THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS CAUSE NO.101 OF 2019

DEOX TIBEINGANA---------- APPLICANT

VERSUS

NUMBERS FINANCE AND INVESTMENT CO LTD----------RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application under section 5(1), (2) (4) (a), (c) and (d) of the Insolvency Act and Section 98 of the Civil Procedure Act to set aside the respondent's Statutory Demand dated 10th April 2019.

The main ground upon which this application is premised is that;

The applicant disputes all the debt claimed by the respondent in the statutory demand.

The Applicant holds some property belonging to the applicant in respect of the said debt.

This application was supported by the affidavit of Deox Tibeingana-the applicant which sets out the grounds which briefly are;

- That the applicant and respondent executed an agreement on the 7th day of November, 2018 for a loan facility of 450,000,000/= however the respondent's officials only disbursed in cash 405,000,000/=.
- That following negotiations with another creditor who was holding two titles for a property in Mbuya, the applicant executed a sale agreement dated 22nd February, 2019, by which a value of sale of property was assigned in favour

of the applicant in order to clear the outstanding loan obligations with the respondent.

- That after the applicant was misled to believe the loan was paid off by the sale, the respondent went back to the applicant with a statutory demand notice without any form of notice as to the cancellation of the previous agreement which was executed by their lawyer and the respondent's MD is a witness.
- That the loan was repaid off by handing over land in lieu of the balance vide sale agreement dated 22nd February 2019 which sale agreement has never been cancelled, repudiated or terminated.
- That the applicant had earlier on been advanced funds by the respondent which funds he repaid.

The respondent in reply or opposition to this application filed an affidavit through Twine Collins a director in the respondent company. He contended that the company is duly registered and carrying on the business of money lending in Uganda.

The applicant took a loan of 450,000,000/= and it would attract an interest of 10% per month. That out of 450,000,000/= shs 45,000,000/= would be deducted at source and applied to interest for the loan period while 405,000,000/= would be disbursed directly to the applicant.

The applicant has since breached the loan agreement and failed to honour his obligation to repay the full loan amount and as a result both the unpaid principal and accumulated interest is 685,000,000/= as of 9th May 2019.

That the respondent company was not party to the said sale agreement dated 22nd February 2019 with Charles Odere. The company has not received any payment from any of the applicant's creditors or Mr Charles Odere on account of any deed of assignment.

That Mr Charles Odere has since communicated to the applicant that the deal fell through, and he withdrew from it and is no longer bound by it.

The applicant is highly indebted to other creditors; Commercial Bank of Africa, DFCU Bank, Butebi Investments Ltd, Vijay Reddy, Uganda Revenue Authority, Brigadier Kasirye Gwanga, Godfrey Kirumira and other money lenders

At the hearing of this application court directed the parties to file written submissions which the parties duly filed.

The applicant was represented by *Mr David Ssempala* and the respondent was represented by *Mr.Colline Taremwa Robert*.

I have considered the respective submissions before arriving at this decision. The parties raised the following issues for determination.

ISSUES.

1. ***Whether the applicant is indebted to the respondent to a tune of 640,000,000/=?***
2. ***Whether this matter is properly before the court?***
3. ***Whether the court can grant a bankruptcy order in the circumstances?***
4. ***What are the remedies available to the parties?***

Whether the applicant is indebted to the respondent to a tune of 640,000,000/=?

The applicant's counsel submitted that it is a requirement under the insolvency Act that the petitioner must prove by way of evidence that he or she is unable to pay his or her debts with such debt exceeding Uganda shillings fifty million and cited the case; ***In the Matter of Hellen Kakyo, Bankruptcy Cause No. 4 of 2014.***

The applicant contends that an agreement entered into by the parties cannot unilaterally be terminated by one party unless the agreement specifically provides for such a right. Therefore the purported termination of the same by Mr Charles Odere is null and void.

Therefore since there was an agreement by the applicant and the respondent to settle the debt by taking advantage or an assignment of the products of sale, the loan stands settled.
The applicant contests the debt and it is premature to trigger insolvency proceedings against him. This is especially so after the applicant handed over his land in lieu of the balance and he was misled to believe the loan had been paid off by the said sale of land until he was served with a statutory notice.

The applicant's counsel also submitted that, the law on insolvency aims at enforcing rights and not establishing them and cited the case of ***Omer farming Company Limited vs Rehoboth Agricultural Management Services limited Miscellaneous Cause No. 21 of 2019.***

He further submitted that a debt can only be ascertained by both parties agreeing to the same or having common position to it and a debt cannot be certain if one of the parties is disputing the said debt. Since the applicant assigned his proceeds to the respondent in settlement of the debt, the statutory demand issued against the applicant is premature and therefor improperly before the court.

The respondent's counsel submitted that he has never received any money from the guarantor or funds from the conditional sale of land agreement since it was never a party to the said contract and that the guarantor terminated the Agreement on the ground that the applicant had failed to perform the conditions precedent.

The mere execution of the Agreement with a third party did not extinguish the applicant's loan agreement obligations with the respondent before payment of the full purchase price.

