



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALTY AND TAX 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. The subject of this ruling is a notice of motion application dated 20th June 2018, and brought under the provisions of sections 3(1), 692(4) and 698 of the Insolvency Act No. 18 of 2015 (herein “the Act”) and Regulation 10(4) of the Insolvency Regulations 2016(herein “the Regulations”).

2. The Applicant is seeking for the following orders that:

- a. There be a temporary injunction, pending the hearing and determination of this application, restraining the Petitioner from further advertising the Petition herein or issuing any other public statements regarding the Petition herein or the intended liquidation of Sucasa at Mombasa Road Limited.
- b. The Petition dated 21stFebruary 2018 be struck out for being in violation of Regulation 77B of the Insolvency (Amendment) Regulations 2018.
- c. The Petition dated 21stFebruary 2018, be struck out for being an abuse of the court process.
- d. In any event, the consent orders made on 27thApril 2018 be set aside in their entirety.
- e. The costs of the struck out Petition be awarded to the Interested Party the Cooperative Bank of Kenya Limited, to be borne by the Petitioner.

3. The application was filed pursuant to the Petition filed herein on 27th February 2018, by one Eternal Foundation Construction Company Limited (herein “the Petitioner”), seeking that a liquidation order be made in respect of one, Sucasa at Mombasa Road Limited (herein “the Company”), on the ground that, it is truly indebted to the Petitioner in the aggregate sum of Kshs. 53,044,729.65.

4. The said sum is alleged to be due, pursuant to the practical completion certificate issued on 22nd August 2016, as well as the final account rendered on 31st August 2016, issued in favour of the Petitioner upon its partial completion of the construction of 1087 Housing units on plot LR No. 202882 Mlolongo Mavoko (herein “the suit property”).

5. The Petition was advertised in the Daily Nation Newspaper of 15th March 2018, whereupon the parties affected by the Petition, including one Starlings Muchiri Muciimi, filed their notice of appearance to be enjoined in the proceedings. Thereafter, the Petitioner and the Company entered into an agreement by consent letter dated 16th April 2018 on how the debt amount would be paid. The agreement was filed in court and adopted as an order of the court on 27th April 2018.

6. The terms of the consent are as here below stated:

a. The Petitioner has agreed to accept 21 Studio Apartments, 17 One Bedroom Apartments and 3 bed sitter Apartments in the subject project in full and final settlement of the debt amount PROVIDED that within 14 days of filing of this consent in Court, the Company's financier issues to the Petitioner's Advocates an undertaking to partially discharge the subject units;

b. Upon registration of all the said units in favour of the Petitioner, the Petitioner's claim will be marked as withdrawn;

c. In default of finalizing registration of all the units within 120 days of this consent, the concession granted to the Company by the Petitioner shall be withdrawn and/or cancelled immediately and the Petitioner will set down the matter for hearing.

7. However, the Interested Party (herein "the Applicant") learnt of the Petition through the advertisement and upon perusal of the court file, got to know of the consent order. The Applicant avers that it has advanced mortgage finance facility of Kshs. 1,100,000,000 to the company for the construction of multiple dwelling units on suit property which is owned by Suraya Property Group Limited. That it holds an "All Asset Debenture" dated 24th September 2013, over all the moveable and immovable assets of the Company and more particularly, over the project called Sucasa at Mombasa Road.

8. Therefore the consent order that purports to bind it to issue an undertaking to discharge the aforesaid apartments, so that they can be registered in the Petitioner's name is prejudicial, as it was done without its knowledge and consent.

9. Further, the loan was advanced on the terms and conditions contained in the letter of offer dated 10th May 2013, as amended on 24th February 2014, 29th March 2016 and 2nd October 2017, and on the strength of a valuation report dated 17th June 2013. That according to that valuation, the project would be valued at Kshs. 2,500,000,000 upon completion and although the project is yet to be completed, upon consultation with the professionals, the Applicant is satisfied that, the project is still viable and should be carried on to completion. Consequently, it has not categorized the mortgage finance facility as a non-performing loan.

10. Further, the houses to be constructed under the project, can only be sold for value when completed, as it is difficult, if not impossible, to sell the houses when incomplete, as any such sale would lead to serious losses to the Applicant and other would be creditors of the Company.

