REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERICIAL AND ADMIRALTY DIVISION

INSOLVENCY CAUSE NO. 1 OF 2017

DIAMOND HASHAM LALJI.....DEBTOR

AND

CARGILL KENYA LIMITED.....CREDITOR

JUDGEMENT

1. This Petition is in respect of Diamond Hasham Lalji (the Debtor). Cargill Kenya Limited (the Creditor) seeks a Bankruptcy Order in respect of his Estate.

2. Some facts are common. The Debtor is the Chairman and Director of Premier Flour Mills Limited, Maize Milling Company Limited and Milling Corporation of Kenya (2009) Limited (hereafter jointly the 'Companies' or 'Principal debtors'). The debt arises from supply of commodities to the Companies by the Creditor. The Companies as at 16th January 2017 were indebted to the Creditor as follows:-

Premier Flour Mills Ltd – USD 1,922,599.00

Maize Milling Company Ltd – USD 484,952.00

Milling Corporation of Kenya (2009) Ltd– USD 2,749,575

3. By an agreement made on 16th January 2017, the Debtor was required to give a personal guarantee in favour of the Creditor to secure the payment of the principal debt. In consonance with this requirement, the Debtor, on the very same day executed a Deed of Guarantee and Indemnity in favour of the Creditor. In that agreement, the principal Debtors gave a proposal to pay the principal debt as set out therein.

4. The Companies breached the repayment plan with the consequence that the entire amount became due and payable under the termination and default clause. A further consequence was that the Creditor was entitled to call up the guarantee for the settlement of the debt. In the Notices dated 4th April 2017, the Creditor demanded payment of the sum of USD 5,218,161.58 from both the principal Debtors and the Debtor. The demand did not bear fruit.

5. The matter would have to be escalated and on 27th April 2017 the Creditor issued a 21 day Statutory Demand for payment upon the Debtor. This was pursuant to the provisions of Section 17(3)(a) of The Insolvency Act(hereinafter the Act) and Regulation 15(3) of The Insolvency Regulations.

6. The Debtor did not make payment but so as to forestall the now imminent insolvency proceedings, the Creditor sought to set aside the Statutory Demand through a Notice of Motion dated 15th May 2017. By a Ruling dated 18th May 2017, this Court declined the application and that paved the way for the Petition to be prosecuted.

7. As at 27th April, 2017(the date of demand) the Debtor owed the Creditor USD 5,216,332.86 but there has been some post demand payments. Some Kshs.34,000,000/= has been paid.

8. The Creditor pleads that the Debtor is unable or has no reasonable prospect of paying the debt. Further that the Statutory Demand had lapsed and the orders sought should be granted.

9. For the Debtor the Court is asked to give regard to the payments made todate. He also states that he has always been willing to pay the debt and has made various proposals to the Creditor.

10. In paragraph 10 of his Replying affidavit of 7th May 2018 he proposes to discharge that debt as follows:-

a) Payment of Kenya Shillings Five Million (Kshs.5 million) per month as indicated in the table below:

No.	Period	Amount
1.	08th May 2018 to December 2018	60 million made up of Kshs.5 million per month and an additional Kshs.20 million in November 2018.
2.	January 2019 to December 2019	80 million made up of Kshs.5 million per month and an additional Kshs. 20 million in November 2019.
3.	Janaury 2020 to December 2020	80 million made up of Kshs.5 million per month and an additional Kshs.20 million in November 2020.
4.	January 2021 to December 2021	80 million made up of Kshs.5 million per month and additional Khs.20 million in November 2021.
5.	January 2022 to December 2022	80 million made up of Kshs. 5 million per month and an additional Kshs.20 million in November 2022.
6.	Last 4 months January 2023 to April 2023	

b) Upon discharge of property, Joint valuation and sale of properties to cover the balance.

11. The Debtor also states that he is offering various properties valued at approximately Kshs.330,000,000/= as security for the debt. In the end, this Court is asked to find that he has made a reasonable proposal to pay and that in the circumstances it would not be just and equitable for the Court to make a Bankruptcy order.

