REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO.1 OF 2017

ECO BANK KENYA LIMITED................................CREDITOR

VERSUS

FRANCIS TOLE MWAKIDEDI..........DEBTOR/GUARANTOR

JUDGMENT

1. Through the petition dated 27th February 2017, the Creditor herein **ECOBANK KENYA LTD**, petitioned this court for a bankruptcy order in respect of the Estate of **Francis Tole Mwakidedi** carrying on business and trading as Skytech Communications Resources Limited.

2. The creditor states that the said **Francis Tole Mwakidedi** (hereinafter **"the Guarantor"**) is justly and truly indebted to it as the Guarantor to Skytech Communications Resources Limited (hereinafter, the **"Principal Debtor")** in the total sum of Kshs 10,068,678.00.

3. The Creditor contends that it does not hold any security on the Guarantor's estate or any part thereof for the payment of the said sum and that the amount owed by the Principal Debtor is within the prescribed bankruptcy level in accordance with the Insolvency Act and Rules.

4. The Creditor states that the Principal Debtor is unable or has no reasonable prospect of paying the debt and that the Guarantor has been unable to make good the debt.

5. It is the Creditor's case that there is no outstanding application to set aside the statutory demand in respect of the debt owed by the principal debtor which was guaranteed by the Guarantor herein and that 21 days have lapsed since a statutory demand was served in the Guarantor on 27th June 2016.

6. The petition is supported by the verifying affidavit of the Creditor's/petitioner's Head of Remedial Management sworn on 27th February 2017 wherein she avers that on 9th July 2009, the Principal Debtor obtained a loan facility of Kshs 6 million from the Creditor the particulars of which were as follows:-

> ***a) Facility: Project Loan for Kshs 6,000,000.00***
>
> ***b) Repayment: The facility is repayable from the proceeds of the contracts to be remitted to the Borrower's Account with the bank within 180 days from the date of reimbursement.***
>
> ***c) Tenor: The facility is available for utilization for a period of 180 days from the date of reimbursement.***
>
> ***d) Interest: Interest will be at Bank's Base Rate plus 3% p.a. The current Base Rate as at the date hereof is 15.75% p.a.***
>
> ***e) Default interest: If any sum or installment payable to the borrower under the project loan is not paid on the date on which it is due in accordance with the provisions of the facility letter or the security, the borrower shall pay interest by way of liquidated damages on such amount at the rate of 5% p.a. over and above the interest rate herein.***
>
> ***f) The bank's statement and records will constitute conclusive evidence of indebtedness in a court of Law- Clause 12.***

7. She avers that the facility was secured by the Letter of Assignment, Board Resolution authorizing the borrowing, Credit Agreement for Advance Account, Directors Personal Guarantee for Advance Account copies of which were exhibited as annexures to the verifying affidavit.

8. She further states that by a Guarantee and Indemnity dated 10th July 2009, the Guarantors guaranteed to pay the amount borrowed by the Principal Debtor together with interest, fees, commission, costs, charges and expenses upon demand. She further states that the Borrower dishonored and breached the terms of the said loan facility by defaulting in payment of the installments that fell into arrears to the tune of kshs 10,068,678.00 and which continues to accrue interest at the rate of 22.93% per annum from 15th September 2016, plus a default interest at 28.83% until payment in full.

9. She further avers that the Guarantor is liable to pay the bank the amount owed by the Borrower and that on 24th June 2016, a statutory demand notice was sent to the Guarantor advising him to rectify he default with 21 days. A copy if the statutory notice and certificate of posting were also annexed to the affidavit.

10. She contends that no payment has been made despite the demands and that through an email dated 26th August 2016, the Guarantor requested for a statement of account from the creditor which statement was availed. She maintains that the bankruptcy order sought to be issued against the Guarantor and his assets be vested with the Bankruptcy Trustee.

11. The Guarantor opposed the application through a Notice of Preliminary Objection dated 28th June 2017 wherein he sets out the following grounds:-

> ***a) That the Guarantor has been wrongly sued. The debtor and Guarantor are two separate and distinct persons in law and the proceedings herein are fundamentally defective and irregular.***
>
> ***b) That the petition is pre-mature and an abuse of the court process as the creditor is yet to exhaust recovery mechanisms available to it in law against the debtor and /or Guarantor.***
>
> ***c) That the petition offends the provisions of the Insolvency Act, 2015 as the debtor (Skytech Communications Resources Limited) made payments in an effort to secure and/or compound the debt as provided for under the law.***

12. On 3rd October 2018 the Guarantor filed an affidavit in response to the petition wherein he avers that the Borrower and Guarantor were not served with the statutory demand as required by law. He states that contrary to the Creditor's averments on the issue of security, the Creditor registered a charge on the Borrower's parcel of land being LR Nos. 27565, VIO TAITA TAVETA COUNTY and a second charge over LR No. BURA/NYOLO/2360 TAITA TAVETA COUNTY.

