



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO.1 OF 2017

ECOBANK KENYA LIMITED.....THE BANK/CREDITOR

VERSUS

FRANCIS TOLE MWAKIDEDI.....DEBTOR/GUARANTOR

RULING

1. The Bank/Creditor, **M/s ECOBANK Kenya Limited** filed these proceedings against the Guarantor urging there is an amount owed by **SKYTECH COMMUNICATION RESOURCES LIMITED** which was guaranteed by Francis Tole Mwakidedi, the guarantor herein, is within the prescribed bankruptcy level in accordance with the Insolvency Act and Rules; that the **Skytech Communications Resources Limited** is unable or has no reasonable prospect of paying the debt and that the guarantor, Francis Tole Mwakidedi, has been unable to make good the debt therein.

2. The applicant urges that there is no outstanding application to set aside the statutory demand in respect of the debt owed to it by **M/s Skytech Communications Resources Limited**, which was guaranteed by Francis Tole Mwakidedi and that 21 days have lapsed since the statutory demand dated 24th June, 2016 was issued and served in respect of the debt owed to it by **Skytech Communications Resources Limited** through certificate of postage dated 27th June 2016 upon Francis Tole Mwakidedi T/a (**Skytech Communications Resources Limited**) and since then no application was filed for setting aside the demand.

3. That before this matter could proceed to hearing the guarantor, Francis Tole Mwakidedi, had his Advocate M/s J. Maluki & Company Advocates file a Notice of Appointment of Advocates on 25th April 2017, followed later by notice of Preliminary Objection setting out three principal grounds of objection being as follows:-

a) That the Guarantor has been wrongly sued. The Debtor and Guarantor are two separate and distinct persons in law and the proceedings herein are fundamentally defective and irregular.

b) That the Petition is Pre-mature and an Abuse of the Court Process as the Creditor is yet to exhaust recovery mechanisms available to it in law against the Debtor and/or Guarantor.

c) That the Petition offends the provisions of the Insolvency Act, 2015 as the debtor (Skytech Communications Resources Limited) made payments in an effort to secure and/or compound the debt as provided for under the law.

4. At the hearing Mr. Atonga, learned Advocate, appearing for the guarantor, urged all the three (3) grounds, urging this court to uphold the three preliminary points of law whereas Mr. Wawire, learned Advocate, for the creditor, opposed the three grounds and sought that the same be dismissed.

5. I shall proceed to consider the arguments and the law related to the three grounds as raised in support of the guarantor's objection and as opposed in favour of the creditor.

(A) Whether the guarantor has been wrongly sued?

6. The Guarantor urges that the petition is ill-advised because the principal debtor, **M/s Skytech Communications Resources Limited** and the guarantor are two separate and distinct persons in law and by preferring this petition against the guarantor the proceedings are fundamentally defective and irregular. The counsel relied on the letter of offer under clause 3 in the petitioner's petition; urging in the event of default the creditor is obliged to petition for insolvency of winding up against the principal borrower but not against the guarantor nor to petition for guarantor to be declared bankrupt as the creditor should follow the company and not the respondent as a person.

7. Mr. Wawire, learned Advocate, urged the preliminary objection is not meritorious pointing out the guarantor has introduced some factual evidence in absence of a replying affidavit to challenge the petition; pointing out the petition is against the guarantor not the borrower and is based on the guarantee executed between the Bank and the guarantor as evidenced under pages 13 – 20 of the verifying affidavit; in which the guarantor guaranteed payment. He further referred to Clause 1 of the statutory demand, which he urged was served and the statutory demand was not challenged within the stipulated period of 21 days.

8. I have perused the proceedings and have considered the arguments by both counsel and considered the law. Indeed the principal borrower is a limited liability company with capacity to sue and to be sued separately and distinctly from the guarantor, one Francis Tole Mwakidedi. There is averment by the creditor's counsel that the guarantor was served with statutory demand and that a guarantee was executed between the Bank and the guarantor, in which the guarantor guaranteed payment of the sum borrowed with default clause to pay in case of default. I have noted and found the principal borrower and the guarantor are two separate entities who can be sued jointly and/or separately and that the issues raised in the petition have not been controverted by way of Replying Affidavit. The point raised by the guarantor; is not purely a point of law, that he is wrongly sued. The issue raised can only be determined by way of evidence as to whether he is the right party or not, and in absence of response on record by the guarantor, this court would be, acting in absence of evidence, to find and hold that though the company and the guarantor are two separate and distinct entities; the guarantor is wrongly sued. I accordingly find no merit in this ground.