12. Counsel for the parties herein filled written submissions in respect to their cases. These are considered in the context of the evidence available. Although both sides have framed issues for determination, this Court takes a view that the issues must not ignore that a central feature of our current laws on Bankruptcy of Natural persons is to give a financially distressed person a second chance. These are revealed by the provisions on the alternatives to Bankruptcy (Section 14), those that grant the Debtor an opportunity to secure or compound for a debt (Section 20) and those which give the Court power to decline to grant a bankruptcy order when it is not just and equitable to do so (section 25(2)). These shall be discussed in greater detail.

13. Against this backdrop, the Court sets out the following as issues for determination:-

a) Does the application before Court satisfy the threshold of Section 17(2) of The Act?

b) If the answer to (a) is in the affirmative, has the Debtor made a reasonable offer to secure or compound for the debt?

c) Even if the answer to (b) is in the negative is it nevertheless unjust or inequitable to make a bankruptcy order?

Of Section 17(2) threshold.

14. These are Bankruptcy proceedings brought against a natural person. Our law in respect of such proceedings is substantially found in part 111 of The Insolvency Act. The Bankruptcy application is by a Creditor which must, for a start, satisfy the minimum threshold set out in section 17(2) of the Act which reads:-

"17. Creditor may apply for bankruptcy order in respect of debtor

(2) Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made—

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;

(b) the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the applicant creditors, either immediately or at some certain, future time, and is unsecured;

(c) the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and

(d) there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts".

15. This threshold has been easily achieved by the application before Court and the Debtor, in acknowledgment of this, hinges his hope on other provisions of the Act. Yet the Court still has an obligation to satisfy itself that the checklist has indeed been ticked off. The prescribed Bankruptcy level is specified in Regulation 3 of Insolvency Regulations 2016 to be Khs.250,000/=. The debt herein is about Kshs. 487 million (going by todays conversion rate of the US Dollar to the local currency) and exceeds the prescribed Bankruptcy level by far.

16. It is not in dispute that the Debtor's liability herein arises from the Deed of Guarantee and Indemnity of 16th January 2017. In the affidavit filed in response to the application before Court, the Debtor does not dispute that the debt is due and unsecured.

17. In regard to the test under section 17(2)(c) as to whether the Debtor appears to be unable to pay, subsection (3) has the following deeming provisions:-

"(3) For the purposes of 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; or

(b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part."

18. The statutory notice contemplated by Section 17(3) was served on 9th May 2017. It is common fact that 21 days lapsed before the Debtor paid the debt or secured or compounded for the said debt. Indeed post the notice only Kshs.34,000,000/= of the substantial debt of USD 5,216,332.86 has been paid.

19. The same statutory notice and set of circumstances meets the test of when a Debtor appears to have no reasonable prospect of being able to pay a debt provided in section 17(4) as follows:-

"(4) For the 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 to whom it is owed has served on the debtor a demand requiring the 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".

20. When the provisions of Section 17(2)(c) are read together with sections 17(3) and 17(4), it becomes clear that a Debtor is deemed to be unable to pay or to have no reasonable prospect of being able to pay when the factors set out therein exist. The Court will have to find that the Debtor is unable to pay or has no reasonable prospect of being able to pay. In this regard, the Court accepts the submissions by Mr. Regeru appearing for the Creditor that the following passage from the "Law of Insolvency" by Ian Fletcher is an accurate statement of the Law,

"*Instead, what has traditionally sufficed, and still is retained as the basis of the law of the present day, is that there should be evidence before the Court that the debtor has given an outward and visible appearance of insolvency through behavior which is characteristic of that condition. In consequence of the recent legislative reforms, the one characteristic feature now utilized for this purpose is the debtor's apparent inability to pay such of his debts as are sought to be utilized by one or more of his creditors as the basis of a bankruptcy petition…there is a special procedure, known as the service of the statutory demand, whereby the creditor may cause the debtor to provide objective evidence which the law will regard as establishing his apparent inability to pay, so as to fulfill this legal requirement*".

21. An attempt by the Debtor to set aside the statutory notice failed when this Court dismissed his application of 15th May 2017 in a Ruling of 3rd November 2017.

