Suri v Kaur (Commercial Case E114 of 2024) [2024] KEHC 11981 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E114 OF 2024

JWW MONG'ARE, J

OCTOBER 4, 2024

BETWEEN

AVTAR SIGH SURI ..... PLAINTIFF

AND

PARMJIT KAUR ALIAS MANDEEP KAUR ..... DEFENDANT

RULING

Introduction & Background

1. On 7th June 2023, the Defendant obtained a judgment against the Plaintiff in NRB ELCC No 738 of 2013 for inter alia the sum of Kshs 22,078,207.00/= on account of *pro-rata* rental income reckoned up to and including June 2023 together with interest at a rate of 14% per annum until payment in full. By a plaint dated 6th March 2024, the Plaintiff filed this suit stating that he is ready to settle the decretal amount in monthly instalments of Kshs 2,065,515.50/= until payment in full and that an application in ELC Suit No 738 of 2013, to liquidate the entire debt in 12 monthly instalments was coming up on 11th March 2024.

2. The Plaintiff claims that upon receipt of this application, the Defendant on 28th February 2024, issued a statutory demand notice ("the statutory demand") to the Plaintiff demanding the payment of the decretal amount within 21 days, failing which they would file bankruptcy proceedings. The Plaintiff avers that the amount indicated in the statutory demand is illusory and fictitious with no basis at all since no figures are mentioned therein, making it subjective and ambiguous; the interest in a previous letter has been cooked, and extrapolated and that the Plaintiff has already paid Kshs 5 Million on 12th February 2024.

3. The Plaintiff contends that the statutory demand does not bear a case number and is not endorsed by the Deputy Registrar of the High Court as required under section 384 of the *Insolvency Act*, Regulation 77B of the *Insolvency Regulations* and Form No 32E.

4. That the Defendant has not stated how much is owed in the statutory demand and that the costs of the suit have not been taxed to warrant crystallization of the decretal amount contrary to section 94 of the *Civil Procedure Act*. He avers that the statutory demand is premature, null, void and wanting in both form and substance, having not been issued in compliance with the provisions of the *Insolvency Act* and Insolvency Regulations. That the same as issued is not only substantially disputed but also an unascertained debt there being no documentation availed to the Plaintiff or this Court to substantiate the claim in the statutory demand.

5. The Plaintiff states that at all times, the Defendant is a co-owner of LR No 4274/44 along Riverside Drive, which is being subdivided into half between the partes herein and that according to a valuation by Dayton Valuers on 6th February 2024, the property value is Kshs 197.5 million. He reiterates that the debt herein being disputed should be pronounced in ELC No 738 of 2013 after a taxation of costs and not insolvency proceedings.

6. The Plaintiff advances the argument that he is a renowned businessman of 85 years and that he relies on his reputation to do his one business and obtain financing and any suggestion of financial weakness on his part could well spell his death-knell in business. As such he contends that he shall suffer immense loss and damages if the Defendant proceeds with filing an insolvency petition or takes any steps to publish the intended liquidation in the press or Kenya Gazette.

7. He thus seeks inter alia that the court declares the statutory demand a nullity and an infraction to the *Insolvency Act* and Regulations; he further seeks an order setting aside the statutory demand and an order restraining the Defendant from undertaking further insolvency proceedings against the Plaintiff so long as he is making reasonable payments and the Defendant has not exhausted her execution remedies towards settling the decretal amounts in ELC No 738 of 2013.

8. Contemporaneously with the plaint and to further forestall the Defendant from presenting the insolvency proceedings against the Plaintiff to the Office of the Official Receiver or to the court or advertising in the press or Kenya Gazette or howsoever in any way, in respect of the decretal sums in ELC Suit No 738 of 2013, the Plaintiff has also filed the Notice of Motion dated 6th March 2024 under Article 159 of *the Constitution*, sections 427 (3) & (4), 384 of the *Insolvency Act*, Regulation 10 & 77B of the Insolvency Regulations and section 1A, 1B, 3, 3A of the *Civil Procedure Act* which is now the subject of the court's determination.

9. The application is supported by the facts on its face and the Plaintiff's supporting affidavit sworn on 6th March 2024. It is opposed by the Defendant through the replying affidavit of her advocate in conduct of this matter, Virinder Goswami, sworn on 26th March 2024 and the Notice of Preliminary Objection of the same date. The parties have also supplemented their arguments by filing written submissions which were orally highlighted by their respective counsel.

