REPUBLIC OF KENYA

IN THE COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY NOTICE NO. E 068 OF 2019

(CONSOLIDATED PURSUANT TO THE COURT'S DIRECTION OF 12TH MARCH 2020

TO SERVE SUBMISSIONS FOR INSOLVENCY NO. E068 & E069 OF 2019)

RUFUS RAGUI.....1ST APPLICANT

GRACE GICHUKI.....2ND APPLICANT

-VERSUS-

VIVO ENERGY KENYA LIMITED.....RESPONDENT

RULING

BACKGROUND

The Applicants (hereinafter "Rufus Ragui and Grace Gichuki) are Chief Executive Officer and Director of Bonfide Clearing and Forwarding Limited respectively.

The Applicants filed a request to be issued with an Insolvency Notice after being served with a Statutory Demand for Ksh 24,416,935.56 as Final Decree and Ksh 655,384.00 as Certificate of Stated Costs, to be paid to **Vivo Energy Kenya Limited** as obtained in Chief Magistrate's Court at Nairobi ***CMCC Number 1201 of 2018***, ***Vivo Energy Kenya Limited vs Banfide Cleaning and Forwarding Limited, Grace Gichuki and Rufus Ragui.***

By an application dated 10th December 2019, filed together with supporting affidavit the Applicants sought orders that the Statutory Demand dated 11th November 2019 be set aside and the costs of the application be provided for.

In the Applicants Supporting Affidavits dated 9th December 2019, they stated that the impugned Statutory Demand emanated from the Judgment of Nairobi ***CMCC No. 1201 of 2018 – vivo Energy Kenya Limited vs Bonfide Clearing and Forwarding Limited, Grace Gichuki and Rufus Ragui*** (Hereinafter, "the suit"), the matter referred to in paragraph (7) above and as stated on the face of the Statutory Demand.

They averred that by said Judgment delivered on 23rd April 2019 all the Defendants were directed to settle the Plaintiff's claim by paying, jointly and severally, a decretal sum of Ksh 23,751,551.56 together with interest at the rate of 12% from 1st May 2019 until payment in full.

That the court also directed the Defendants to pay, jointly and severally, costs of the suit Ksh 665,384.00 together with interest at the rate of 12% from 24th April 2019 until payment in full.

They asserted that the judgment clearly stated that the Respondent herein would recover the decretal sum jointly and severally from the Defendants; meaning that all the Defendants were liable for the satisfaction of the decree and therefore the Respondent was at liberty to execute against all Defendants.

They averred that at all times, Bonfide Clearing and Forwarding Limited had indicated its willingness to honour the Respondent's award, and had hitherto made proposals to make monthly installments of Ksh 2,000,000.00 until the amount is paid in full.

That the statutory demand notice is premature as there is no execution issued by the court against the Applicants that has been returned unsatisfied.

They contended that there is a wide range of modes of execution availed to a Decree Holder under **Order 22 of the Civil Procedure Rules, 2010** varying from attachment and sale of the property of the Judgment Debtor, attachment of debts and in the worst case scenario, arrest and detention in Civil jail, among others, which the Respondent has deliberately avoided.

That where the law provides for an alternative method or procedure, such procedure must first be utilized and in this case, the Civil Procedure Act is sufficient for the Respondent to pursue the decretal amount without the necessity of petitioning the Court for Bankruptcy/Insolvency.

GROUNDS OF OPPOSITION

The Respondent opposed the application on the following grounds;

a) That the said application is hopelessly incompetent and an abuse of this Court having been filed out of time and without leave of this Court;

b) That the Application is not merited as the Debtors seek to turn this Court into its haven having failed to discharge their obligation under a Decree elsewhere;

c) That the Debtors are underserving of the Orders sought in so far as they have and continue to suppress the following material facts:

i) They were duly served with the Statutory Demand

ii) They are judgment Debtors in ***Nairobi CMCC No. 1201 of 2018*** (***Vivo Energy Kenya Limited vs Bonfide Clearing and Forwarding Limited, Grace Gichuki and Rufus Ragui***);

iii) They have not honoured settlement proposal made to the Respondent before and after action; and

iv) The Decree the subject of the Insolvency proceedings remains

1ST AND 2ND APPLICANTS' SUBMISSIONS

The Applicants submitted that by their Applications, rightly sought this Court's intervention to set aside the Statutory Demands dated 11th November 2019 issued by the Respondent on grounds that the impugned Statutory Demands were issued in contravention of the Law.

