

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**INSOLVENCY PETITION NO. E038 OF 2020**

**AND**

**IN THE MATTER OF PETER KIARIE MURAYA**

**AND**

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

**BETWEEN**

**WILLIAM KUNGU KINYANJUI.....  
.....PETITIONER**

**AND**

**PETER KIARIE MURAYA.....  
.....RESPONDENT**

**JUDGMENT**

**Introduction & Background**

1. By a petition dated 12<sup>th</sup> August 2020 and supported by affidavits sworn on 5<sup>th</sup> October 2022 and 3<sup>rd</sup> November 2022, the Petitioner is seeking a bankruptcy order against the Respondent for an unpaid debt of Kshs. 20,000,000.00. He claims that the money

was paid by him to the Respondent pursuant to a written agreement dated 28<sup>th</sup> September 2017 but the consideration for the payment has totally failed. The Petitioner avers that the Respondent is unable to pay the debt as he served a Statutory Demand on the debtor and that twenty-one (21) days elapsed after service, and the Respondent did not comply with the demand nor file an application to set it aside.

2. The Petitioner states that after this suit was filed, the Respondent proposed to repay the Kshs. 20,000,000.00 within six months with interest but the Petitioner insisted on a lump sum or part-payment with post-dated cheques. The Respondent then countered and offered an alternative plan to pay interest monthly and settle the principal in four installments of Kshs. 5,000,000 over one year. The Petitioner rejected the payment plan proposals given how long the debt has remained unpaid and he indicated he would only accept half the debt immediately, with post-dated cheques for the balance within 2-3 months.
3. *Co-operative Bank of Kenya Limited* (“the Bank”) also supports the Petition through the affidavits of its employee in its Legal Department, Duncan Matisero sworn on 12<sup>th</sup> July 2024 and 3<sup>rd</sup>

March 2025. The Bank claims that the Respondent is personally liable to it for a substantial debt arising from personal guarantees he provided for two companies that have defaulted on their loans. That due to the defaults by the borrowing companies, the Bank has initiated recovery actions, including Statutory Demands issued to both companies on 22<sup>nd</sup> August 2023 and a Notification of Sale issued to both companies on 23<sup>rd</sup> February 2024, notifying them of the Bank's intention to exercise its statutory power of sale over the charged properties. The Bank argues that because the Respondent provided personal guarantees for the facilities to the two companies which have now defaulted, he is personally liable for the total sum of Kshs. 3,292,438,105.87. The Bank states that it is supporting this petition to ensure that this debt is considered alongside the debt owed to the Petitioner and that if the Bank's debt is not considered in this proceedings, the Bank will be greatly prejudiced.

4. The Respondent responded to the Petition through his affidavits sworn on 26<sup>th</sup> September 2022 and 11<sup>th</sup> November 2024. He depones that the Kshs. 20 million debt is not a simple unsecured loan and claims that the agreement dated 28<sup>th</sup> September 2017,

provided security for the loan in the form of a *Hibiscus Villa* at *Fourways Junction* and that a sale agreement for *Villa SPG/03/P2/H105* valued at Kshs. 27.5 million was executed and remains valid. He claims this agreement has not been rescinded or terminated and that the funds were also intended to be applied toward the purchase of Office Suite SPG/30/88. That because the debt is secured by these assets, the Respondent contends that the court cannot declare him bankrupt, as bankruptcy proceedings typically require an unsecured debt.

5. The Respondent claims that the Kshs. 20 million is not a debt owed by himself, arguing that the 28<sup>th</sup> September 2017, agreement did not require him to personally repay the money to the Petitioner. He asserts that he has already fulfilled his obligations under the Agreement as the Kshs. 20 million was transferred to *Spring Valley Mall Limited* in June 2018 for the credit of the Petitioner and a Letter of Offer for Office Suite SPG/30/88 was issued to the Petitioner on 28<sup>th</sup> September 2017, acknowledging the Kshs. 20 million as a payment toward the purchase of that office suite. He states that the funds were used

for legitimate purposes, such as paying loan interest and completing construction to enable bank financing.

