

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

INSOLVENCY CAUSE NO. 16 OF 2019

IN THE MATTER OF ERNEST OGESI KIVAI

AND

IN THE MATTER OF THE INSOLVENCY ACT, NO. 18 OF 2015

RULING

1. The cause herein was initiated by way of petition, dated 10th December 2019, by the KCB Bank Kenya Limited, to be known as the petitioner. The claim is that the Ernest Ogesi Kivai, to be known as the guarantor, was indebted to the petitioner in the sum of Kshs. 106, 200, 000.00, arising from guarantees that he had executed on divers dates in 2014 and 2015, undertaking to settle amounts due and owing to Kavuca Holdings Company Limited, to be known as the borrower, who had been granted various loan facilities by the petitioner. The petitioner had allegedly demanded payment of the outstanding loan amount from the guarantor, based on the deeds of guarantees and indemnity, totalling the amount aforesaid, but the said guarantor had been unable to pay or had no reasonable prospects of paying the debt. It is averred that the amount owed by the guarantor was within the prescribed bankruptcy level in accordance with the Insolvency Act No. 18 of 2015, and the Rules. It is averred that there was no outstanding application to set aside the statutory demand in respect of the debt owed by the guarantor, and that 21 days had expired since the statutory demand had been served on the guarantor, which had not been complied with nor set aside.

2. What I am called upon to decide is a Motion, dated 7th September 2020, filed at the instance of the guarantor. He seeks the striking out of the petition, on grounds that no valid statutory demand had been served on him, and that the statutory demand, dated 13th June 2019, did not meet the threshold provided in section 17(3) (a) of the Insolvency Act and Regulation 16(1)(a) of the Insolvency Regulations, 2016, since it was signed by the advocates for the petitioner rather than by the petitioner itself, and the said advocates were not the creditor, within the meaning of creditor in section 2 of the Insolvency Act.

3. In the affidavit sworn in support, the guarantor avers that he had not been served with the statutory demand, and that he only came to learn of the instant suit when a friend of his called him, and informed him of it, after he saw it in a cause list at the Kakamega law courts. He followed up thereafter, and established that a statutory demand notice had allegedly been served, as per an affidavit on service filed in court. He avers that the statutory notice ought to have been signed by the petitioner rather than by its advocates, since the creditor was not the advocates but the petitioner going by the definition of creditor in section 2 of the Insolvency Act. He argues that the petition was not properly grounded as it was based on an invalid statutory notice, and, therefore, it was null and void. He avers that a bankruptcy order could only be validly made against him where there has been full compliance with the law.

4. The reply to the Motion is by the business manager of the petitioner responsible for the Kakamega branch. He asserts that the petitioner had served a statutory demand on the guarantor, dated 13th June 2020, on 14th June 2020, informing him that if he did not pay the amount in the demand, within 21 days of service, insolvency proceedings would be commenced against him. The guarantor failed to settle the amount demanded, nor to apply to set aside the statutory demand. It is averred that the guarantor was obliged to settle the amount demanded, or apply to set aside the statutory demand within 21 days. With that failure, the petitioner then moved to court vide the petition herein. He asserts that the statutory notice on record was proper. He further avers that the guarantor had not disputed the debt, and, therefore, there was nondisclosure, and the guarantor had not come to court with clean hands.

5. Directions were given on 24th September 2020, for disposal of the Motion, by way of written submissions. The record before me bears the written submissions filed on behalf of the petitioner, complete with its list of authorities.

6. There are only two issues for me to determine. The principal issue is whether there is a valid statutory demand on record, and the secondary one is whether the same was properly served on the guarantor.

7. The case by the guarantor is that the statutory demand exhibited in the papers, filed by the petitioner, is not valid, for it is purported to be executed by the advocate for the petitioner, rather than by the petitioner itself, as the law envisages a demand issued by the creditor, and in this case the creditor is the petitioner and not its advocates.

8. The petitioner argues that its statutory demand was valid, as it met the requirements of the Insolvency Act. The petitioner has placed before me a number of decisions, where the courts have held that the statutory demand need not be signed solely by the creditor, it can also be signed by an agent of the creditor, and such agent includes advocates for the creditor. I am talking of *Kwale International Sugar Company Limited vs. EPCO Builders Limited & 2 others* [2020] eKLR (Okwany J), *Xplico Insurance Company Limited vs. Musyimi Paul Maingi t/a Maingi Musyimi & Associates Advocates & another* [2020] eKLR (Majanja J), *Africa Reit Limited vs. China National Aero Technology International Engineering Corporation* [2020] eKLR (Okwany J), among others. Consequently, it is my finding and holding that the statutory demand, dated 13th June 2019, was a valid demand, despite having been signed by the advocates for the petitioner.

9. The next consideration is whether the same was properly served on the guarantor. The guarantor argues that it was never served on him. The petitioner says that he did serve the same on the guarantor, and it points at an affidavit of service that has been placed on record. I have closely perused through the affidavit of service. It indicates that the demand was served on 14th June 2019, the guarantor's at his place of work within Parliament Buildings, Nairobi. He accepted service, but he declined to sign the copy retained by the process server as acknowledgement of service. The process server has gone into details of all he did in an effort to effect service and I have no reason to doubt him. The service has not been strenuously contested, for no effort was made to have the process server cross-examined, to establish the veracity of what is alleged in the said affidavit.

10. Having disposed of the two issues, it is my finding that the statutory demand on record is a valid and proper statutory demand, in keeping with the provisions of the Insolvency Act, and the same was properly served on the guarantor. The effect of that is that the petition herein was properly filed, and ought to proceed to full hearing and determination, and the Motion, dated 7th September 2020, is, therefore, without merit, and it is hereby **dismissed with costs**.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER 2021

W MUSYOKA

JUDGE