



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

INSOLVENCY PETITION NO. 9 OF 2018

IN THE MATTER OF SUCASA AT MOMBASA ROAD LIMITED

AND

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

AND

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2016

RULING

1. This ruling relates to a notice of motion application dated, 11th April 2019, brought under the provisions of; section 698 of the Insolvency Act No. 18 of 2015, Regulation 10 of the Insolvency Regulations 2016, Section 3A of the Civil Procedure Act, Order 45 and 51 Rule 1 of the Civil Procedure Rules, 2010, Article 159 (2) of the Constitution of Kenya and all enabling provisions of the law.
2. The Petitioner (herein “the Applicant”), is seeking for orders that, the Honourable Court be pleased to review its ruling delivered on 5th March 2019 2018, with costs to the Applicant.
3. The application is supported by an affidavit sworn by the Applicant’s director, Chen Xiongguan. He avers that, the Applicant filed a Petition to declare; Sucasa at Mombasa Road Limited (herein “the company”) insolvent due to its inability to pay the Applicant’s debt, to an aggregate sum of Kshs. 53,044,729.65. On 21st June 2018; Co-operative Bank of Kenya Limited (herein “the interested party) applied that the petition be struck out on the ground that, it did not comply with the statutory requirement for service of; a statutory demand notice upon the debtor before the petition for liquidation could be commenced as per Regulation 77B of the Insolvency Act (Amendment) Regulations 2018.
4. The Court delivered its ruling on 5th March 2019, striking out the Petition as prayed, on the ground that, the Petitioner failed to serve upon the debtor, the mandatory statutory demand notice as required, as there was no evidence of service. Further, that, the Petitioner had failed to accompany the petition with the statutory demand as required by law.
5. However, the Applicant argues that, ruling by the Honourable Court was a misapplication and misreading of the facts and circumstances. That prior to the filing of the letter dated the 9th October 2017, the Creditor duly served upon the Debtor a statutory demand notice and which was duly received by the Debtor on 9th October 2017. The Debtor acknowledged the same and responded through a letter dated 24th October 2017 acknowledging to be in debt to the Creditor.
6. The Creditor responded to the said letter on the 30th October 2017, indicating that the said statutory notice will stand until the debt acknowledged is settled. The Creditor further attached the same to the petition although it was not distinctively marked.
7. That the Honourable Court indicated in the ruling that, if the Creditor/Applicant could prove that, indeed a statutory demand was served on the Debtor in whatever form, then the Petition for liquidation by the Petitioner would not be defeated.
8. That, the Creditor/Applicant is ready and willing to produce to court a copy of the demand served on the Debtor before the Petition for Insolvency was filed in court as required under section 384 (1) of the Insolvency Act, 2015, before the promulgation of Regulation 77B of the Insolvency Act (Amendment) Regulations 2018, which requires such statutory demand to accompany the petition for Insolvency.