6. The Respondent states that if the security or sale agreements with *Muga Developers Limited* and *Spring Valley Mall Limited* have failed, that is a matter for separate legal proceedings such as a claim for breach of contract and does not justify a bankruptcy order against him personally. For these reasons, the Petitioner urges the court to find that the debt claimed is secured and that the petition against him should be dismissed with costs.
7. In response to the Bank, the Respondent argues that the Bank's claim against him as a personal guarantor is premature, speculative, and legally untenable because the Bank has not yet exhausted its remedies against the principal debtor companies. He acknowledges that he executed personal guarantees for the facilities extended to *Loneview Developers Limited* and *Encasa at Mombasa Road Limited*. However, he states that under the law of guarantee, a creditor must exhaust all available remedies against the principal debtor before pursuing the guarantor. The Respondent points out that the Bank's own attachments show that it is currently in the process of exercising its statutory power of

sale over the charged properties belonging to the principal debtor companies. He argues that the Bank has not completed this process, that the final amount that may remain outstanding after realization of the securities is yet to be determined and that the Bank cannot aggregate the full outstanding amounts against the principal debtors and claim the same from the guarantor. The Respondent contends that his liability as a guarantor does not arise until the principal debtor has defaulted; and the Bank has exhausted all remedies against the principal debtor. He further argues that the guarantor's liability is limited to the actual shortfall remaining after the securities have been realized, not the full outstanding balance of the principal debtors.

8. The Respondent asserts that the Bank has failed to provide evidence of steps taken to mitigate its losses or maximize recovery from the principal debtors and he states that the law imposes a duty on a creditor to take reasonable steps to minimize the guarantor's liability. The Respondent that the Bank's attempt to join the insolvency proceedings at this stage is irregular and unsupported in law and a circumvention of established legal principles calculated to prejudice his rights as a guarantor. As

such, he also urges the court to disallow the Bank's participation in these proceedings until it has fully exhausted its remedies against the principal debtors.

9. In addition to their pleadings, the parties have also relied on their written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

10. The main issue for the court's determination is whether the Petitioner has satisfied the legal requirements under the ***Insolvency Act*** for the Respondent to be declared bankrupt. As submitted by the Petitioner, a bankruptcy petition by a creditor must, for a start, satisfy the minimum threshold set out in **section 17** of the ***Insolvency Act*** which provides in part as follows:-

***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

11. The Respondent has not denied that indeed it is indebted to the Petitioner for the sum of Kshs. 20,000,000.00. This sum exceeds the prescribed Bankruptcy level specified in **Regulation 3 of Insolvency Regulations, 2016** which is Kshs.250,000.00. The Agreement of 28<sup>th</sup> September 2017 is common to the parties and

provided for a liquidated amount of Kshs. 20,000,000.00 payable to the Petitioner by June 2018. As to whether the debt is unsecured, the same is contested. However, I am in agreement with the Petitioner's averment that the Agreement between the parties does not offer the *Hibiscus Villa* as security and that this property is registered in the name of a third party, *Muga Developers Limited*, which is a separate entity from the Respondent and he did not have any legal capacity to pledge it as security for the loan between the parties. As the court (the late Majanja J.,) noted in the ruling of 14<sup>th</sup> June 2022, the Respondent is not privy to the sale agreement between the Respondent and the said third party, for the sale and purchase of the *Hibiscus Villa*.

12. In any event, I am in agreement with the Petitioner's submissions that even with the *Hibiscus Villa* agreement, the same is not a formal charge capable of registration, it is held by a third party not the Respondent personally and it is subject to a condition that it would be rescinded upon repayment. It is also clear that the *Spring Valley Mall*, which was the subject of the office suite purchase, was never constructed, meaning the consideration failed. The Petitioner's submissions on this point are compelling

that a creditor does not lose the right to present a bankruptcy petition simply because the debtor claims there is security, particularly where that security is disputed, invalid, or unrealizable.

