THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 0258 OF 2022
HOME CONNECT PROPERTIES (U) LTD :::::::::::::::::::::::::::: APPLICANT
VS
1. KASSIM BUYONDO
2. PETER KIMANJE NSIBAMBI
T/A KIMANJE NSIBAMBI ADVOCATES :::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA
RULING

Introduction

[1] This application was brought by Notice of Motion under Section 5 of the Insolvency Act 2011, Section 98 of the CPA, Regulations 6(1) & (2) of the Insolvency Regulations and Order 52 rules 1 and 3 of the CPR seeking orders that;

a) The statutory demand dated 4th November 2022 be set aside.
b) Costs of the application be provided for.

[2] The grounds upon which the application is based are summarized in the Notice of Motion and also set out in the affidavit in support of the application deposed by **Mayanja Charles Lwanga**, the Applicant's Managing Director. Briefly, the grounds are that on 6th November 2022, the 1st Respondent served the Applicant with a statutory demand dated 4th November 2022 seeking payment of UGX 575,475,000/= as a debt due and owing to the Respondents which demand was vague, argumentative and ambiguous for falling short in clarifying whether it sought to enforce payment of the sum claimed or return of certificates of title for a portion of the land. He stated that the suit land comprised in Busiro Block 38 Plot 16 which was later subdivided into plots 91, 92, 93 and 94 upon which the statutory demand arises is subject of disputes as to its true ownership. The deponent stated that on 2nd June 2022, he on behalf of the Applicant executed a sale and purchase agreement with the 1st

Respondent on advice of the 2nd Respondent for the suit land and made an initial instalment payment of UGX 400,000,000/= on the 2nd Respondent's Bank account at Kenya Commercial Bank. By a mutual understanding and under the agreement, the Applicant company transferred the land into its own name and subdivided it into plots. The Respondents guaranteed and warranted the Applicant under clause 4.6 of the sale agreement that there were no existing claims with any third party that could adversely affect the Applicant's title save for squatters but when the Applicant commenced grading and levelling the land, there were third party adverse claims from several entities and individuals. This prompted the Applicant to halt making any further payments having already paid a total sum of UGX 685,000,000/=. The Respondents instead of addressing the adverse claims on the land resorted to black mail, defamatory media stories and issuing a statutory demand that risked prejudicing the Applicant into liquidation on account of an alleged debt whose existence is substantially in dispute and is based on an agreement that was rescinded without refunding the sums advanced and costs incurred in settling squatters. The deponent asserted that the Applicant is a solvent company and a going concern with more assets than liabilities. He concluded that it is in the interest of justice that the application is allowed and the statutory demand is set aside.

[3] The Respondents opposed the application through two affidavits in reply affirmed by **Buyondo Kassim**, the 1st Respondent and **Peter Kimanje Nsibambi**, the 2nd Respondent. The two affidavits have related depositions which I will set out jointly. The gist of the depositions is that the application is misconceived, incompetent and fatally defective for lack of locus standi on the part of Mayanja Charles Lwanga to swear the affidavit in support and for the affidavit being argumentative and full of false hoods. It was also stated that the application disclosed no cause of action against the 2nd Respondent since he was not party to the agreement and his only role in the transaction was

provision of legal services to the 1st Respondent who was the vendor of the subject property. The Respondents set out the background and the terms of the land sale agreement executed between the Applicant and the 1st Respondent on 2nd June 2022 in respect of 61 acres of land comprised in Busiro Block 38 plot 93 currently Block 38 Plot 877 at Namayumba – Gobero, Wakiso District. They also set out the terms of payment according to the agreement. According to the Respondents, the Applicant made payment of only the sum of UGX 460,000,000/= by the end of the contractual period on 3rd October 2022 out of the total consideration of UGX 1,035,475,000/= leaving an outstanding balance of UGX 575,475,000/=. On 4th October 2022, the 1st Respondent terminated the agreement for breach of contract and requested the Applicant to return the certificates of title in respect of 34.7 acres that is the equivalent of UGX 575,475,000/= that stood unpaid by the Applicant. The Applicant did not return the certificates of title as required and on 8th November 2022, the Applicant was served with the statutory demand dated 4th November 2022 requesting for the return of certificates of title measuring 34.7 acres in respect of which no consideration had been paid by the Applicant. The Applicant refused to comply with the demand and filed the instant application. The Respondents prayed that this application be dismissed and the Applicant be liquidated for having failed to satisfy the debt or liability which is unequivocal.