The respondent contended further that they cannot be held liable for the failure of the agreement since the agreement was terminated due to default of the applicant. The respondent cited the case of ***Fulgensius Mungereza vs Price Water Coopers Africa SCCA No. 18 of 2002*** to buttress his argument that contracting parties must

adhere to the terms of the agreement; courts of law cannot vary the contract to suit arguments of a single party.

That the applicant defaulted on the Loan agreement on the 7th December 2018 from then on a monthly interest at 10% has been accruing. The applicants debt now stands at 730,000,000/=. Therefore according to them the applicant is indebted and the court should find so.

The respondent also contended that the applicant partly acknowledges the debt. An acknowledgment of the debt is incompatible with the ability to substantially dispute it under insolvency.

The respondent cited the case of ***Joshua Mwalyo vs Sillvya Wanjiru Merie Insolvency Cause No. 7 of 2017*** where court held that the applicant having acknowledged part of the debt, he failed to substantially dispute the debt.

Determination

The main issue for determination is whether the applicant is indebted to a sum that has continued changing due to the 10% interest and now stands at 730,000,000/= and thus this would justify the issuance of the statutory demand the respondent issued.

Section 4(2) of the Insolvency Act provides that;

A statutory demand shall-

(a) be made in respect of a debt that is not less than the prescribed amount and in case of a debt owed by-

(i) An individual is a judgement debtor; or

(ii) A company is an ascertained debt, but need not be a judgment debt.

The applicant is an individual and the above provisions require that he should be a judgement debtor implying that a suit must be filed and he is found liable and thus becomes a judgment debtor.

In the present case the respondent did not file any suit against the applicant or has no judgment against the applicant in order to qualify the debt owed as a judgement debt.

It therefore means that a statutory demand/demand notice cannot issue against an individual without a judgment or the debtor being found liable under a judgment. It was very erroneous for the respondent to issue a Statutory demand without a judgment.

The bankruptcy proceedings are not intended as a means for a single creditor to enforce his debt but are instead a method for the collective realisation of the assets of the debtor in order to maximise recovery for the general body of creditors. See ***Chan Siew Lee Jannie vs Australia and New Zealand Banking Group Ltd*** *[2016] 3 SLR 239*

This court agrees with the submission of the applicant to the extent that the law of insolvency aims at enforcing rights and not establishing them. This point has been emphasized by Lord Hoffmann at 15, in the case of **Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc** [2007] 1 AC 508

> ***"The important principle is that bankruptcy, whether personal or corporate is a collective proceeding to enforce rights and not to establish them"***

Where parties seek to establish their rights like in this case, then actioning the insolvency trigger as in this case is not the proper procedure to undertake. The Companies Court cannot properly be used for the purpose of debt collection. **In Re A Company (No. 001573 of 1993 [1983] B. L. C 492 Harman J**

> ***…." It is trite law that the Companies Court is not , and should not be used as (despite the methods infact often used adopted) a debt – collecting court. The proper remedy for debt collecting is an execution upon a judgement , a distress, a garnishee order, or some procedure.***

The sum effect of failing to file a suit to confirm the said debt renders the entire insolvency proceedings illegal and contrary to the Insolvency Act and this court would have no option but to set aside the statutory demand wrongly issued by the applicant. This would imply that the said debt is not proved through a judgment.

When a debtor seeks to challenge a statutory demand, it is not uncommon for him to try to dispute the liability for the debt. It is equally common for the debtor to allege that the loan agreement contravenes legislation relating to money-lending.

This type of dispute is best suited to be challenged in a court of law and court makes a finding on the actual and exact debt due and thus qualifies it to be a judgment debt. Such a challenge will automatically raise triable issues that ought to be determined by court.

In determining whether the statutory demand ought to be set aside on the merits, courts have applied a test laid down in the case of ***Tan Eng Joo v United Overseas Bank Ltd*** *[2010] 2 SLR 703*, Singapore High Court held that a statutory demand ought to be set aside if there are triable issues to go for trial.

In the present case, the applicant disputes the sums claimed as due as per agreement of sale of land through which he assigned the debts to Mr Charles Odere. The contentions by the respondent should have been determined in a suit filed against the applicant in order to have him in the purview of section 4(2) of the insolvency Act as a judgment debtor.

The statutory demand was merely used to bring improper pressure to bear on the applicant in order to collect a disputed debt in this case. It would be wrong to allow the machinery designed for clear cases of insolvency to be used as a means of resolving disputes which ought to be settled in ordinary litigation. ***See Re Lympne Investments Ltd [1972] 2 All ER 385***

The arguments of the respondent that the applicant acknowledges part of this debt citing the Kenyan case of ***Joshua Mwalyo vs Sillvya Wanjiru Merie Insolvency Cause No. 7 of 2017*** is devoid of any merit since the law restricts issuing of a statutory demand to a judgement debtor only.

Obiter dicta

There seems to a lacunae in the law to the extent that; what happens when the individual in his own admission in an affidavit or acknowledgment by letter admits liability in writing or otherwise? Should the parties first file a suit in order for the debtor to become a judgment debtor?

I have not found it necessary to resolve the rest of the issues since this application was solely intended to set aside the statutory demand

In the result, this application is allowed with no order as to costs. I so order

SSEKAANA MUSA
JUDGE
16th/08/2019