9. In light of the aforementioned, the finding of the court, that the Petitioner has now produced to the Honourable Court a copy of the statutory demand duly served on the Debtor/Company before the filing of the petition.
10. That Section 698 of the Insolvency Act, 2015, as read together with Order 45 of the Civil Procedure Rules, 2010, grants the Honourable Court authority to review any orders it makes under the Insolvency Act, 2015. In the interest of justice the Court ought to allow the application for review of the ruling.
11. However, the Interested party filed grounds of opposition to the application on 24th May 2019, stating that, the application discloses no ground for review known to law because;
- a) *The failure to annex the statutory demand to the Petition is admitted and the court's finding that there was no statutory demand is therefore in consonance with the record;*
 - b) *Even the document dated 9th October 2017, purported to be the statutory demand, is not a statutory demand under Regulation 77B of the Insolvency (Amendment) Regulations 2018;*
 - c) *If the Petitioner's argument is that the said document qualifies as a statutory demand, then that is a point of law which cannot be the subject of an application for review but a ground for appeal;*
 - d) *Whether there was need to comply with Regulation 77B of the Insolvency (Amendment) Regulations 2018 was fully addressed by the court at paragraph 45 of the ruling. An erroneous conclusion on that point of law, if at all, is a ground for appeal not for review;*
12. That the document stated to be a statutory demand was at all times within the Petitioner's knowledge and arguments on its validity as a statutory demand were always available to the Petitioner's advocates. Further, the issue of statutory demand was a hotly contested issue. It is therefore undesirable, even impermissible, for the court to exercise its review jurisdiction on hotly contested points of law and fact.
13. The parties disposed of the by filing submissions. The Applicant filed their submission on 13th November 2019, and relied on the provisions of; Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 and section 80 of the Civil Procedure Act (cap) 21 Laws of Kenya to argue that the court has the power to review the subject ruling.
14. The Applicant submitted that, although these provisions are achieved disjunctively, the pre-conditions stated must be well demonstrated as the effect of review is to re-open the application or case afresh. The case of; *Evan Bwire v Andrew Nginda Civil Appeal No 103 of 2000* was relied to argue that he who alleges must prove, as stipulated under section 107 of the Evidence Act (cap 80) of the laws of Kenya.
15. The Applicant further submitted that, they have met the prerequisites for review that, there was a mistake or error apparent on the face of record and sufficient cause to review the order made in the ruling, as the failure of the court to address itself to the statutory demand notice, forming part of the Creditor's petition, qualify as an omission apparent to the face of court.
16. The case of; *Nyamongo & Nyamongo v Kogo (2001) EA 170* was cited where the scope of what amounts to an error was determined, the court stating that, it cannot be defined exhaustively and must be determined on the facts of each case. Similarly, the court in the case of; *National Bank of Kenya v Ndungu Njau Civil Appeal No. 2111 of 1996* stated that, "the error or omission must be self-evidence and should not require an elaborate argument to be established."
17. That the court herein did give consideration, to the fact that the statutory demand was replica as part of the pleadings and not a separate copy, hence sufficient ground to review the application. The Applicant cited the case of; *Stephen Gathua Kimani v Nancy Wanjira Wariungi t/a Providance Auctioneers (2016)eKLR*, quoting the case of; *Sadar Mohamed v Charan Singh and Another (1963) EA557* where the court stated that; "any other sufficient reason for the purpose of review, refers to grounds analogous to the other two error on the face of the record and discovery of new matter"
18. Hence the failure to consider the statutory notice is sufficient reason that, the legislative intention of; Regulation 77B (2) (a) of the Insolvency Act (Amendment), Regulations 2016, as amended in 2018, was served by the notice. Reliance was placed on the case of; *A.G for Canada v Hallet & Carey Limited (1952) AC 427* where the court held that; the paramount rule remains that, every statute is to expounded according to its manifest and express intention.
19. The case of; *Phillip Chemwolo & Another v Augustine Kubede (1982-88) KAR 103*, was also cited where the court stated that; "blunders will continue to be made from time to time and it does not follow that, because a mistake has been made that a party should suffer the penalty."
20. The Interested party filed its submissions on 4th February 2020 submitting that, first, it must be obvious that an application for review on the basis that, there is an error apparent on the record does not permit the introduction of additional material. If additional material must be introduced, then there was no error apparent in the first place.
21. The Interested party relied on the case of; *National Bank of Kenya Limited n Ndungu Njau(1997)eKLR*, where the court stated that; "it will not be sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that, the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law."
22. It was further submitted that, whether the court was right or wrong in its conclusions of law, it cannot be the subject of a review but of an appeal as stated in the case of; *National Bank of Kenya Limited versus Ndungu Njau(supra)*. Further, the Petitioner having stated in the

supporting affidavit, that it had a statutory demand “duly served on the Debtor/ Company before the filing of the Insolvency petition, although not annexed to the Creditor/ Applicant’s petition” clearly admit, there was no error in the court concluding; that there was no demand.