22. Having satisfied the essentials of section 17(2), this Court holds that the present Bankruptcy application is properly before Court.

Has the Debtor made a reasonable offer to secure or compound for the debt?

23. In an affidavit sworn on 7th May 2018, the Debtor depones that the principal Debtors are committed to paying the debt and have so far paid a sum of Khs.34,000,000/=. In addition that the principal Debtors have made various proposals for settlement of the entire debt including a joint sale of certain properties which are currently under charge. In a further affidavit of 14th November 2018, the principal Debtor states that he has offered properties valued at Kshs.330 million as security for payment of the debt or for a joint sale with the Creditor.

24. In respect to settlement of the Debt, it is said that the principal Debtors have made the following proposals:-

a) Payment of Kenya Shillings Five Million (Kshs.5 million) per month as indicated in the table below:

No.	Period	Amount
1.	08th May 2018 to December 2018	60 million made up of Kshs.5 million per month and an additional Kshs.20 million in November 2018.
2.	January 2019 to December 2019	80 million made up of Kshs.5 million per month and an additional Kshs. 20 million in November 2019.
3.	Janaury 2020 to December 2020	80 million made up of Kshs.5 million per month and an additional Kshs.20 million in November 2020.
4.	January 2021 to December 2021	80 million made up of Kshs.5 million per month and additional Khs.20 million in November 2021.
5.	January 2022 to December 2022	80 million made up of Kshs. 5 million per month and an additional Kshs.20 million in November 2022.
6.	Last 4 months January 2023 to April 2023	

b) Upon discharge of property, Joint valuation and sale of properties to cover the balance.

25. Mr. Owino appearing for the Debtor argues that the Debtor has made an offer to secure or compound for the debt but the offer has been unreasonably refused. The Court is asked to consider that while a period of 5 years may seem long, the proposed joint sale of the properties may pay up the entire debt or a significant portion before the end of that period. This Court is asked to find that it is not just and equitable to make a Bankruptcy order.

26. To the Debtors' assurances that the principal Debtors would settle the outstanding debt, the Creditor had argued that the Debtors' obligation arose from the Deed of Guarantee and Indemnity to which the principal Debtors are strangers. It was then submitted,

> "The principal Debtors can therefore not be merged with the Debtor who is the Guarantor. Accordingly, and by virtue of the principal Debtor and the Debtor being separate, the Debtor cannon in his Replying Affidavit, give positions pertaining to the principal Debtors as though the two are synonymous. The obligation is on the Debtor to pay and it is not the Debtor's place to give proposals pertaining to the principal Debtors. This was as it was enunciated by the Court of Appeal in Mwaniki wa Ndegwa v National Bank of Kenya Ltd & another [2016] eKLR, while citing with approval the case of Ebony Development Company Ltd v Standard Chartered Bank Ltd [2008] eKLR, where the High Court stated the following regarding the obligation of a guarantor:-
>
> "*The obligation of guarantor is clear. It (sic) becomes liable upon default by principal debtor…… it is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum*"".

27. To these arguments the Debtor sees the participation in the offer by the principal Debtors as inevitable for the following reasons:-

a) The Debtor is a Director and Chairman of the Principal Debtors.

b) The Debtor owns properties and runs his businesses through the principal Debtors and

c) Any security or payment is through the principal Debtors and will require their consent and participation.

28. The plea by the Debtor that this Court should decline the application is substantially hinged on section 20(3) of the Act which reads:-

> "3) The Court may dismiss the application if it is satisfied that the debtor is able to pay all of the debtor's debts or is satisfied—
>
> (a) that the debtor has made an offer to secure or compound for a debt in respect of which the application is made;
>
> (b) that the acceptance of that offer would have required the dismissal of the application; and
>
> (c) that the offer has been unreasonably refused".

The purport of these provisions is that the Court can refuse to make a Bankruptcy order where a the Debtor who is unable to pay the Debt at the time of the proceedings makes a reasonable offer to secure or compound for the debt but which offer has been unreasonably refused by the Debtor.