10. The Plaintiff's case in his application mirrors that in his plaint which I have already highlighted above. On her part, the Defendant first assails the competence of the application by stating that the proceedings such as these as initiated by the Plaintiff are an abuse of the process of court as the statutory demand issued under the *Insolvency Act* cannot be challenged by a plaint filed as a Civil Suit. That such statutory demand can only be challenged if and when the same comes up for hearing or by an application under Regulations made under the *Insolvency Act* as stated in Regulation 16 thereof and that the statutory demand not advertised cannot be subject of alleged damages as averred in the Plaint.

11. On the merits of the application, the Defendant depones that the same has none and that the court should dismiss it. That for more than a decade, the Plaintiff has perverted the course of justice and the Defendant implores the court to allow justice to finally take its course. She contends that since June 2023, when the ELC delivered judgment in ELC No 738 of 2013, the Plaintiff was silent on proposals to pay and that the debt due is not disputed. She avers that the net amount plus interest thereon exceeds the amount shown on the statutory demand which does not even account for the costs and that from the Plaintiff's past conduct, this application is not made in good faith and neither is the Plaint. That instead of paying, the Plaintiff files application after application and that in March, 2014, the Plaintiff agreed to disburse directly to the Defendant her share of rent as per the consent recorded on 4th March 2014 but the Plaintiff did not disburse the rent.

12. The Defendant claims that the Plaintiff made multiple applications to set aside the consent order which applications were dismissed in Rulings delivered on 5th May 2020 and 10th December 2020 and that the Court of Appeal dismissed two of the Plaintiff's applications for stay of execution. That on 20th March 2024 the ELC dismissed the Plaintiff's application to pay by instalments where Mboya J., held that the application was an attempt by the Plaintiff to breach his fiduciary duty to the Defendant.

13. The Defendant depones that due to the Plaintiff's delay tactics, the rental income that he owes her is growing, interest thereon continues to accrue and the Plaintiff does not even disburse the current rental income as he was ordered in the Judgment aforesaid. That costs have mounted incredibly due to the Plaintiff's unrestrained conduct and the Defendant implores the court to dismiss this application and put a stop to the Plaintiff's conduct as the sums due are trust property and the Plaintiff has a solemn duty to pay immediately.

Analysis and Determination

14. I have carefully considered the pleadings and the rival written submissions filed herein. As stated in the pleadings and reiterated in the submissions, the Defendant is challenging the competence of the suit and the application for apparently running afoul Regulation 16 of the Insolvency Regulations which provides as follows:

> 16. Application to set aside statutory demand
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> (1) The debtor may, apply to the Court for an order to set aside the statutory demand—
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> (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.
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> (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.

15. In essence, the Defendant is challenging the form of the Plaintiff's suit and application. Regulation 10 of the Regulations provide that all applications under the *Insolvency Act* to the court shall be by way of Notice of Motion and if the application is one seeking to set aside the statutory demand, then as per Regulation 16(3) above, the same shall be accompanied by a supporting affidavit. However, in this case, the Plaintiff's prayer to set aside the statutory demand is anchored in the plaint as opposed to the present Notice of Motion that is accompanied by a supporting affidavit.

16. In *Maganlal Motichand Chandaria & 6 others v Paresh Kumar Dodhia* ML HC Comm. Suit No 403 of 2016 [2017] eKLR this court held that any challenge to a statutory demand ought to be commenced by way of a Notice of Motion filed as a miscellaneous cause in the matter of the *Insolvency Act* and Regulations and in the matter of the impugned statutory demand and that any other mode would be fatally defective. In that case, the late Onguto J., held as follows:

> 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.
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> 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.
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> .....
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> 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.
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> .....
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> 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.

17. I am persuaded by the aforementioned holding and find that the Plaintiff's plaint which seeks to set aside the statutory demand is defective for want of form and that this defect is fatal to the Plaintiff's case and cannot be resurrected by the court's "oxygen principles" and inherent power and; pursuant to the provisions of Article 159 of the *Constitution*. The Plaintiff ought to have sought to set aside the

statutory demand by instituting this suit as a miscellaneous cause, filed by way of a Notice of Motion and supporting affidavit.

18. I therefore agree with the Defendant's objection that the statutory demand has not been properly challenged in this case and the same remains valid. Based on these findings, the Plaintiff's Plaint and the present application are incompetent and should be struck out. However, I will deal with the same for the sake of completeness and justice, seeing that both parties have argued and submitted extensively on the substance of the application. But first, I note that the Plaintiff in his submissions also assailed the Defendant's deposition for being sworn by her counsel and yet this matter is highly contentious.