[4] The Applicant filed an affidavit in rejoinder to the two affidavits in reply whose contents I have also taken into consideration.

Representation and Hearing

[5] At the hearing, the Applicant was represented by **Mr. Edward Ssekika** from M/s Shield Advocates while the Respondents were represented by **Mr. Wandera Moses** from M/s Kimanje Nsibambi Advocates. It was agreed that the hearing proceeds by way of written submissions which were duly filed and

have been taken into consideration in the determination of the matter before the Court. In their submissions, both counsel raised preliminary objections which I will first deal with.

Preliminary Objections

A. The application is incompetent and defective for lack of a seal of the court and the statutory demand having been served out of time.

Submissions by Counsel for the Respondents

[6] It was submitted by Counsel for the Respondents that the Notice of Motion that was served on the Respondents lacked a date, signature and seal of the court which made it fatally defective. Counsel stated that although the Judiciary introduced filing by way of the Electronic Court Case Management Information System (ECCMIS), the pleadings have to be properly signed and sealed by the court and, without the seal of court and the signature of the Deputy Registrar, the instant application is incompetent and was illegally served upon the Respondents. Counsel also submitted that the application was filed and served beyond the mandatory 10 days from the date of service of the statutory demand as provided for under Sections 5(2)(a) and (c) of the Insolvency Act 2011. Counsel pointed out that while the statutory demand was served upon the Applicant on 8th November 2022, the Respondents were served with the application on 29th November 2022 which was out of time and without applying for extension of time. Counsel prayed that the application be dismissed with costs for being defective and incompetent before the Court.

Submissions by Counsel for the Applicant

[7] In response, Counsel for the Applicant submitted that the *Constitution (Integration of ICT into the Adjudication Processes for Courts of Judicature) (Practice) Directions 2019* introduced the e-filing and e-processing of cases under the ECCMIS system and makes it no longer a requirement for the

judicial officer to sign the pleadings with a pen as long as they are validated on the system. Counsel stated that the instant application was filed on 18th November 2022, validated and signed by the Registrar on 23rd November 2022. Counsel argued that the application was filed within the prescribed time under Section 5(2)(a) of the Insolvency Act 2011 since the statutory demand was served on 8th November 2022 and the signing of the application by the Registrar on 23rd November 2022 was outside the control of the Applicant.

Determination by the Court

[8] It is true as stated by Counsel for the Applicant that the Judiciary in Uganda, like elsewhere, is undergoing transformation of its processes through the adoption of automation. Through *The Constitution (Integration of ICT into the Adjudication Process for Courts of Judicature) (Practice) Directions, Legal Notice No. 6 of 2019*, the Judiciary introduced the Electronic Court Case Management Information System (ECCMIS) which, necessarily, departs from some of the usual norms in the court system. The process is evolving and all its degrees of functionality cannot be achieved at the same time. At the time this matter was filed on 18th November 2022, the system was in its first year of piloting. Around that time, registrars of the courts had not had their electronic pens activated and could not sign on the scanned documents. The electronic seal is also not yet activated and authentication of documents takes a different form, away from the usual court seal. All this is an evolving process and, provided that there is proof that a document has been duly filed through the system, it cannot be challenged on account of non-compliance with certain aspects of the old manual system. In view of the foregoing, therefore, the contention by Counsel for the Respondents that the application lacked a signature of the Registrar and the seal of the court is devoid of merit. The Applicant's pleadings were properly filed on the system and were duly authenticated by the Court. This part of the objection fails.

[9] Regarding the time of filing and serving of the application, the facts clearly show that the Applicant was served with the statutory demand on 8th November 2022 and filed the present application on 18th November 2022, well within the prescribed 10 days provided for under Section 5(2)(a) of the Insolvency Act 2011. It was explained by the Applicant that the pleadings were authenticated by the Registrar on 23rd November 2022 and served onto the Respondents on 29th November 2022. I agree with the Applicant's Counsel that the requirement to file within time had been complied with and the Applicant had no control as to when the Registrar issued the application for purpose of service onto the Respondent. Service of the application outside the 10 days cannot, therefore, invalidate the application. This part of the objection is also without merit and is overruled.