On whether the issuance of the impugned Statutory Demands was premature in default of execution against the Applicants. The Applicants relied on the case of ***Speaker of the National Assembly vs James Njenga Karume [1992]eKLR***, in which the Court of Appeal held;

> ***"In our view …where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

On the question of, what is the test for setting aside a Statutory Demand; the Applicants submitted that, the High Court in the case of ***Nairobi Insolvency Cause No. 1 of 2018 – Invesco Assurance Company Limited vs Dama Charo Nzai [2018]eKLR***, while quoting with approval the case of ***Peter Munga vs African Seed Investment fund LLC [2017]eKLR,*** stated as follows;

> ***"The test …is whether it would be unjust for the Statutory Demands to give rise to insolvency proceedings in the particular case."***

The Applicants further submitted that the Respondent's step of issuing the impugned Statutory Demands was a grave transgression against the provisions of **Section 17(3)(b) of the Insolvency Act** which contemplates bankruptcy proceedings in a scenario only where a decree issued against a proposed bankrupt is returned unexecuted and unsatisfied wholly or in part.

That it is only and once the Decree holder has extinguished that plethora of modes of execution can they proceed to declare the Judgment Debtor bankrupt and take over the bankrupt's estate.

It was the Applicants submission that should this court allow a decree holder to bypass the procedure set out for execution of decrees, it will render **Order 22 of the Civil Procedure Rules** as nugatory and convert this court into a debt collection tool for the recovery of decree or judgment debt.

RESPONDENT'S SUBMISSIONS

a) Whether the Respondent has bypassed the process of execution

The Respondent submitted, **Section 38 of the Civil Procedure Act** provides for different modes of execution as follows;

> ***"subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree-***
>
> ***a) By delivery of nay property specifically decreed;***
>
> ***b) By attachment and sale, or by sale without attachment, of any property;***
>
> ***c) By attachment of debts;***
>
> ***d) By arrest and detention in prison of any person;***
>
> ***e) By appointing a receiver; or***
>
> ***f) In such other manner as he nature of the relief granted may require"***

Section 2 of the Insolvency Act, 2015 defines execution process as follows;

> ***"execution process" means any of the following***
>
> ***a) Issuing or proceeding with any of the following orders or warrants under a judgment or order obtained against the debtor in any court in its civil jurisdictions-***
>
> ***i) An order or warrant for the possession, seizure, or sale of any property;***
>
> ***ii) An order of attachment.***
>
> ***b) Obtaining a garnishee order in favour of a judgment creditor under the Civil Procedure Rules;***
>
> ***c) Obtaining an order that a judgment creditor may sue a sub-debtor under the Civil Procedure Rules;***
>
> ***d) Having a charging order nisi made absolute under the Civil Procedure Rules;***
>
> ***e) Beginning or continuing proceedings in any court for the appointment of a receiver of property, except an application for the appointment of a person as interim trustee under section 36;***
>
> ***f) Exercising a power of re-entry under a lease, or a power terminating a lease."***

In ***Ecobank Kenya Limited vs Francis Tole Mwakideli [2018]eKLR***, the court held as follows;

> ***"A creditor is free to choose from which debtor and what method to use to recover the debt. The debtor has no luxury nor right of choosing for the creditor who amongst the debtors, to pursue and failure to pursue all 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 also 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…"***

The Court of Appeal in ***Prideinn Hotels & Investments Limited vs Tropicana Hotels Limited [2018]eKLR*** held as follows;

> ***"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."***
>
> b) The meaning of "joint and several" liability

The Respondent submitted that Judgment in ***CMCC No. 1201 of 2018 (Vivo Energy Kenya Limited vs Bonfide Clearing and Forwarding Limted & 2 Others)*** was entered against Bonfide Clearing & Forwarding Limited, Rufus Ragui and Grace Gichuki jointly and severally. The court in ***Republic vs Permanent Secretary in Charge of Internal Security – Office of the President & Another ex-parte Joshua Mutua Paul[2013]eKLR,*** defined the phrase "Jointly and severally" as follows;

> ***"It is therefore important to understand the meaning and effect of a "joint and several" judgment or liability. In Dubai Electronics vs Total Kenya and 2 Others High Court (Milimani commercial and Admiralty Division) Civil Case No. 870 of 1998 after considering past decision on the issue stated;***

"Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the Plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them" that is my understanding of joint and several liability."

c) Whether the requirements for setting aside the statutory demands have been met

It was the Respondent's submission that **Regulation 17 (6) of the Insolvency Regulations, 2016** provides the conditions that must be met to warrant the setting aside of a statutory demand as follows;

i) The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;

ii) The debt is disputed on grounds which appear to the Court to be substantial;

iii) 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

iv) The court is satisfied, on other grounds, that the demand ought to be set aside

In ***Re A Debtor (No. 1 of 1987, Lancaster), ex-parte the debtor vs Royal Bank of Scotland PLC***, the Court of Appeal held as follows:

"Section 267 (2) sets out four conditions which must be satisfied in the case of a creditor's petition presented in respect of a debt. One of these conditions, contained in paragraph (c), is that the debt is one of which the debtor appears unable to pay or to have no reasonable prospect of being able to pay.