19. The Defendant rebutted by submitting that the deposition outlines the record of the previous proceedings between the parties herein and that there can never be a better deponent than an advocate on issues relating to archives or court records as such matters are within an advocate's knowledge as was held by the court in *Republic v National Environment Management Authority and others ex parte Greenhills Investment Ltd and others* [20051 2 EA 269. While it is indeed true that advocates swearing affidavits on behalf of their clients is frowned upon, the Court of Appeal, in *Kamlesh Manshuklal Damji Pattni v Nasir Ibrahim Ali and 2 others* NAI CA Civil Appl. No 354 of 2004 [2005] eKLR held that there is no express prohibition against an advocate who of his/her own knowledge can prove some facts, to state them in an affidavit on behalf of his client. I do not hear the Plaintiff claiming that the Defendant's counsel is not well versed in the facts he was deposing to or that there is a possibility he would be called as a witness or be subjected to cross-examination in what is otherwise a straight forward application for an injunction. I agree with the Defendant that her counsel is well versed with the chronology of facts in this matter which is common to the parties and that he has knowledge of the issues herein and thus competent to swear an affidavit on the same. I find no merit in this objection and the same is therefore dismissed.

20. Turning to the merits of the application, the Plaintiff seeks an order of injunctive relief so that the court can forestall the Defendant from presenting insolvency proceedings against the Plaintiff to the Office of the Official Receiver or to court or advertising in the press or Kenya Gazette or howsoever in any way, in respect of the decretal sums in ELC Suit No 738 of 2013. The parties agree that the conditions for the granting of an interlocutory injunction were set out in *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 which case has been widely and generally accepted by our courts where at pg. 360 it was stated as follows:

> First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (*E.A. Industries v Trufoods* [1972] E.A. 420.)

21. In *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (*supra*) and further clarified that they are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. This means that if an Applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions. As to what constitutes a *prima facie* case, the Court

of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR explained as follows:

> A *prima facie* case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

22. Going through the pleadings, it is my finding that the Plaintiff has not made out a *prima facie* case for a number of reasons. First, in as much as he argues that the debt is disputed since the costs in ELC Suit No 738 of 2013 are yet to be taxed, he has expressly stated that he has been seeking to pay and has been paying the decretal amount in instalments which is an admission of indebtedness. The ELC also ordered the Plaintiff to pay costs and the taxation that is pending is only to ascertain the amount of costs to be paid. What the Plaintiff appears to be disputing is the amount to be paid as costs and not whether the Defendant is to be paid the costs. In short, the Plaintiff is disputing the level of his indebtedness in respect of the costs which this court has always held is not a valid ground for the grant of an injunction. This position is cemented by the Court of Appeal's decision in *Civil Servants Housing Co. Ltd and another v Lavuna and others* [1995] LLR 366 (CAK) where it held that "...A court should not grant an injunction.....on the ground that there is a dispute as to the amount due...". The ELC has rendered a judgment that the Plaintiff is indebted to the Defendant and this judgment has not been stayed or set aside. I therefore find that the Plaintiff is truly and admittedly indebted to the Defendant and that there is no dispute on the same. Second, the Plaintiff has stated it is willing to pay the debt in installments and that as long as this is the case, then the Defendant should not file any insolvency proceedings against him. Again, this court has always stated that it cannot force a party to accept a payment proposal as this would amount to re-writing the parties' contract and/or bargain (see *Muigai Enterprises Limited v Kenya Commercial Bank Limited* [2016] eKLR). In any case, I find that the ELC in its ruling of 20th March 2024 has already declined this request by the Plaintiff to liquidate the decretal sum in installments and therefore, he cannot rely on any pending or further accommodation from the court to pay the decretal sum in installments and that this is not a ground to grant him an injunction to restrain the Defendant from filing insolvency proceedings against him.

23. Having failed to demonstrate a *prima facie* case with a probability of success, the inquiry on whether the Plaintiff is entitled to an injunction ends at this point in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 others*(*supra*). It is clear that the Plaintiff is indebted to the Defendant and the debt is undisputed at least in respect of the sum of Kshs 22,078,207.00/= and interest therein. I find that there is no valid reason why the Defendant should be restrained from presenting insolvency proceedings against the Plaintiff. Finally, since the statutory demand has not been properly challenged, the same remains valid and enforceable against Plaintiff and the Defendant is at liberty to institute bankruptcy proceedings against the Plaintiff after the lapse of the statutory period.

Conclusion and Disposition

24. The Plaintiff's application dated 6th March 2024 lacks merit and is hereby dismissed with costs to the Defendant. The interim orders in place are discharged forthwith.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4TH DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Waigwa for the Applicant.

2. Mr. Kamau holding brief for Mr. Goswami for the Respondent

3. Amos - Court Assistant