REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

INSOLVENCY NOTICE NO. E001. E002, E003 & E004 OF 2020

AND

IN THE MATTER OF RAPHAEL TUJU,

AND

IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE LAWS OF KENYA)

BETWEEN

RAPHAEL TUJU……DEBTOR/APPLICANT

AND

EAST AFRICA DEVELOPMENT BANK……CREDITOR/RESPONDENT

RULING

1. The Debtor/Applicant in this suit together with ALMA TUJU, YMA TUJU AND MANO TUJU ("THE APPLICANTS") in **HCCOMM IN No. E002, E003 and E004 of 2020** respectively have filed applications by way of Notices of Motion dated 30th January 2020 seeking to have the Statutory Demands issued against them by the Respondent on 10th and 20th January 2020 set aside. The applications are supported by the Applicants' affidavits sworn on 30th January 2020

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and opposed by the Respondent through the replying affidavits of its Ag. Head of Business Kenya, LOUIS MUIGAI sworn on 20th February 2020. The applications have been canvassed by way of written and oral submissions by the parties' counsel, who indicated that a ruling in one application will dispose the rest of the applications. Therefore, this ruling will apply to and deal with the applications to set aside the statutory demands in **HCOMM IN No. E002, E003 and E004 of 2020**.

2. **Section 26** of the ***Insolvency Act*** grants the court discretion to stay an application by a creditor on such terms, and for such period, as the Court considers appropriate. Further, **Regulations 16** and **17** of the ***Insolvency Regulations, 2016*** provides as follows:

> ***16. Application to set aside statutory demand***
>
> *(1) The debtor may, apply to the Court for an order to set aside the statutory demand—*
>
> *(a) within twenty-one days from the date of the service on the debtor of the statutory demand; or*
>
> *(b) if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier.*
>
> *(2) Subject to any order of the Court under regulation 17 (7), time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the Court.*

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(3) The debtor's application shall be in Form 7 set out in the First Schedule and shall be supported by an affidavit, which shall be in Form 8 set out in the First Schedule.

(4) The affidavit referred to under paragraph (3) shall—

(a) specify the date on which the statutory demand came into the debtor's possession;

(b) state the grounds on which the debtor claims that it should be set aside; and

(c) annex a copy of the statutory demand.

17. Hearing of application to set aside statutory demand

(1) On receipt of an application under regulation 16, the Court may, if satisfied that no sufficient cause is shown for granting the statutory demand, dismiss the application without giving notice to the creditor.

(2) The time limited for compliance with the statutory demand shall commence from the date on which the application is dismissed.

(3) If the application is not dismissed under paragraph (1), the Court shall fix a date and venue for it to be heard, and shall give at least seven days' notice to—

(a) the debtor or, if the debtor's application was made by an advocate acting for him, to the advocate,

(b) the creditor; and

(c) any other person who is named in the statutory demand as the person whom the debtor may enter into communication with in reference to the statutory demand

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or, if more than one person is named, the first person to be named.

(4) Where the creditor responds to the application, the creditor shall serve the response upon the debtor and the Court at least three days before the date of hearing of the application.

(5) On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.

(6) The Court may grant the application if—

(a) 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;

(b) the debt is disputed on grounds which appear to the Court to be substantial;

(c) 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

(d) the Court is satisfied, on other grounds, that the demand ought to be set aside.

.....

(9) If the Court dismisses the application, it shall make an Order authorising the creditor to present a bankruptcy application either immediately or on or after a date specified in the Order.