11. That, the valuation report dated 17th June 2013 shows that on completion, the total number of units would be 1062, yet the Petitioner says it has completed the construction of 1087 units, and as far as the Applicant is aware, the construction of the project is far from complete. It is therefore impossible for the Petitioner to claim that, it has completed construction of more units than what had been projected.

12. The Applicant argued that if the Petitioner further advertised and attracts more publicity than it already has, the potential buyers of the units under construction would shun the units since no one is willing to buy in a sinking company.

13. The Applicant averred that, the Petition is an abuse of the Court process and should be struck out *in limine*, because it is being used, unlawfully so, as a debt collection tool against the Company.

14. Further, the consent order dated 27th April 2018, demonstrates that, the Petition is being used to force the Company to pay the amount demanded and to collect disputed debts, failing of which it will face the sword of liquidation.

15. That the documents show in its possession that, there is a genuine and substantial dispute between the Petitioner and the Company on whether or not the Petitioner rendered the services it was contracted to and whether or not it is entitled to the amounts it is claiming. Therefore, the Petitioner wrongfully presumes that the mere issuance of a statutory demand, without more, entitles it to institute a liquidation petition without demonstrating the source of the debt and whether there is a bona fide dispute on it.

16. Finally, the Applicant averred that, the construction contract between the Petitioner and the company provides for an alternative remedy of dispute resolution mechanism outside the court, yet the Petitioner before invoking it, moved the court, if at all the court has the jurisdiction.

17. However, the application was opposed by the Petitioner on the ground that, it presented the Petition, advertised it and presented all documents and the prescribed forms to the Official Receiver. That, upon payment of the mandatory deposit of; Kenya Shillings Forty Thousand only (Kshs 40,000.00), towards the Official Receivers' expenses, the Petitioner was issued with a receipt and a Certificate of Compliance, dated 11th April 2018.

18. Similarly, upon filing of the Petition in court on 12th April 2018, the court assessed the documents filed to ensure compliance with both the Act and Regulations made there under certified it as ready and gave a hearing. Therefore, the Petitioner fully complied.

19. The Petitioner averred that, it entered into an agreement with the company on how the debt would be settled, hence the consent demonstrates that, there is a presence of a legally acknowledged debt, by the Company and the Petitioner is at liberty to commence the liquidation application in order to accrue its debt amount.

20. The Petitioner argued that, any party who is directly or indirectly affected by the Petition, has the right to notify the court of its interest to be enjoined in the proceedings by entering a notice to appear. Thus, mere grumbling on the sideline of any other unsecured creditor, as indicated by the Applicant, without the proper legal action taken, cannot amount to a sufficient ground for dismissal of the Petition.

21. As such the application should be heard and determined along with any other application(s) which opposes the Petition. That, if the application is heard and determined on its own, it will open a Pandora's box, as the Honorable court will have to handle each and every application made by any interested party through the same manner.

22. The Petitioner stated that the application is a “Hail-Mary” attempt meant to forestall the prosecution of the Petition, thus an abuse of the court process. That it is incompetent, fatally defective and drafted with *mala fides*.

23. The parties agreed to dispose of the application by the filing of submissions. I have considered the submissions alongside the averments in the respective affidavits. I find that the issues that have arisen for determination are:

- a. Whether there is a valid Petition herein; and
- b. Whether the Applicant has satisfied the criteria for granting the orders sought.

24. In my considered opinion, the issues raised are both issues of law and fact. The issue relating to the validity of the Petition is an issue of law, whereas the issues relating to inter alia, the rights of the creditors who are opposing the Petition, on the ground inter alia that, the Petition is premature the issue of an order to restrain further advertisement of the Petition and the prejudice the consent order herein will occasion, are issues of facts. In my further considered opinion, the above factual issues can be canvassed during the hearing of the Petition.

25. However, the issue of the Petition being defective for want of compliance with the statutory and regulatory provisions ought to be dealt with first as it goes to the root of the entire Petition. The court invited the parties to address it on this issue as to whether it should be dealt with alongside the hearing of the Petition. The Petitioner and the Applicant held opposite views. The Petitioner supported the proposal and the Applicant opposed the same. The court opted to proceed and deliver the Ruling on the application.