23. Similarly, when the Petitioner urges in its submissions, for a purposive interpretation of Regulation 77B (2), it is inviting the court to reconsider its initial view of the law. It permeates ground (g) of the Motion, where the Petitioner doubts whether the 2018 Regulations, could apply to a process that started before the 2018 Regulations.

24. That, in both arguments, the court is being invited to re-look at its decision and reach a different conclusion. This is so because at paragraph 26 to 44 of the ruling, the court considered in great detail the provisions of; Regulation 77B (2) and found that they had not been complied with. The court also fastidiously considered whether the 2018 Regulations were applicable to a process that had commenced before. It reached a conclusion in paragraph 45 of the ruling.

25. Further at paragraphs 37 & 44 of its ruling, the court was empathetic that, it had carefully combed the court file but could not find a statutory demand as required by Regulation 77B (2). Yet the Petitioner has three theories, in its submissions; first, the statutory demand was served and was in fact admitted in various correspondence. Second, even if the demand was not presented with the Petition, it was within the Petition. Third, at all events, the statutory notice can be availed to the court.

26. The Interested party submitted that, the first of these theories is self-defeating, because the Petitioner states at paragraph 15 of the Petitioner’s Supporting Affidavit sworn on 11th April 2019, that, it had a statutory demand “duly served on the Debtor/Company before the filing of the Insolvency Petition although not annexed to the Creditor/Applicant’s Petition.” That admission, cannot be an apparent in the court record and a conclusion to the contrary would be the apparent error. Further, whether that statutory demand can now be consumed within a Petition or even introduced after the filing of a Petition forms the second and third of the Petitioner’s theories, answered by the court at paragraph 44 of the ruling when it said that the statutory demand must accompany the Petition at the time of filing, not later. That, if the court was wrong in finding so, it is a ground for appeal but certainly not for review. Finally, as held in the case of; National Bank of Kenya Limited versus Ndungú Njau(supra), “an issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

27. I have considered the arguments and submissions by the parties and I find that, the main issue to determine herein is; whether the Applicant has met and/or satisfied the threshold for grant of the orders sought. The application is premised on the provisions of; section 80 of the Civil Procedure Act (cap 21) Laws of Kenya and Order 45 of the Civil Procedure Rules, 2010.

28. The provisions of the section 80 provides that:

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

29. In the same vein, Order 45 (1) of the Civil Procedure Rules, 2010

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order .

30. These provisions set down three grounds, which an aggrieved party must establish for grant of an order for review: -

a) New material facts or evidence which the party was unable to procure and produce before the court at the time when the court passed the decree despite exercising due care and diligence.

b) There was a mistake or an error committed by the Honourable court which was apparent on the face of record while pronouncing the decree, because of which the party believes that the decree has been influenced and could be passed in his favour either. Any other sufficient reason.

c) Any other sufficient reason.

31. However, the general principle law is that, while exercising the power of review, cannot sit in appeal over its judgment/decision. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 of the Civil Procedure Rules, 2010.

32. The term “mistake or error apparent” by its very meaning implies an error which is apparent on the face of the record of the case and does not require comprehensive examination, scrutiny and elucidation either of the facts or the legal position. It must be an error of inadvertence. Mere disagreement with the view of the judgment cannot be the ground for invoking review jurisdiction, as held in the matter of; Amar Nath vs. Jee Ram & Anr. Review Pet. No.254/2017.

33. Similarly, the Supreme court of India held in the case of; Ajit Kumar Rath vs State of Orisa & Others (1999) 9 SCC 596, that; “a review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it”.

34. A perusal of the application herein and the grounds in support thereof; does not reveal, in no uncertain terms, the particular ground under Order 45 (1) of the Civil Procedure Rules, 2010, which the Applicant is relying on. It simply narrates the events leading to the applicant without specifically identifying grounds relied on.

