefs. This Court choses to proceed with caution by stating that the threshold for a counterclaim as required in Regulation 17 (supra) is that such counterclaim, set off or cross-demand must be equal or exceeding the sum of money in the statutory demand. In the Counterclaim and Defence in that case there is no mention of any amount of money counterclaimed or to set off the demanded amount.

25. Notably, these are bankruptcy proceedings against natural persons which have been instituted simultaneously with HCCOMM E507 of 2022 where allegedly similar reliefs have been sought. The preference of the use of multiple processes by the creditor as in this case will be juxtaposed with where

a company is involved. The Court of Appeal in the case of Pride Inn Hotels & Investments Limited -vs- Tropicana Hotels Limited [2018] eKLR, held that:-

> " There is no requirement under the *Insolvency Act* or the *Companies Act* which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the *Insolvency Act* which a creditor such as the Respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence."

26. Similarly, the Respondent is not limited in option by the *Insolvency Act* when it comes to bankruptcy proceedings against natural persons. This Court is guided by the case of *Ecobank Kenya Limited –vs- Francis Tole Mwakideli* [2018]eKLR cited with the approval in *Rufus Ragui & Anor –vs- Vivo Energy Kenya Limited* [2020]eKLR, wherein it was stated:-

> " A creditor is free to choose from which debtor and what method to use to recover debt. The debtor has no luxury or right of choosing for the creditor who amongst the debtors to pursue and failure to pursue all the debtors at once is not fatal to the creditor's petition. In view of the above, I find no merit in ground number (b) of the objection. I find that the petition is not premature, not an abuse of the court process as the creditor is not obliged to exhaust other recovery mechanism available to it before bringing up an application for bankruptcy."

27. Further, the Creditor by participating in the Thika Environment and Land Court, ELC No.216 of 2018 which consists of two consolidated suits, the creditor is acting within its rights to defend its rights in the securities given by the Applicants. In view of this, the Court finds that the proceedings herein are not an abuse of the court process. The grounds advanced by the Applicant do not warrant the setting aside of the Statutory Demand and as such the debt is not disputed on substantial grounds.

28. In the resultant, it is this Court's finding that the grounds that have been advanced by the Applicant in seeking to have the statutory demand set aside do not meet the threshold set out under Regulation 17 of the *Insolvency Regulations*, and as such the debt is not disputed on substantial grounds.

Conclusion

29. The Court therefore orders that:-

    a. The Application dated 19th December, 2020 seeking to set aside the Statutory Demand is hereby dismissed with costs to the Respondent.

    b. The Respondent/Creditor be and is hereby authorized to commence the bankruptcy proceedings against the Applicant/Debtor.

    c. The Orders herein to apply to Insolvency Petition No.E034 of 2020.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 5TH DAY OF JUNE , 2023.

D. O. CHEPKWONY

JUDGE