B. The Applicant has no cause of action against the 2nd Respondent

Submissions by Counsel for the Respondents

[10] Relying on the case of *Auto Garage v Motokov [1971] EA 514* on the position of the law as to when a cause of action is disclosed, Counsel for the Respondents submitted that the 2nd Respondent was not privy to the sale agreement between the Applicant and the 1st Respondent and the 2nd Respondent's law firm only acted on instructions of the 1st Respondent creditor to draft and serve the statutory demand. Counsel argued that the 2nd Respondent did not violate any of the Applicant's rights and he was wrongly sued since he was not a party to the sale agreement, has never been registered as proprietor of the subject land, and is neither a creditor nor did he issue the statutory demand. Counsel for the Applicant made no specific reply to this point of objection.

Determination by the Court

[11] The position of the law is that for a suit to disclose a cause of action, it must show that the plaintiff enjoyed a right, the right was violated and it is the

defendant who violated the right. See: *Auto Garage v Motokov No.3 1973 EA 514*. It is also an established position of the law that in order to determine whether a plaint or any pleading discloses a cause of action, the court has to look at the plaint or the particular pleading with the attached documents and nowhere else. See: *Kapeeka Coffee Works Ltd v NPART, CACA No. 3 of 2000*.

[12] On the case before me, it is clear that the 2nd Respondent's law firm were attorneys for the 1st Respondent in the transaction for the sale of the subject land and also drafted and issued the statutory demand onto the Applicant. The Applicant offered no explanation as to why they treated the 2nd Respondent as a party to this action. Even when the matter was raised as a preliminary objection, the Applicant's Counsel offered no response. As a person who provided professional legal services to the 1st Respondent, I am unable to see how the 2nd Respondent violated the Applicant's rights as to trigger a cause of action in the terms alleged. In the circumstances, this preliminary objection succeeds and the 2nd Respondent is, accordingly, struck off as a party to the application.

C. The affidavit in support of the application is full of falsehoods

Submissions by Counsel for the Respondent

[13] Counsel for the Respondent submitted that the affidavit in support of the application is full of obvious falsehoods regarding the total amount paid, warranties and guarantees, termination of the agreement by the 2nd Respondent and absence of a debt due and owing, among others. Counsel invited the Court to find that the affidavit in support of the application is permeated with falsehoods and untrue allegations and prayed that the affidavit is found by the Court to be defective and the application be accordingly dismissed as unsupported by any evidence.

Submissions by Counsel for the Applicant

[14] Counsel for the Applicant submitted that the sum stated under paragraph 17 of the affidavit in support is not false as it incorporates other payments like payment of squatters. Counsel submitted in the alternative that a false hood in an affidavit does not render the entire affidavit defective but rather the court has power to apply the doctrine of severance on the offending part and to place reliance on the remaining part. Counsel argued that should the court be inclined to find any falsehood, then it should apply the doctrine of severance.

Determination by the Court

[15] The position of the law is that parts of an affidavit containing any falsehoods can be ignored and/or severed and the rest of the averments considered. See: *Col. Dr. Kiiza Besigye v Museveni Yoweri & EC, Election Petition No.1 of 2001*. Counsel for the Respondent stated that the averments that contain falsehoods and misleading information are to be found in paragraphs 9, 10, 13, 17, 18, 19, 22 and 28 of the affidavit in support. Upon examination of the impugned paragraphs of the affidavit in support, my view is that the said paragraphs represent matters that are asserted by the Applicant and disputed by the Respondents. Although it has emerged that the 2nd Respondent was wrongly included as a party to the application, such does not negate the possibility that at the time of filing the application, the Applicant honestly believed that the 2nd Respondent was personally responsible in the dispute. This is especially because the Applicant was in possession of some documents (memoranda) that indicated that the 2nd Respondent has personal interest in a portion of the subject property.

[16] As such, the mere fact that matters set out in the impugned paragraphs are contested or have been disbelieved by the court after trial does not make them obvious falsehoods. A falsehood is determined from the point of view that

at the time the person made the statement, he knew that the statement was wrong or did not believe it to be true. I do not find any proof in the present case that the Applicant knew the falsity of the averments in issue and had no belief in their truthfulness. This point of objection is not made out and is accordingly rejected.