13. He further avers that the Borrower embarked on repaying the said loan and had as at 30th October 2015 repaid more than Kshs 12 million towards settling the loan which payment was not reflected in the borrowers loan account. He accuses the Creditor of converting/restructuring the loan facility from the original sum of kshs 6 million by adding unconscionable charges and penalties to make it appear like a different loan facility.

14. He also accuses the Creditor of failing to issue the Borrower with the updated loan statements so as to hide the true facts and confuse the Borrower's directors who have ensured that the loan was repaid in full and even in excess of the sum due.

15. He states that the petition is brought in bad faith as it is filed against him in his personal capacity yet he executed the guarantee in his official capacity as a director of the Borrower. He argues that the proper cause of action for the Creditor to take should have been the winding of the company as provided for in the letter of offer dated 9th July 2009.

16. He contends that the petitioner should be ordered to render a true record and statement of account of all the repayments made by the borrower towards liquidating the debt.

17. Through a ruling delivered on 13th July 2018, Makau J. dismissed the preliminary objection filed on 25th April 2017 thereby setting the stage for the hearing for the petition.

18. The petition was canvassed by way of written submissions. Parties highlighted the written submissions on 21st November 2019 even though the respondent did not file any written submissions.

19. A summary of the petitioner's submissions, as presented by **Mr. Wawire**, advocate, was that the Guarantors were duly served with the statutory notice through both registered post and email which notice they did not set aside or comply with thereby precipitating the filing of this petition.

20. Counsel submitted that since the Guarantors did not set aside the statutory notice, the consequence of such failure should lead the court to conclude that the Guarantor has not paid the debt and has no reasonable prospect of paying it.

21. On the issue of the petitioner/creditor having other securities which can be sold in order to recover the debt, counsel submitted that the security offered by the borrower is much less than the debt.

22. Counsel argued that Regulation 17(6) (c) of the Insolvency Regulations provides that if the securities offered do not exceed the debt owed, then the bankruptcy petition must be allowed. According to the petitioner, it had been shown that the securities were valued at Kshs 2.5 million when the debt was more than Kshs 10 million.

23. On the claim that the amount demanded is overstated, it was submitted that there is no evidence to show that the amount demanded by

the petitioner had been paid and that the statement of accounts provided by the creditor clearly showed that the amount due to the creditor is kshs 10.6 million. It was further submitted that even assuming that the amount of debt due was overstated, that would not form a sufficient ground for disallowing the petition.

24. **Mr. Maluki,** learned counsel for the respondent submitted that the Creditor charges illegal interest and had refused to adjust the same even when the Banking Amendment Act was in force. Counsel urged the court to reject the petition on account of the illegal interest rates. Counsel distinguished the present case from the case of ***Peter Munga v African Seed Investment LLC*** [2017] eKLR wherein the issue of whether an overstatement of the amount in the statutory notice was discussed and the court held that such an overstatement could lead to the setting aside of a statutory demand.

25. Counsel argued that the decision in the cited case was made at preliminary stage of setting aside the statutory demand while the present case is at the final stage. It was further submitted that personal service of the statutory notice was not effected on the respondent.

26. On the issue of the securities offered for the loan facility being less than the amount of debt due, counsel submitted that the value of the securities could only be established through a valuation report which the petitioner had not produced despite the fact that the original title documents were in its custody.

Analysis and determination

27. I have carefully considered the petition filed herein, the respondent's response and the submissions of the parties' respective counsel together with the authorities that they cited. I find that the main issue for determination are as follows:

> ***a) Whether the borrower and the respondent herein were served with the statutory demand notices.***
>
> ***b) The consequences of non- compliance with the statutory notices.***
>
> ***c) Whether the creditor charged illegal interest.***
>
> ***d) Whether the securities offered by the borrower were sufficient to satisfy/settle the debt.***

Service of statutory notice

28. While the respondent argued that personal service of the statutory demand notice ought to have been effected on both the borrower and the Guarantor, the petitioner's position was that service could and was effected on them by way of both registered post and email.