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(10) The Registrar of the Court shall, after the Court has made an order under paragraph (8), send a copy of the Order to the creditor. [My Emphasis]

3. The Statutory Demands issued by the Respondent are demanding payment of USD 16,550,608.83 from the Applicants. **Regulation 17(6)** above outlines the grounds upon which the Applicants' applications may be allowed. The Applicants aver that their liability arises from a Guarantee and Indemnity dated 10th April 2015, linked to a Facility Agreement between the Respondent and *Dari Limited*. They state that a guarantee is a secondary obligation and that Respondent's rights against a guarantor are co-extensive with their rights against the Principal Debtor, meaning the guarantee should not be examined separately from the primary lender-borrower relationship.
4. They state that there is a pending suit, **HCCOMM Case No. 1 of 2020** regarding the recognition of a foreign judgment from the UK over the same debt and they contend it would be unjust to issue a bankruptcy order before a final determination is made on the Principal Debtor's obligation. They depone that the Respondent holds securities over the Principal Debtor's assets, that is, LR 1132/03 and LR 1055/165, and they claim that the Statutory Demands are incompetent because they fail to indicate the nature

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and value of these securities as required by law. They claim that valuation reports from 2015 indicate the combined market value of the securities is Kshs. 1.84 Billion, which far exceeds the amount claimed.

5. The Applicants claim the Respondent failed to honour the Facility Agreement by not disbursing all agreed funds, specifically Kshs 294 million for construction, paralyzing the project. The Applicants argue that by failing to disburse the funds, the Respondent increased their risk as Guarantors and they assert that the law protects Guarantors from such prejudicial conduct, and that such actions entitle the guarantor to be discharged from liability. The Applicants conclude that the proceedings are an abuse of court process and a ploy to rob them of their constitutional right to property under **Article 40** of the ***Constitution*** as the Respondent is attempting to treat the guarantee as if it were an original debt.

6. In response, the Respondent avers that the Statutory Demands are valid and should be enforced. It reiterates that the debt arises from the Guarantee and Indemnity dated 10th April 2015, which contains a warning that the guarantor is liable "*instead of, or as well as the Principal Debtor*" and the Respondent asserts that under Clauses 3.1 and 3.2 of the Guarantee, the Applicants have primary

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obligations to pay on demand and indemnify the Respondent, not merely secondary obligations. Furthermore, under Clause 25, the Applicants waived any right to require the Respondent to first pursue the Principal Debtor or enforce other securities before claiming against them.

7. The Respondent contends that contrary to Applicants' claim of an ongoing dispute, the English High Court issued a summary judgment on 17th June 2019 ordering the Applicants to jointly and severally pay the judgment sum. This court (Okwany J.,) has already granted leave to recognize and enforce this English Judgment in Kenya in the ruling delivered on 7th January 2020 and confirmed on 14th February 2020. Therefore, the issues raised by the Applicants regarding the underlying Facility Agreement have already been finally determined by the English Court and cannot be re-litigated in Kenya.

8. The Respondent avers that it complied with the ***Insolvency Regulations*** as it disclosed the security it holds over the assets of the Applicants and that the properties cited, that is, LR 1132/03 and LR 1055/165, belong to the Principal Debtor, *Dari Limited*, not the Applicants personally. The Respondent states that it is not required to disclose security held against a third party in a statutory demand against an individual guarantor. Regarding the value of

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the security, the Respondent claims that it disclosed the forced sale value of approximately Kshs. 404 million based on the last available valuation in 2015. The Respondent claims that the Applicants have refused access to conduct a fresh valuation.

9. The Respondent depones that the Principal Debtor defaulted early in that interest due in October 2015 was paid late, and subsequent payments were never made and the Respondent alleges that the directors of *Dari Limited*, that is the Applicants, constructed and sold dwellings on the secured property without the Respondent's consent and failed to account for the proceeds, compromising the value of the security.

10. The Respondent denies failing to disburse funds and that the small balance of approximately USD 102,916 was cancelled by the Principal Debtor in a letter dated 5th October 2015 and that the Kshs. 294 million was never a committed facility; it was a proposal that was never finalized, and the Principal Debtor also indicated it no longer required it. For these reasons, the Respondent prays that the Applicants' applications to set aside the Statutory Demands should be dismissed and that the Respondent should be allowed to present its bankruptcy petitions, arguing the debt is indisputable and the Guarantee creates a primary, enforceable obligation.