26. Be that as it were, the question that arises is whether, there is a valid Petition. In that regard, Regulation 77 B, of the Insolvency Act, (Amendment) Regulations, 2018, states that:

1. For the purposes of section 425 of the Act an application for liquidation shall be-

- a. by way of a petition in Form 32C as set out in the First Schedule; and
- b. Accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.

2. The petition for liquidation shall be accompanied by the following documents –

- a. a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and
- b. A statement of financial position in Form 32 as set out in the First Schedule where necessary.

27. It is noteworthy that, the above provisions are couched in mandatory terms by the use of the word “shall”. Therefore, the requirement of a statutory demand is mandatory. In the case of; *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR, the court observed that, a requirement is never intended to be optional if a word such as “shall” or “must” is used. Similarly, in the case of; *R vs Immigration Appeal Tribunal ex-parte Jeyestation* (1999) 3 ALL ER 231, the court held that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable caution.

28. Finally in the case of; *Bray Head (Ascot) Ltd v Berkshire County Council* (1964) 2QB 303, the court stated that:

“ in the majority of cases whether the requirement is categorized as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation, the tribunal’s task will be to do what is just in all the circumstances.”

29. However, to appreciate the rationale of this mandatory requirement, one needs to examine the importance and/or the purpose of the statutory demand. It is to give notice to the debtor company of the intended liquidation order against it and to give it time to clear off the debt owed to the creditor.

30. The court in the case of; *Bray Head (Ascot) Ltd v Berkshire County Council* (*supra*), stated as follows:

“What is the purpose of service? It is to bring to the attention of the opposite party that a serious action is contemplated against it unless the demands in the notice are met.”

31. Therefore, if the statutory demand goes unchallenged, it demonstrates that an undisputed debt is outstanding. This is a criteria that must be satisfied for a petition for liquidation to be allowed. If a liquidation application is made over a debt that is disputed, the court will simply dismiss the petition and can award costs against the creditor.

32. In the same vein, the provisions of, Section 384 (1) of the Insolvency Act, makes reference to the issue of service of a demand and states that:

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; (emphasis mine),

33. It therefore follows that, before a petitioner can rely on the ground of the debtor's inability to pay, to petition for liquidation of a company, the Petitioner has to prove that a statutory demand was served and the debtor failed to comply accordingly and therefore the debt is not disputed.

34. More still, the content of the statutory demand supports the rationale of the mandatory requirement of its service. In that regard, the Halsbury's Laws of England 4th Ed Vol 7(2) paragraph 1446 outlines the ingredients of a valid statutory demand and states as follows:

“The statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf. The statutory demand must state the amount of the debt and consideration for it or if no consideration the way if (debt) arises...The statutory demand must include an explanation to the Company of the following matters: (a) Purpose of demand and fact that if demand is not complied with, proceedings may be initiated for winding up; (b) time for compliance with notice if consequential is to be avoided and (c) methods of compliance open to the Company” (emphasis mine).

35. Therefore, the statutory demand may be rescinded, if one or more of the following arise:

- a. The amount stated in the demand is in dispute, or is less than Kenya shillings a hundred thousand (Kshs 100,000)
- b. The creditor holds security equaling or exceeding the debt;
- c. The debtor is paying by installments and have not reneged on any payments;
- d. The debtor owed money by the creditor;
- e. The demand was made in error;
- f. The creditor failed to use the correct forms and/or required method of serving the demand. (emphasis mine)

36. To revert back to the issue under consideration, I have considered the facts in the instance case, and as aforesaid, the Applicant submits the Petition is not accompanied by a statutory demand and therefore the Petition is defective and the Court lacks jurisdiction to entertain it. The documents annexed to the Replying affidavit dated 11th October 2019, sworn by Chen Xiongguan on behalf of the Petitioner shows that the only document annexed there to which is relevant to the subject issue, is a Certificate of Compliance marked “CX-02”. I have not seen or found a copy of a statutory demand served upon the company (if any).

37. I have also perused the documents filed alongside the Petition and I found a verifying affidavit and a letter of authority given to the deponent to act on behalf of the Petitioner. There is no statutory demand. If indeed the statutory demand was served as required, or expected, nothing would have been easier than to provide a copy thereof.