29. On this aspect of service, of statutory notice, the court falls back on the terms of agreement/contract between the parties herein. Clause 27 of the Guarantee and Indemnity contract signed by the parties herein provides that:

> ***"Any notice or demand for payment by the bank under the guarantee shall be deemed to have been properly served on the Guarantor if delivered by hand or sent by registered post, telex or fax addressed to the Guarantor or the person to or upon whom the notice or demand it to be made at the registered or principal place of business or last known place of abode of the Guarantor ore of such person, as the case may be. In the absence of evidence of earlier receipt, any notice or demand shall be deemed to have been received, if delivered by hand, at the time of delivery or, if sent by post, four days after the date of posting (notwithstanding that it be undelivered or returned undelivered)or, if sent by telex or fax, on the completion of transmission. Where a notice or demand is sent by registered post, it shall be sufficient to prove that the notice or demand was properly addressed, stamped and posted."***

30. I have perused a copy of the statutory notice attached to the petitioner's verifying affidavit as an exhibit together with the certificate of posting and I am satisfied that the said documents establish that the Guarantor was duly served with the statutory demand notice in line with the terms of their contract.

31. Needless to say, it is trite law that parties are bound by the terms of their contract and this court cannot therefore rewrite the agreement between the parties by holding that personal service ought to have been effected on the respondent. This court further notes that the postal address, provided by the respondent in the Guarantee and Indemnity document being P.O.B OX 10088-00100 GPO Nairobi is the same address that the petitioner used in sending the statutory demand notice.

32. For the above reasons, I find that proper service of statutory notice was effected on the respondent. That service of the statutory demand notice was indeed effected on the respondent is further evident in the email from the respondent to the petitioner dated 26th August 2016 wherein the respondent acknowledged that he had received 2 statutory notices and sought clarification on the actual amount due to the bank. I reiterate that the petitioner has established on a balance of probabilities that the statutory demand was served on the Guarantor.

Non-compliance with the statutory notices

33. Section 17(3) (a) and 17(4) (a) of the Insolvency Act (hereinafter **"the Act"**) stipulate as follows:

> ***"(3) For purposes of the 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."***

"(4) For purposes of subsection (2) (c), a debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable and-

> ***a) The applicant creditor to whom it is owed has served on the debtor a demand requiring he debtor to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due.***
>
> ***b) At least twenty one days have elapsed since the demand was served; and***
>
> ***c) The demand has been neither complied with nor set aside in accordance with the insolvency regulations."***

34. Under the above sections of the Act, the respondent was expected, upon service with the statutory notice, to comply with the notice by either settling the debt or to secure or compound for it to the satisfaction of the creditor or to set it aside.

35. In the present case, there no such compliance with the notice by the respondent and neither was the statutory notice set aside within the prescribed period of 21 days. The consequence of non-compliance with the notice or its setting aside leads to the conclusion that the debtor is unable to pay the debt or has no reasonable prospect of settling the debt.

36. Section 20 of the Act stipulates as follows:

"(1) The court may not make a bankruptcy order on a creditor application unless it is satisfied that the debt, or one of the debts in respect of which the application was made is either –

> ***a) The debt which having been payable at the date of the application or having since become payable has been neither paid nor secured or compounded for; or***
>
> ***b) A debt the debtor has no reasonable prospect of being able to pay when it falls due."***

37. In the present case, I find that it was not disputed that the petitioner advanced the loan to the Borrower and that the respondent herein agreed to be a Guarantor for the said loan. It was also established that the Borrower defaulted in the loan repayments which default, the Guarantor does not dispute save for the claim that the debt is overstated and that the interest rates applied by the bank are illegal.

38. I note that the Creditor produced statements of account as annexure in the verifying affidavit showing that the amount owed to the creditor is Kshs 10,068,678. I am therefore satisfied that the petitioner has established that it is a Creditor for purposes of these proceedings.

Securities for the debt

39. The respondent also raised the issue of the existence of securities for the loan being charges registered on the Borrower's properties, namely; LR No. 27565, VOI TAITA TAVETA COUNTY and LR No. BURA/NYORO/2360 TAITA TAVETA COUNTY. This court however notes that the Guarantor did not provide any documentary proof of the existence of the said securities save for notification of sale of the said properties issue by Garam Auctioneers. While replying on Regulations 17(6) (c) of the Act, the Guarantor's position was that he should not be adjudged bankrupt as the debt could be settled through the sale of the securities. The said Regulation stipulates as follows:

"(6) The court may grant the application if –

> ***a) ……………………………***
>
> ***b) ……………………………..***
>
> ***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;"***

40. My finding is that a simple reading of the above Regulation shows that it is applicable in instances where an application has been instituted to set aside the statutory notice or the value of the security is equal to or exceeds the full amount of debt. In the present case, I have already found that no application was filed by the Guarantor to set aside the statutory notice which is the forum where the Guarantor would be putting across the argument that the Principal Debtor has provided sufficient security to satisfy the debt.