29. So has the Debtor made an offer to secure or compound the debt at all? The Creditor submits that he has not because an offer made by the principal Debtors is not an offer by the Debtor. Of course it need not be belabored that whilst there is a relationship between the Debtor and the Companies, the Debtor on the one hand and the Companies on the other are separate and distinct. And in respect to the transactions giving rise to the debt herein, the Debtor has a personal obligation arising from the Deed of Guarantee and Indemnity. On a ordinary reading of the law, it is the Debtor who is expected to make a reasonable offer and so offers made by a third party would not generally be taken to be an offer by the Debtor.

30. That said, this Court cannot see any reason why it should not treat a third party offer made on behalf of the Debtor to be an offer of the Debtor if it is one that can give rise to an enforceable obligation against the third party. If the offer can be ring-fenced so that the third party will be under a legal duty to keep the promise of securing or compounding for the debt on behalf of the Debtor, then a plausible argument can be made for treating that offer as coming from the Debtor himself.

31. In the matter at hand it is the Debtor who deposes to the willingness of the Companies to settle the debt. There is no evidence of a settled or enforceable offer by the Companies. And whilst the Debtor may well be the alter ego of the Companies, Company decisions are made in accordance with their Memorandum and Articles of Association. It would therefore be expected that the offer be backed by clear evidence that a formal offer has been made in that regard. The statements appear far too casual and this Court is unable to find that any firm offer has been made by the companies on behalf of the Debtor.

32. But if my assessment of the law or facts are faulty on this regard, I now turn to consider whether the Creditor has unreasonably refused the offer. In doing so it has to be borne in mind that whether a refusal is unreasonable will turn on the facts of each case. The test has to be objective and may take into account:-

a) The age of the debt.

b) The past and/or present conduct of the Debtor which may include previously kept or broken promises.

c) The time it will take to fully discharge the debt giving regard, inter alia, to its size.

d) The possible financial implication and hardship the offer will have on the Creditor if it were to be accepted.

e) The past and present conduct of the Creditor including, but not limited, to whether s[he] has been accommodative or simply unyielding.

f) Where security is offered, whether it is readily realizable.

g) Whether, generally, the offer is presented in good faith.

h) If the refusal is malafides.

The list is not closed. While the assessment ought to be an overall appreciation of the offer vis a vis the refusal, the Court will be entitled to find that one decisive factor makes what ordinarily would be an unreasonable refusal to be justified.

33. The indebtedness of the Creditor arose at the expiry of the 7 day notice 4th April 2017 when the principle debtors failed to pay and the guarantee was called up. The debt then stood at USD 5,216,332.86 (about Kshs.521 million towards conversion). The Companies having paid Khs.34 million, the debt is now about Kshs.487 million. The Debt has been outstanding for about 22 months as at the date of this judgment.

34. The evidence by both the Creditor and the Debtor is that even after the service of the statutory demand, there have been tripartite negotiations between the Companies, the Creditor and the Debtor. It would seem that at one time there was a promise to pay Kshs.100 million within some period but which was extended to 27th August 2017. Only Kshs. 34 million out of that promise has been forthcoming. It is against this background that it may not be unreasonable for the Creditor to assert that an offer that extends payment upto April 2023 (another 4 years) is not good enough. If accepted, the repayment period would have been for a total of 6 years with 2 years which have already gone yielding less than 10% of the due debt.

35. Yet, there is the argument that the sale of some landed properties by the principal Debtors may retire the debt earlier. But something waters down this pledge. It seems curious that in regard to what is supposed to be a serious offer the Debtor makes the following rather general disposition:-

> "Further to my Replying affidavit, as security for payment, or even agreements for joint sale on applicable properties, I have offered two ready title deeds valued at approximately Kshs.90,000,000/= and an additional four titles that are in the final stages of being subdivided and transferred valued at approximately Kshs.240,000,000/=. The total available security is valued at approximately Kshs.330,000,000. These securities have been offered after the filing of my Replying affidavit. In an e-mail dated 13th November 2018, the Creditor's concerned representative indicated that he was out of office for the remainder of this week and will present to this legal team next week and revert. *Annexed hereto and marked DHL are copies of correspondence*".