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11. I have gone through the grounds raised by the Applicants and the Respondent's response to the same. I am in agreement with the Respondent and I also take judicial notice that there are various decisions by this court and the Court of Appeal that have settled much of the issues being raised and prosecuted by the Applicants herein. For instance, in **East African Development Bank v Dari Limited & 5 others [2025] KEHC 16473 (KLR)** this court held that the issue of the Respondent not disbursing an additional Kshs. 294 million facility was settled by the English Court and that the Court of Appeal in **Dari Limited & 5 others v East African Development Bank [2023] KECA 454 (KLR)** had confirmed that the issue cannot be revisited. This court found that the English Court, in its judgment of 19th June 2019, made a definitive finding at paras. 20-23, holding that: "*the Bank was not under any obligation to lend this amount. No facility agreement was concluded… the evidence before the Court indicates that ultimately the defendants did not want the KES 294 million*."

12. Whereas I also take judicial notice that this issue is currently pending before the Supreme Court, I am aware that this does not automatically stay the effect of the existing Court of Appeal judgment and I note that this attempt was thwarted by the apex court in **Dari Limited & 5 others v East African Development**

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Bank [2023] KESC 90 (KLR). Therefore, the status quo remains that the English Court's judgment against the Applicants stands recognized in the country by dint of the court's ruling of 7th January 2020 and affirmed by the Court of Appeal on 20th April 2023. The judgment was against the Principal Debtor, *Dari Limited* and the Applicants herein as Guarantors where they were summarily ordered to pay USD 15,162,320.95 together with interest. Once a foreign judgment is recognized and adopted by a Kenyan court, it ceases to be a claim under the original contract or the Guarantee in this case and it becomes a domestic judgment debt. The Applicants can no longer argue as Guarantors with potential defences under the law of guarantee; they are now judgment debtors liable under a court order.

13. However, this court has carefully considered the applications to set aside the statutory demands in light of the recent ruling in **HCCOMM Case No. E636 of 2024**, wherein the Bank was granted leave to sell L.R. No. 11320/3 and L.R. No. 1055/165, being the properties charged as security under the Facility Agreement. The guiding principle of our insolvency regime, as encapsulated in the ***Insolvency Act*** is that bankruptcy and liquidation are measures of last resort. The spirit of the ***Act*** leans towards the preservation

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of value and the exploration of all other avenues for debt recovery before resorting to the extreme step of personal bankruptcy.

14. Given that the primary securities, which are the charged properties, are now in the process of being realized by the Bank pursuant to the orders of this court, I am inclined to allow that process to run its course. To permit the bankruptcy proceedings to continue concurrently would be premature and could potentially prejudice the Guarantors, especially if the sale of the properties yields sufficient funds to settle or substantially reduce the outstanding debt. The law of insolvency anticipates that secured creditors should first look to their security and that bankruptcy proceedings against guarantors should generally await the outcome of such realization to ascertain the actual shortfall, if any.

15. Consequently, I find that the statutory demands issued against the Applicants are, at this juncture, premature. The interests of justice would be best served by staying these bankruptcy proceedings pending the sale of the secured properties. As stated, I take this position based on the principle that bankruptcy should be the final option, invoked only after other reasonable means of recovery have been exhausted. Accordingly, the statutory demands are hereby set aside, with liberty granted to the Respondent to issue fresh demands in respect of any shortfall that may remain after the

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properties are sold. On costs I find and hold that this is a matter where each party should bear their own costs of the present applications. It is so ordered.

DATED SIGNED and DELIVERED virtually at NAIROBI this 9th DAY OF MARCH 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Mabachi and Ms. Macharia for the Applicants.
2. Mr. Wasonga holding brief for Mr. Nyamodi for the Respondent.
3. Amos - Court Assistant

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