41. The above finding notwithstanding and even assuming, for arguments sake, that the Debtor had provided the Creditor with the 2 securities to secure the loan, Regulation 17(6)(c) of the Insolvency Regulations provides that the court must be satisfied that the value of the security equals or exceeds the full amount of the debt. In the present case, the evidence tendered by the respondent shows that the 2 properties are valued at kshs 1.1 million against a debt of kshs 10.6 million. Clearly therefore, the value of the securities does not fall anywhere near being equal to let alone exceeding the value of the debt.

42. The Guarantor faulted the Creditor for failing to do a valuation of the 2 securities in order to establish their exact value. My take however is that the burden was on the Guarantor to establish the value of the securities going by the old adage "he who alleges must prove". I find that having introduced the issue of the existence of the securities, albeit without any proof of registered charges, the Guarantor was under an obligation to prove that the said securities were capable of settling the debt.

Illegal interest/amount owed overstated

43. It was also respondent's case that the bank charged illegal interest that had the effect of overly increasing the amount owed. According to the respondent, the Principal Debtor had already paid more than Kshs 12 million towards satisfaction of the loan which payments were not reflected in the loan account. On its part, the Creditor produced statements of accounts showing that the borrower owes the bank Kshs 10.068, 678.00 as the time of filing the petition.

44. Under Clause 14 of the Guarantee and Indemnity Contract, it was agreed that;

> "***Any statement of account of the principal debtor signed as correct by any duly authorized officer of the bank shall be conclusive evidence against the Guarantor of the indebtedness of the Principal Debtor to the Bank."***

45. From foregoing Clause, it is clear to me that the statement of accounts provided by the Creditor is conclusive proof of the debt. In any event, any contest or challenge on the amount due and owing ought to have been pursued by the respondent within the 21 days period after service with the notice and in this case, I have already found that the respondent did not mount any such challenge.

46. Furthermore, courts have taken the position that the mere overstatement of the amount in the statutory notice, *per se*, does not invalidate the demand. In ***Peter Munga v African Seed Investment Fund LLC (supra)***, Onguto J. stated:

> ***"60. It is important to point out that the mere overstatement of amount claimed in a statutory demand does not perse invalidate the demand. The debtor is obligated to contest the amount and with the requisite period and additionally it must be such as to cause prejudice and injustice to the debtor if the demand was allowed to subsist."***

47. Similarly, in ***Invesco Assurance Company Ltd v Dama Charo Nzai & 57 Others*** [2019] e KLR, while citing the decision in ***Peter Munga*** (supra) Korir J. held;

> ***"45. The applicant has alleged that the debt in the statutory demand is overstated and calls for the invalidation of the demand. The position in law is that an overstatement of the debt does not invalidate the demand except when certain conditions are met. Section 17[6] of the Insolvency Act provides that:***
>
> ***"17(6) An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless-***
>
> > ***a) The debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing and***
> >
> > ***b) The debtor makes that notification within the period specified in the demand for the debtor to comply with it."***

48. The common thread that runs through the above cited decisions is that a challenge, on the amount due under the loan agreement as stated in the statutory demand can only be mounted in an application to set aside the notice and even then, the mere fact that the amount is overstated cannot invalidate the demand except under the conditions stated under Section 17(6) of the Act which stipulates that:

> ***"17(6) An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless-***
>
> ***c) The debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing and***
>
> ***d) The debtor makes that notification within the period specified in the demand for the debtor to comply with it."***

Conclusion

49. Having regard to the finding and observations that I have made in this judgment, I find that the petition dated 27th February 2017 is merited and that the petitioner has proved its case against the respondent on a balance of probabilities.

50. Consequently I allow the petition and adjudge the Guarantor herein bankrupt under Section 13(2) of the Insolvency Act.

It is so ordered.

Dated, signed and delivered in open court at Nairobi this 13th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Shikali for Wawire for the petitioner.

Mr. Aminza for Maluki for the guarantor

Court Assistant – Sylvia