D. The Respondent's statutory demand is incurably defective for not being verified by a statutory declaration.

Submissions by Counsel for the Applicant

[17] Counsel for the Applicant submitted that in accordance with section 4(2)(c) of the Insolvency Act, a statutory demand shall be accompanied with a statutory declaration. Counsel cited the decision of the Austrian Federal Court in the case of *Victor Tunesvitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (In Liquidation) TASSC 121 (1994) 14 ACSR 565, (1994) 12 ACLC 963 (2 September 1994)*, to the effect that the omission to accompany the statutory demand with the requisite affidavit [statutory declaration] constitutes a sound reason why the demand should be set aside. Counsel submitted that the Respondent's statutory demand being in form of a formal letter is incurably defective for failing to comply with the mandatory requirement of being verified by a statutory declaration as mandated by law. Counsel argued that the essence of a statutory declaration verifying a statutory demand is for a creditor to demonstrate that the demand is true and accurate and that the use of the word "shall" in section 4(2)(c) of the Insolvency Act makes the provision mandatory non-compliance of which makes the statutory demand incurably defective and void.

Submissions by Counsel for the Respondent

[18] In response, Counsel for the Respondent relied on section 5(7) of the Insolvency Act 2011 to the effect that a statutory demand shall not be set aside by reason only of a defect or irregularity unless the court considers that

substantial injustice would be caused if it were not set aside. Counsel submitted that failure to attach a statutory declaration is a mere irregularity which does not render the statutory demand invalid as long as the applicant is not prejudiced. Counsel also cited the provisions of Order 6 rule 6 of the CPR that enjoins parties to be bound by their pleadings and argued that the issue of not attaching a statutory declaration was never pleaded in both the application and the affidavit in support but is merely evidence from the bar which is an abuse of court process. Counsel also argued that the case of *Victor Tunesvitch Property Limited v Farrow Mortgage Service Pty (in liquidation) TASS 121[1994]14 ACSR 565* was cited out of context on account that it is a 1994 decision yet the Insolvency Act of Uganda is of 2011 and that the parent insolvency law of Austria is different from that of Uganda.

Determination by the Court

[19] Section 4(2)(c) of the Insolvency Act provides that a *"statutory demand shall … except where the debt is a judgment debt, be verified by a statutory declaration attached to the demand"*. The use of the word "shall" in the above provision connotes a mandatory requirement. The question, however, is whether, taking the particular provision in mind, the provision should be construed as mandatory or directory. The courts have set out tests as to when a legal provision may be construed as strictly mandatory on the one hand; and liberally as directory on the other hand. Two of those tests are; one, where the provision sets a sanction for not doing a particular act or taking a particular step, then it ought to be construed strictly; and secondly, where the specific purpose of the provision makes it clear that it was intended to be construed strictly. See: *Sitenda Sebalu v Sam K. Njuba and Another, Supreme Court Election Petition Appeal No. 26 0f 2007*.

[20] In the present case, according to the above cited provision, where the subject debt is a judgment debt, attachment of a statutory declaration is not

necessary. The rationale is clear; being that the debt is already subjected to proof before the court. On the other hand, where it is another kind of debt, a statutory declaration shall be attached. Again, the rationale is clear; being that there is no verification or proof concerning the debt which is a prerequisite before the statutory demand can be acted upon. A statutory declaration is a document made on oath and, as such, provides the necessary verification. In my view, this particular provision ought to be construed strictly and in a mandatory sense. I have found useful and persuasive authority in the decision cited by learned Counsel for the Applicant in *Victor Tunesvitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (In Liquidation) TASSC 121 (1994) 14 ACSR 565, (1994) 12 ACLC 963 (2 September 1994)* to the effect that the omission to accompany the statutory demand with the requisite affidavit [statutory declaration] constitutes a sound reason why the demand should be set aside. I am of the considered view that a statutory demand that is not verified by a statutory declaration would be defective and would be liable to be set aside. The issue being a matter of law, it needed not to have been pleaded by the Applicant before it could be raised, especially where the opposite party has had an opportunity to respond to it. Be that as it may, I will proceed to deal with the other matters raised in the application on the merits.