The tests to be applied in determining whether, for this purpose, a debtor appears to be unable to pay a debt which is immediately payable are stated in Section 268(i) two tests are prescribed, fulfillment of either which is sufficient for a creditor's purpose. The first, stated in para (a), is

'the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as the "Statutory Demand") in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has neither complied with nor set aside in accordance with the rules.'

The second test, stated in paragraph(b), is of an unsatisfied return to 'execution or other process issued in respect of the debt on a judgment or order of any court'……"

The Respondent submitted that alleged part-payment of a debt or willingness to negotiate is not a reason to set aside the statutory demands. The Judgement-debtors have on various occasions made settlement proposals but they have failed to honour the same. The Respondent cannot be compelled to continue engaging in unfruitful negotiations with the judgment-debtors which will not amount to an agreement. The Respondent relied on the case of ***Erick Kimutai Sitonik (suing as the legal representative of the estate of the late Zachayo Kiplangat Sitonik vs Sot Tea Growers Savings and credit Cooperative Society & 7 Others[2016] eKLR***, where the court held that;

"I am not averse to any ADR. However, ADR is a voluntary process and all parties need to be agreeable to the same. The Plaintiff is not agreeable to an ADR process and I cannot force him to go through a mechanism that is supposed to be voluntary"

DETERMINATION

From the parties pleadings and submissions the issue that emerges for determination is whether the statutory demand of 11th November 2019 is valid and should be upheld or should be set aside.

Section 384 (1) Insolvency Act [also Regulation 77b of Regulations 2016] provides;

"The circumstances in which a company is unable to pay its debts

(1) For the purposes of this Part, a company is unable to pay its debts—

(a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).

The Respondent served the statutory notice on 11th November 2019 to the Applicants herein. The Notice is in compliance of **Section 384 (1) Insolvency Act** was/is appropriate as it emanates from default of payment of debt of the Respondent that exceeds Ksh 100,000/-. The Statutory Notice intimated unless the Debtor paid the decretal amount in 21 days from date of service of the Notice, the Respondent would proceed to file for Insolvency of the Company.

The Statutory Demand is based on the judgment and decree in Nairobi ***CMCC No 1201 of 2018 Vivo Energy Kenya Ltd vs Bonafide Clearing & Forwarding Limited, Grace Gichuki & Rufus Ragui*** of 23rd April 2019 and 1st May 2019 respectively. The Judgment was entered for the Respondent against the Applicants for Ksh 23,751,551.56 and Costs of Ksh 665,384/- with interest at 12% from 24th April 2019 until payment in full. The judgment has not been reviewed or successfully appealed against.

The Applicants contest the Statutory notice as irregular as the Respondent did not make any attempts to realize the judgment and decree against the Applicants individually and directly after the execution against the Bonafide Clearing and Forwarding Limited failed as attachment and sale of assets were mortgaged to 3rd Party banks.

This Court finds that there is no provision of law that mandates consecutiveExecution process that the execution of a decree has to be by each method outlined sequentially. **Section 38 of CPA** spells out various modes of execution the Court may grant upon application by the Decree-holder.

Order 22 Rule 7 CPR 2010 provides that the decree-holder Applicant shall file application for execution of the decree including the mode of execution that the Applicant seeks to pursue. In this case it would be 'by appointing Receiver' of the Company that was served with Statutory Notice. The provisions are reinforced by the case of ***Ecobank Kenya Ltd Vs Francis Tole Mwakidedi [2018] eKLR supra*** on the point that a Creditor is free to choose the method of recovery of debt. With respect, the Respondent only has to satisfy the requirements in **Section 384 (1) Insolvency Act**

Secondly, the Applicants contend that the statutory notice was premature in default of execution against the Applicants individually as the judgment and decree was against the Applicants and the Company jointly and severally.

The Applicants relied on the cases; ***Speaker of National Assembly vs James Njenga Karume [1992] eKLR supra;*** that where there is a clear procedure it ought to be followed. The Applicants also relied on the case of ***Re Company BLC 492*** that provides that Court should not be used as debt collectors.

Whereas it is conceded that the judgment was against the Applicants and Company was jointly and severally against all 3 of them, the same argument pertains; the Creditor is at liberty to choose the mode of execution appropriate in the circumstances to realize the debt. The Court does not find the Statutory Notice premature in terms of **Section 384(1) of Insolvency Act**.