The identity of the properties to be sold are not disclosed and neither is a professional opinion of the value demonstrated. In the circumstances such as this, a Creditor would be rightly entitled to doubt the credibility of the proposal made.

36. The Court adds that the failure to make a disclosure of all his assets and liabilities does not help the argument of the Debtor that he is able to pay the debt as it is only upon such disclosure that the Court can evaluate his Debtors' ability to meet the offer. And it cannot be ignored that the promise to now pay the debt is by the very companies whose default led to the arrangement of the guarantee that has given rise to the debtor's apparent insolvency. The offer is not by new third parties but by companies whose history in the matter has not been impressive.

37. On the Court's evaluation of the material before it, the Creditors rejection of the offer has not been unreasonable.

38. Without a doubt, the making of a Bankruptcy order is drastic and in scheme of the Insolvency Laws should be an order of last resort. Yet to avail himself or herself of the alternative remedies available, a Debtor must demonstrate that it has the ability to pay the Debtor's debts or that it is not just and equitable for the Court to make a Bankruptcy order. This is the true intent of section 25 of the Act which provides:-

> "(1) The Court may make a bankruptcy order in respect of the debtor if the creditor has complied with section 17.
>
> (2) The Court may refuse to adjudge a debtor bankrupt if—
>
> (a) the applicant creditor has not satisfied the requirements specified in section 17;
>
> (b) the debtor is able to pay the debtor's debts; or
>
> (c) it is just and equitable that the Court should not make a bankruptcy order".

39. While the Debtor insists that he has made a reasonable offer to settle the debt, this Court has found it not to be so. The Court has given reasons for reaching that decision. But the Debtor still makes two other arguments in support of the position that the justice and equity of the matter does not support the grant of a Bankruptcy order.

40. The first is that the Debtor is a Director of the principal Debtors and thereof the affairs of the Companies including their affairs and relationship with Creditors will come to a halt if a bankruptcy order is made. However no information of the entire ownership, directorship and management of the Companies has been availed to demonstrate that without the Debtor the Companies will surely collapse or face dire difficulties.

41. The other submission is that no prejudice, which cannot be compensated by interest and costs, will be suffered by the Creditor since payment of the debt is now secured. The observation already made by Court is that the generality of the offer for security and the dearth of specifics of the properties offered as security does not lend itself to a conclusion that the offer for security is firm and credible.

42. In the end the Court finds that the Creditor has made out a case for the grant of a Bankruptcy order.

43. The law in section 44 requires the official receiver, as soon as is practicable after receipt of a copy of a Bankruptcy order, to nominate a qualified person to be a Bankruptcy Trustee in respect of a Debtor's property. The qualified person means the Official receiver or an authorized Insolvency Practitioner. In the matter at hand, one Mr. Anthony Makenzi Muthusi (an Insolvency Practitioner) has, at the request of the Creditor, accepted to be the Bankruptcy Trustee. In a letter of 22nd March 2018, the Official receiver gives her sanction to the said arrangement. Section 44 of the Act provides:-

> "(1) As soon as practicable after receiving a copy of a bankruptcy order, the Official Receiver shall nominate a qualified person to be bankruptcy trustee in respect of the debtor's property.
>
> (2) In this subsection (1), "qualified person" means the Official Receiver or an authorised insolvency practitioner".

While the prerogative to nominate the Bankruptcy Trustee belongs to the Official receiver, the Official receiver has in this matter exercised her prerogative upon a proposal by a party. I take it that there is no controversy in that respect as the Debtor makes no comment on the proposed appointment.

44. The orders of this Court are:-

> 44.1 Diamond Hasham Lalji (the Debtor herein) is adjudged Bankruptcy.
>
> 44.2 A Bankruptcy order is hereby made in respect to the Estate of the Debtor.
>
> 44.3 Anthony Makenzi Muthusi shall be the Bankruptcy Trustee of the Estate of the Debtor.
>
> 44.4 The costs of these proceedings shall be paid out from the Estate of the Debtor.

Dated, delivered and signed in open Court at Nairobi this 1st day of March, 2019.

……

F. TUIYOTT

JUDGE

Present;

Owino for the Debtor

Thuo for Regeru for Creditor

Nixon – Court assistant