E. The Respondent's statutory demand offends the binding and enforceable arbitration clause between the parties.

Submissions by Counsel for the Applicant

[21] It was submitted by Counsel for the Respondent that the issuance of a statutory demand and triggering insolvency proceedings without subjecting the dispute to arbitration as provided for under clause 9.1 of the land sale and purchase agreement was premature and contrary to section 5(l)(a) and 9 of the Arbitration and Conciliation Act. Counsel argued that the step to issue the statutory demand was made in non-compliance with the binding and enforceable arbitration clause that referred the parties to arbitration.

Submissions by Counsel for the Respondent

[22] In response, Counsel for the Respondent submitted that Section 5(1)(a) of the Arbitration and Conciliation Act instructs the court not to refer a matter for arbitration where the arbitration agreement is incapable of being performed. Counsel submitted that the arbitration in respect of the land sale agreement between the Applicant and the 1st Respondent is incapable of being performed because there is no longer any existing contractual obligation between the parties following the termination of the agreement on 4th October 2022. Counsel also argued that the issue of arbitration was never pleaded by the Applicant and prayed that it should be rejected by the court since it is diversionary.

Determination by the Court

[23] Under the law, reference to arbitration is pursuant either to an arbitration clause embedded in a contract or by operation of the law. In both cases, a party has no choice to opt out except, in the case of proceedings based on an arbitration clause, upon existence of circumstances laid out under Section 5 of the Arbitration and Conciliation Act Cap 4, namely; where the arbitration agreement is null and void, inoperative or incapable of being performed; or where there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

[24] In the instant case, it was claimed by the Respondent's Counsel that the arbitration clause was inoperative and incapable of being performed on account of the fact that the 1st Respondent had already terminated the agreement between the parties. The question, however, is whether the termination of the agreement by the 1st Respondent on 4th October 2022 was done in accordance with the terms of the agreement. It is only if such termination was envisaged in the agreement that it can prevail or take

precedence over the arbitral clause. Looking at the sale agreement, there is no express term for automatic termination of the contract by either party. Indeed, the purported termination letter dated 4th October 2022 (Annexure G to the 1st Respondent's affidavit in reply) does not cite any clause under which the 1st Respondent proceeded to effect the termination. On the contrary, the agreement contains an express provision on dispute resolution under clause 9.1 to the effect that; *"Any dispute arising from this agreement shall first be settled amicably by the parties, and if a settlement is not reached, the parties shall enlist a single arbitrator of their choice to arbitrate the matter in accordance with the law"*.

[25] The above provision of the contract means that even the dispute that led to the purported termination was subject to amicable resolution first and, upon failure, to arbitration. There was no room for automatic termination of the contract without recourse to the agreed mode of dispute resolution. As such, I do not agree with the argument by the Respondent's Counsel that the arbitration clause had been rendered inoperative by the purported termination of the agreement by the 1st Respondent. Rather I am in agreement with the Applicant's Counsel that the step by the 1st Respondent to trigger insolvency proceedings in this matter was premature on account of failure to exhaust an agreed mode of dispute resolution and, particularly, to make use of an arbitration clause that was expressly embedded in the subject agreement. This issue too being a matter of law, it needed not be pleaded by the Applicant before it could be raised, especially where the Respondent had an opportunity to and did respond to it. Once raised as such, it cannot be ignored by the Court. On this ground, as well, the statutory demand would be set aside for having been taken out prematurely and in contravention of the law and the contractual obligation. This preliminary point raised by the Applicant also succeeds.

Issues for Determination by the Court on the Merits

[26] Two issues were raised for determination by the Court on the merits, namely;

a) Whether there is a debt owing and due to the Respondents?
b) What remedies are available to the parties?

Resolution of the Issues

Issue 1: Whether there is a debt owing and due to the Respondents?