With regard to the set down procedure **Section 39 CPA & Order 22 rule 7 CPR**, the Respondent executed against the Company and the assets were not available for attachment as Company assets were mortgaged to banks. The decree executed in favour of the creditor of the company [was] is returned unsatisfied in whole or in part. This Court has not been used as debt collecting Court, because the Respondent served the Statutory Notice to the Company in pursuit of execution and from that execution could not be realised. It is the Applicants who approached the Court and sought orders to set aside the statutory demand.

The Applicants relied on **Regulation 17 (6) (d) of Insolvency Regulations, 2016**, which requires where Court if satisfied, on other grounds, that the statutory demand ought to be set aside. The Applicants relied on the cases ***Invesco Assuarance Co Ltd vs Dama Charo Nzai [2018] eKLR supra***. They referred to ***Peter Munga vs African Seed Investment Fund LLC [2017] eKLR supra***, that laid down the test for setting aside a statutory demand is whether it would be unjust for the statutory demand to give rise to Insolvency proceedings in the particular case.

The Applicants contended the Respondent wilfully failed to levy execution against the Defendants jointly and severally, bypassed the process of execution under **CPR 2010** and violated **Rule 17 (3) (b) of Insolvency Act** which contemplates bankruptcy proceedings where a decree issued against proposed bankrupt is returned unexecuted and unsatisfied in whole or in part.

The Applicants submitted that from the entry of judgment and decree; there were ongoing negotiations and part payment of the debt of Ksh 6,000,000 and thereafter pay Ksh 2,000,000/- each month as was admitted in Court on 12th March 2020. Therefore, the judgment debt has not been neglected or has there been failure by the Applicants to settle the debt.

This Court considered the facts pertaining to this case, there is judgment against Applicants and the Company jointly and severally for the decretal amount of 23,751,551.56/- interest at 14% and costs of Ksh 665,384 which continue to accrue interest at the rate of 12%.

The Applicants have paid Ksh 6,000,000/- to date and agreed on Ksh 2,000,000/- each month whose payment in the subsequent months has not been confirmed as paid. The Respondent executed against Bonafide Clearing & Forwarding Co Ltd and its assets were found to be mortgaged to 3rd Party Banks. The decree after execution was returned unsatisfied. Therefore, the Company whose assets are mortgaged, the

value of the remaining assets would be less than its liabilities, among them the instant debt. Clearly, the Company is unable to pay its debts and hence the statutory notice was appropriately served to the Applicants.

With regard to **Regulation 17 (6)** of **Insolvency Regulations 2016**, which prescribes grounds for setting aside statutory demand under bankruptcy with regard to a bankrupt. The Regulation does not refer to liquidation or insolvency of Companies.

I wish to adopt the law with regard to the Ruling in ***Kwale International Sugar Co Ltd vs Epco Builders Ltd & 2 Others [2020] eKLR*** which held;

> ***"The reason I have set out the aforesaid provisions is to show that to the extent that the Company relied on Regulations 16 & 17 that relates to bankruptcy of natural persons, in the instant application it is incompetent and lacks merit as Regulations 77 & 78 of Insolvency Regulations that are applicable for liquidation of Companies does not contain a corresponding provision for setting aside of statutory demands issued to Companies."***

From the above excerpt, the **Regulations 16 & 17 of Insolvency Regulations 2016,** are not applicable with regard to liquidation of Companies but for bankruptcy. Without prejudice, the conditions provided by **Regulation 17 (6) of Insolvency Regulations, 2016** have not been met either. A statutory demand maybe set aside if the Debtor has a counterclaim, set off or cross demand that equals or exceeds the amount of debt in the demand; or the debt is disputed; the Creditor holds some security in respect of the debt claimed in the demand and/or the Court is satisfied on other ground that the demand ought to be set aside.

DISPOSITION

1. **The statutory demand dated 11th November 2019 is upheld as valid.**

2. **The Applicant's application in both court files, in E069 & E068 of 2019 are dismissed with costs.**

3. **In light of the onset of Corona Pandemic its lockdown and adverse impact on social economic and political life, the Applicants are granted 90 days to regularize payments of the debt before Insolvency proceedings with regard to Bonafide Clearing & Forwarding Ltd are commenced.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH OCTOBER 2020. (VEDIO CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS NJEHIA H/B MURANGURI FOR APPLICANT

MAJANJA LUSENO & CO. ADVOCATES FOR RESPONDENT- N/A

COURT ASSISTANT: TUPET

Ms Njehia: We ask for leave to appeal

Court: The leave is granted. The parties/Counsel to obtain certified copies of proceedings and Ruling upon payment of requisite fee. Formal application for stay of execution to be filed by the parties.

M.W. MUIGAI

JUDGE