35. However, the Applicant deposes at paragraph 9 of the affidavit in support of the application that, “the ruling of the court was a misapplication and misreading of the facts and circumstances of the case”, The averments are based on the fact that, the court ruled that, the statutory demand was not served prior to filing the Insolvency petition, when indeed it was and/or that, a copy was not produced and yet it was attached to the petition, but the court did not apparently take notice thereof.

36. In my considered opinion, the stated grounds and averments in the affidavit in support of the application, do not clearly support the grounds of; discovery of new and important matter or evidence, or mistake or error is apparent on face of record, although the Applicant descended into that arena and submitted heavily on the same, attracting equal response from the Respondent.

37. In this ruling I will consider the application on the third ground of; “any other sufficient reason” and therefore all arguments on the other two grounds and the submissions in relation to the same shall be left to rest.

38. In that regard, in the year 1922, the Privy Council in the case of; Chhajju Ram V. Neki (1922) 24 BOMLR 1238, laid down the third principle and stated that, “the third ground mentioned, is no doubt giving wide scope to the grounds for review, but at the same time that “sufficient reason” has to be at least analogous (*ejusdem generis*) to either of the other two grounds and the mere reason that decree was passed or order made on erroneous ground that court failed to appreciate the important matter or evidence, would not make any good ground for review, and therefore in such cases, the appeal and not review, is the remedy to get such erroneous decree or order corrected”. A similar holding was stated in the case of; Sadar Mohamed vs Charan Singh and Another (1963)EA 557

39. Similarly, Mulla, the Code of Civil Procedure, 18th Edition, also states that, **the expression** “any other sufficient reason” used in Order 45 Rule (1) means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 45, would amount to an abuse of the liberty given to the court under the Act to review its judgement.

40. To revert back to the matter herein, the court addressed the issue of the statutory demand at paragraphs, 36 to 44 of the ruling under review and concluded under paragraph 44 that; there was no proof that, a statutory demand was served

before filing the petition, as required under the relevant law.

41. The court’s attention has been drawn to a copy of a statutory demand allegedly served upon the debtor before the petition was filed. The Applicant admits that, the same was not annexed to the affidavit in support of its application giving rise to the ruling under consideration. Obviously the failure to annex the same to the application, vindicates the court’s observation, that there was none on the record, (albeit proved otherwise), indeed the Applicant cannot turn guns on the court for failure to note the same, when it was not provided for in the traditional way of doing business, by annexing a copy thereof.

42. Be that as it were, it does appear a copy was printed on the same document filed as a petition. It shows that, it was issued on 9th October, 2017, upon the Debtor and subsequently, the Petition was filed on 27th February, 2018. The Debtor has not impugned the issuance and/or service thereof. In the given circumstances I find and hold that, the failure of the applicant to conspicuously display the statutory demand, leading to the court’s failure to note it, amounts to a mistake and that is a sufficient ground to review the ruling in issue.

43. I have considered the prejudice the Respondent may suffer if the orders sought are granted and I find that, the Respondent contention in the entire matter is that, the consent order entered into by the Creditor/Petitioner and Debtor/company has infringed on its priority rights, under a charge created over the assets of the Company in its favour and has preferred the Petitioner over the assets. I find that, once the application is allowed, the Respondent will have an opportunity to canvass its case.

44. To the contrary, if the review is not allowed the Petitioner will be prejudiced as the Company will be set free on an alleged debt owing to the Petitioner, therefore the scale of justice, tilts in favour of grant of the orders sought. The Respondent can and should be compensated with costs in the circumstances.

45. The Upshot is that; I allow the application as prayed with costs to the Interested Party/Respondent.

46. It is so ordered.

Dated, delivered and signed on this 12th day of May 2020

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Kivindyo for the Petitioner

Mr. Kenneth Wilson for Interested party

No appearance for the 2nd interested party

No appearance for the debtor