Submissions by Counsel for the Applicant

[27] Counsel for the Applicant cited the provisions of Section 5(4)(a), (b), (c) and (d) of the Insolvency Act 2011 to the effect that a statutory demand may be set aside if court is satisfied that there is a substantial dispute whether the debt is owing or is due; the debtor appears to have a counterclaim, setoff or cross-demand and the amount specified in the demand is less the amount of the counterclaim, set-off or cross demand is less than the prescribed amount; the creditor holds some property in respect of the debt claimed and that the value of the security is equivalent to or exceeds the full amount of the debt; or that the demand ought to be set aside on such grounds as the court deems fit. Counsel submitted that the court ought to set aside the statutory demand on account that the alleged debt is equivocal and disputed. Counsel argued that the Respondents seek payment of UGX 575,475,000/= as a sum due or return of the certificates of title measuring 34.7 acres which was not provided for in the agreement. Counsel further argued that the sum advanced so far is disputed on account that the Applicant has paid a total sum of UGX 685,000,000/= while the Respondents acknowledge receipt of only UGX 460,000,000/=.

[28] Counsel cited the case of *Mbale Resort Hotel Ltd v Babcon (U) Ltd HCMC No. 24 of 2018* to the effect that insolvency proceedings are not intended as a

means for a single creditor to enforce his debt but are instead a method for collective realization of the assets of the debtor in order to maximize recovery for the general body of creditors. Counsel submitted that since the Respondents have not triggered clause 9.0 of the sale and purchase agreement, which clearly provides for arbitration in case of any dispute, and the alleged debt is disputed and arises purely as a result of the Respondent's failure to address a litany of third party adverse claims, leading to failure to give good title to the Applicant, the Court ought to set aside the instant statutory demand and refer the parties to explore the option of arbitration as provided for in clause 9.1 of the land sale and purchase agreement.

Submissions by Counsel for the Respondent

[29] Counsel for the Respondent cited the provisions of Section 2 of the Insolvency Act to the effect that a debt means a debt or liability, present or future, certain or contingent and includes an ascertained debt or liability or liability for damages. Counsel submitted that the Applicant entered into an agreement for sale of 61 acres of land comprised in Busiro Block 38 plot 877 at a purchase price of UGX 1,035,475,000/= to be paid through the 2nd Respondent's law firm's bank Account in KCB Bank in three installments by the 3rd of October 2022. Counsel stated that the Applicant acquired physical possession and transferred the 61 acres into its names and created 392 certificates of title out of the subject land. The Applicant, however, only deposited UGX 460,000,000/= into the bank account by the date of the last installment; leading to the termination of the contract on 4th October 2022.

[30] Counsel further stated that the 1st Respondent requested the Applicant to return the certificates of title for the portion of land measuring 34.71 acres of which no consideration was paid before the termination of the contract equivalent to UGX 575,475,000/=. Counsel disputed the claims that the Applicant has so for paid UGX 685,000,000/= as the payment of an extra UGX

225,0000,000/= was not made to the 1st Respondent or with his knowledge. Even then, Counsel argued, only UGX 55,000,000/= has evidence of payment to third parties. Counsel prayed that the court finds that there is a debt owing to the 1st Respondent or liability for surrendering the certificates of title measuring 34.71 acres that are equivalent of UGX 575,475,000/= which was the outstanding balance before the contract was terminated.

Determination by the Court

[31] Although the issue herein was raised as "whether there is a debt owing and due to the Respondents", the correct question for determination in line with the provision under Section 5(4)(a) of the Insolvency Act ought to have been "whether a substantial dispute exists as to whether a debt is owing and due to the 1st Respondent". Where such a substantial dispute exists, the Court may exercise discretion to grant an application to set aside a statutory demand. The Court may also exercise discretion where it is satisfied that the demand ought to be set aside on such grounds as the court deems fit, according to Section 5(4)(d) of the Insolvency Act.

[32] In the instant case, while it is asserted by the 1st Respondent that the Applicant only paid UGX 460,000,000/= towards the purchase price, it is claimed by the Applicant that it made payment of UGX 685,000,000/=. The difference of UGX 225,000,000/= is disputed. However, upon scrutiny of the terms of payment and the sums actually paid, this dispute does not appear substantial, in that only UGX 55,000,000/= out of the disputed sum has evidence; which evidence does not correspond to the agreed mode of payment. In light of that, such would not amount to a substantial dispute sufficient to lead to a cancellation of a statutory demand.