(B) Whether the petition is pre-mature and an abuse of the court process?

9. The learned Advocate for the guarantor urges the petition is pre-mature; an abuse of the court process as the creditor is yet to exhaust recovery mechanisms available to it in law against the Debtor and/or Guarantor. He urged the statutory demand which is required to be personally served upon the principal borrower, has not been served, but instead the notice was served upon the guarantor as supported by creditor's supportive affidavit. He urged the same was not served personally but by way of a Registered Post on the Director of the principal borrower.

10. He reiterated the statutory demand should be served personally on Principal Borrower and not on the guarantor; referring to the petitioner's authority in the case of **(Peter Munga Vs. African Seed Investment Fund LLC. I.C No.2 of 2016)**. He urged that no effort was made to serve the Principal Debtor and the guarantor. He urged further that the alternative provided to be explored to recover the debt similarly have not been pursued and wondering that though there are two guarantors only one has been pursued and submitted the petition is not in good faith. He also urged though the amount of offer was Kshs. 60,000,000, the amount borrowed was about Kshs. 8,000,000 to 9,000,000, urging that the amount has been overstated and is also unwarranted and urged the court to consider the interest.

11. The creditor's Advocate took issue with the guarantor's counsel submissions, urging the Insolvency Act does not state the petitioner should seek alternative remedies before moving to the court. He Pointed out that it is open to a creditor to determine how to recover the debt and that the guarantor cannot impose his will on recovering the debt upon the creditor.

12. Section 17 (2) (a) – (d) of the Insolvency Act provides;

“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 ts, is equal to or exceeds the prescribed bankruptcy level;**
- b) 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".**

13. Section 14 of Insolvency Act provides;

"Alternatives to bankruptcy A debtor who is insolvent may as an alternative to bankruptcy—

- (a) enter into a voluntary arrangement in accordance with Division 1 of Part IV;**
- (b) make a proposal to creditors in accordance with Division 2 of Part IV;**
- (c) pay creditors in instalments under a summary instalment order under Division 3 of that Part; or**
- (d) Enter the no asset procedure in accordance with Division 4 of that Part."**

14. In the instant petition the Principal borrower is the company in which the guarantor is a director of the Borrowing Company. The guarantor does not deny the amount in question has been borrowed and advanced. Nor is there denial that he is a guarantor to the Principal Borrower. There is no outstanding application to set aside the statutory demand in respect of the debt or any of the debts. There is no provision barring the creditor from proceeding with petition before exhausting the alternatives set out under section 14 of the Insolvency

Act. It is not mandatory for creditor to pursue the alternatives to bankruptcy set out thereunder **Section 14 of the Insolvency Act** before bringing up a petition as the one before court. 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.

15. 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 nor 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, nor can a creditor under **section 14 of Insolvency Act** move the debtor who is insolvent to seek an alternative to bankruptcy as indeed it is the duty of the debtor who is insolvent to seek alternative to bankruptcy. I therefore find no merit in ground (b) of the Preliminary Objection.

(C). Whether the petition offends the provisions of the Insolvency Act, 2015?

16. The guarantor urges the petition offends the provisions, of the Insolvency Act, 2015 by failing to disclose the debtor (**Skytech Communications Resources Limited**) has made payments in an effort to secure and/or compound the debt as provided for under the law.

17. The petitioner urged that the guarantor has not filed replying affidavit to demonstrate payment notwithstanding admission of the indebtedness.

18. I have considered the **section 14 and 16 (2) of the Insolvency Act**, relied upon by the guarantor in support of ground (c) of the preliminary objection in support of his assertion, that the Principal Borrower had made payments in an effort to secure and/or compound the debt as provided for under the law.

It is noted that the guarantor has not filed any affidavit nor attached any documents to demonstrate payments by the principal debtor. The guarantor has made an allegation but did not bother to adduce any supportive evidence. His allegation can only be proved by hearing of evidence but not by a Preliminary objection. The allegation is premature and untenable for lack of evidence. It is in view of the above that I find the objection under preliminary objection under (c) to be without merit and the preliminary objection under (c) is rejected.

19. The upshot is that the preliminary objection by the guarantor is without merit; the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 13th day of July, 2018.

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J .A. MAKAU

JUDGE