13. Whereas the Respondent seeks to assail the Statutory Demand in its submissions, he has not filed any application to set aside the Statutory Demand. In regard to the test under **section 17(2)(c)** as to whether the Respondent 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.”*

14. Again, it is not in dispute that the Respondent was served with the Statutory Demand and 21 days have elapsed since the Demand was served and the same has been neither complied with nor set aside. 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”.*

15. 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 (see **Diamond Hasham Lalji v Cargill Kenya Limited [2019] KEHC 12260 (KLR)**). It is therefore my finding that having satisfied the essentials of **section 17(2)**, the present Bankruptcy petition is properly before Court and that the Respondent's failure to pay, secure, or compound the debt following the service of the Statutory Demand creates a statutory presumption that he is unable to pay his debts. The burden then shifts to the Respondent to demonstrate to this Court that he is, in fact, able to pay or has a reasonable prospect of doing so.

16. The Respondent's attempted to rebut by claiming the debt is secured. I have already found that this is not the case as the parties' agreement does not provide for the same and that the *Hibiscus Villa* is owned by a third party and the Respondent was incapable of offering it as security. He has also claimed that he has discharged the debt by paying funds to *Spring Valley Mall Limited* but there is no evidence that the mall ever existed and the consideration has failed. The Respondent has also stated that he made settlement proposals that were never honoured but what he has not provided is evidence of actual payment to the Petitioner, evidence of assets readily available to pay the debt and any application to set aside the statutory demand. This leads me to conclude that the Respondent has not discharged the burden of rebutting the statutory presumption of his inability to pay.

17. The Respondent has also stated that the Bank cannot pursue him until it exhausts remedies against the principal debtors and he relies on the case of **Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 others [2005] KEHC 2735 (KLR)** where Mutungi J., held that "*It is a general rule in guaranteeships that the lender has to exhaust his remedies against the principal*

*debtor before turning to the guarantor. Otherwise the law on the liability of guarantors is meaningless.”* However, the Bank’s supplementary affidavit reveals that its efforts to realize the charged properties are being frustrated by multiple suits filed by third-party purchasers and that these suits are preventing the Bank from completing the statutory sale process. In these circumstances I am of the view that the Bank cannot be said to be “sitting on its security” as it is actively pursuing realization but is being obstructed by litigation.

18. In any event, under **sections 25(2)(c) and 26** of the ***Insolvency Act***, the Court may refuse to adjudge a debtor bankrupt if it is just and equitable that the Court should not make a bankruptcy order and it may stay an application by a creditor for bankruptcy on such terms, and for such period, as the Court considers appropriate. It is clear that the Bank’s realization process is active but incomplete. If the Bank successfully sells the charged properties and recovers substantial sums, it may reduce or eliminate the need for bankruptcy proceedings against the Respondent. The Petitioner’s debt owed to it is relatively small compared to the Respondent’s overall financial exposure to the

Bank. I find that it would be disproportionate to issue a bankruptcy order now when the Bank's security realization may yield funds that could be applied to the Petitioner's debt. It should not be lost that bankruptcy affects the Respondent's personal and commercial standing and the Court should, where possible, allow other recovery mechanisms to run their course first.

19. As such, I would not dismiss the Petition at this point as this would ignore the fact that the statutory threshold has been met, it would potentially prejudice the Petitioner if the Bank's realization efforts fail and reward the Respondent's prolonged non-payment. Instead, I will stay these proceedings pending the outcome of the Bank's realization of the charged properties.

### **Conclusion and Disposition**

20. In the foregoing, I now issue the following orders:

- 1) The Petition dated 12<sup>th</sup> August 2020 is properly before the Court and meets the requirements of section 17(2) of the Insolvency Act**
- 2) The Respondent has not rebutted the statutory presumption of inability to pay under section 17(3)(a) of the Insolvency Act**

**3) In the exercise of the Court's discretion, the making of a bankruptcy order shall be deferred pending the outcome of the Bank's realization of the charged properties**

**4) This proceedings are hereby stayed for a period of twelve (12) months, with liberty to either party to apply for directions or for the discharge of the stay upon the conclusion of the realization process or upon a material change in circumstances.**

**5) That costs of the petition shall be in the cause.**

**DATED SIGNED AND DELIVERED virtually at NAIROBI this**

**8<sup>th</sup> DAY of MAY 2026**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Mr. Mbugua for the Petitioner
2. Mr. Ouma for the Respondent

3. Ms. Mwangi holding brief for Mr. Mubea for the supporting Creditor-Co-operative Bank of Kenya.
4. Amos - Court Assistant

ORIGINAL