[33] It was further stated by the Applicant that when they took possession of the land as agreed in the agreement, and started grading and levelling the

same for marketing and sale in line with the purpose of the purchase, a litany of third party claims ensued. The most significant of the claims are those based on the administration of the estate of the previous owner of the land. It is shown on record that 1st Respondent obtained ownership of the land from two persons, namely, Ndagire Jennipher Lillian and Nambi Allen; being Administrators of the Estate of the late Herbert George Nelson Semambo. The Applicant stated that they obtained evidence showing that the said letters of administration had been cancelled by the court on account of a dispute related to administration of the said estate. Given that the dispute also existed on the ground and had made it impossible for the Applicant to proceed with putting the land to the planned use, the Applicant halted making any further payment.

[34] The role of the court in a proceeding such as this is not to investigate as to which of the claims is correct on the merits. Rather its role is to determine whether a substantial dispute exists as to whether a debt is owing and is due. The law is that in determining whether the debt is disputed on substantial grounds or not, the debt must be ascertained and unequivocal. The test used is similar to the one courts use in determining applications for leave to appear and defend a summary suit. See: *Regal Pharmaceuticals Limited v Maria Assumpta Pharmaceuticals Limited, Company Cause No. 20 of 2011*.

[35] In the instant case, I find substance in this claim by the Applicant. Once the source of the title of the 1st Respondent is questioned on grounds based on the law of succession and the dispute has affected the status quo on the subject property, it is very improbable that such a dispute could be ignored. In the face of such a dispute, the best option on the part of the 1st Respondent would not have been to trigger insolvency proceedings. The reasons as to why the Applicant halted payments as per the agreement ought to have been given due consideration and such was not within the domain of insolvency. The 1st

Respondent ought to have subjected the dispute either to the mode of dispute resolution set out in the agreement or taken out any other viable court action.

[36] Secondly, and equally important, the propriety of insolvency proceedings in the present circumstances is also questionable. The long held view of the law is that insolvency proceedings are not intended as a means for a single creditor to enforce his debt but are instead a method of collective realization of the assets of the debtor in order to maximize recovery for the general body of creditors. It is trite law that a company's court is not, and should not be used as a debt-collecting court. See: *Chan Siew Lee Jannie v Australian and New Zealand Banking Group Ltd [2016] 3 SLR 239*; *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2007] 1 AC 508* and *Re A company (No.001573 of 1993 [1983] B.L.C 492*.

[37] It is in that light that I am greatly persuaded by the decision in *Mbale Resort Hotel Ltd v Babcon (U) Ltd HCMC No. 24 of 2018* in which the learned Judge took the same view as set out by the above cited authorities. In that case, the learned Judge went on to state that where through use of insolvency proceedings *"parties seek to establish their rights … then pulling the insolvency trigger … is not a proper procedure to undertake. The companies court cannot properly be used for the purpose of debt collection"*.

[38] Indeed, I hold the view that insolvency proceedings are meant for companies that are financially struggling, undergoing financial distress and clearly going down. It is meant to preserve value of the company's assets either to save it from completely going down or if it inevitably has to go down, to maximize the possibility of recovery by the lining creditors. For a company that is clearly healthy and/or is a going concern to be subjected to insolvency proceedings, simply because it has disagreed with one of its creditors, is a step that is clearly contrary to both the letter and the spirit of the law of insolvency.

On the case before me, no evidence has been adduced showing that the Applicant is undergoing financial distress. The only available evidence is that it owes some money to the 1st Respondent. Such is not, in the least, sufficient to occasion a trigger of insolvency proceedings. For this reason, I would still set aside the statutory demand on the ground that I am satisfied that the demand ought to be set aside on such grounds as the court deems fit, in line with Section 5(4)(d) of the Insolvency Act 2011.

[39] In the premises, the Applicant has satisfied the Court that the statutory demand ought to be set aside on the several grounds set out herein above. In answer to the 1st and 2nd issues, therefore, this application succeeds and is allowed. Regarding the costs, since the 2nd Respondent successfully challenged his inclusion as a party to the action and was struck off by the Court, I will award to the Applicant half the costs of the application. In all, therefore, the application is allowed with orders that;

a) The statutory demand dated 4th November 2022 is set aside.

b) The Applicant is awarded half the costs of the application.

It is so ordered.

Dated, signed and delivered by email this 8th day of April, 2024.

Boniface Wamala

JUDGE