38. As already stated herein, the requirement of a statutory demand is mandatory. Therefore, the non-compliance thereof renders the Petition invalid. The averments by the Petitioner that the court found the Petitioner had complied with the procedural requirements and/or administrative action, based on a checklist of compliance, cannot override the statutory requirement of service of a statutory demand.

39. Indeed the liquidation of a company is a draconian step which as stated by the Retired Justice Kwach (JA) (as he then was) in the case of; Matic General Contractors Limited (Supra) said amounts to ‘corporate execution’. Similarly, Ringera J (as he then was) in the case of; Kenya Power and Lighting Company Limited vs. National Cereals & Produce Board (2002) 1 KLR 652, likened it to ‘passing a death sentence on an individual.’

40. The Petitioner in its submissions, referred the court to the authority of; Re F.M. Macharia (K) Limited (supra). In that case, to support its argument that it has complied with the issuance of a statutory demand. The issue in dispute was whether, a statutory demand which made reference to section 220 of the Companies Act Cap 486, which had been repealed, was defective or valid for purposes of insolvency proceedings commenced and prosecuted under the Insolvency Act, No. 18 of 2015.

41. The court held as follows:

“The reference to section 220 of the Companies Act was not fatal. The notice is a fore-runner to any petition been lodged and it no doubt operates as the statutory notification of the creditor's intentions. If the content is appropriate, then reference to a wrong section of the statute may be misleading but it causes no patent injustice. The same could apply where there is no reference at all to relevant sections of the statute.”

42. The court's finding in the matter is in concurrence with the finding herein that, to the extent that a statutory demand precedes the Petition. However, that case is distinguishable from the matter herein in that whereas in that case there was a statutory demand issued by the Petitioner to the company and which generally complied with the content required thereof, save for reference to a repealed statute. In the instant matter, there is no evidence that any statutory demand was issued or served hence no evidence of compliance at all.

43. In the same vein, in the case of; ***Bray Head (Ascot) Ltd v Berkshire County Council (1964) 2QB 303***, the issue was the failure to serve the statutory demand at registered offices of the company unlike in this case where there is no statutory demand at all. The court in this case observed that:

“ in the circumstances of this case, it is not disputed by the respondent that the statutory demand was not served on it. All that it is saying is that it was not served on it at its registered offices”.

44. In view of the aforesaid, the court finds that, in the absence of proof that the statutory demand was served before the filing of the Petition herein, the Petitioner has not complied with the mandatory requirements of; Regulation 77B(2)(a) of the Insolvency Act (Amendment) Regulation 2016 as amended in 2018.

45. The other issue to consider is when this amendment came into force vis-à-vis, this case. It suffices to note that, the provisions of; Regulation 77B(2)(a) of the Insolvency (Amendment) Regulation 2016 as amended in 2018, came into effect vide a Legal Notice No. 7 of the Kenya Gazette supplement Number 4 dated 26th January 2018. The Petition herein is though dated 9th October 2017, was filed in court and certified by the deputy registrar of the High Court on 27th February 2018. The verifying affidavit attached thereto, was sworn on 21st February 2018. Therefore, when the Petition was filed and verified the provisions of the said Regulation 77B 2(a) was in force.

46. The upshot of the above is that, I find the application herein has merit and I order that the application for a Winding Up order and the Petition be and is hereby struck out for failure to comply with the Regulation 77B of the Insolvency Act (Amendment) Regulations 2018.

47. Finally, having ordered the Petition be struck out, it will be an exercise in futility to delve into the merits of the remaining factual issue. I will leave them to rest where they have fallen.

48. In view of the circumstances of this case that either party is claiming against the company, it will not be in the interest of justice to order the Petitioner to pay the Applicant's costs on the application. I order that each party to meet its own costs.

49. It is so ordered.

Dated, delivered and signed in an open Court on this 5th day of March 2019.

G. L. NZIOKA

JUDGE

In the presence of;

Ms. Murirage for Mr. Koceye for the Interested Party/Applicant

Ms. Kiruri for Kipro for the company

Mr. Kivindy for Oduor for the Petitioner

DennisCourt Assistant