THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 223 OF 2020

AYO JACINTA :: APPLICANT

VERSUS

HON. ACHIENG SARAH OPENDI:: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed this application under section 5 of the Insolvency Act and Regulation 6 of the Insolvency Regulations seeking for orders that;

a) The statutory demand dated 6th August 2020 be set aside
b) The time for making or serving this application be extended
c) The respondent pays the costs of this application.

the application was supported by the applicant's affidavit with grounds that briefly stated that the respondent's statutory declaration was premature before this court, that no return of execution was ever made to court of attempts to execute against the applicant and that the applicant was prevented by sufficient cause from filling and serving this application within 10 days.

The respondent filed her affidavit in reply to this application wherein she stated that this application is defective, bad in law and a nullity as it did not meet the

legal grounds for setting aside a statutory demand. She stated that the applicant admitted inability to pay a sum to a tune of UGX. 96, 508, 560/=.

The applicant was represented by Counsel *Anthony Bazira* whereas the respondent was represented by Counsel *Mujurizi Jamiru*.

The applicant proposed the following issues for determination by this court.

1. ***Whether time should be extended to validate filing of Miscellaneous Cause No. 223 of 2020.***
2. ***Whether the respondent's statutory demand should be set aside.***
3. ***What remedies are available to the parties.***

The parties were ordered to file written submission to wit, the applicant accordingly filed the same but the respondent did not. Court however considered the evidence on file.

DETERMINATION OF ISSUES

Issue 1

Whether time should be extended to validate filing Miscellaneous Cause No. 223 of 2020.

Counsel for the applicant submitted that extension of time to file and serve an application seeking to set aside a statutory demand is provided for under section 5 (3) of the Insolvency Act where it states that the court may for sufficient cause extend time for making or serving an application to set aside a statutory demand and at the hearing of the application, extend the time for compliance with the statutory demand.

He stated that the essential element of section 5 (1) and (3) of the Insolvency Act and section 96 of the Civil Procedure Act is that the applicant must show sufficient cause which is the basis of judicial discretion. The applicant must therefore satisfy court that the application is brought in the interest of justice and not intended to prevent justice. ***(see; Mian Aqeel Ashraf & Anor v Exim Bank (U) Ltd HCMA 497 of 2017).***

Counsel submitted that the applicant's contention under para. 22- 24 of the affidavit in support at page 5 of the application that she was away in Tororo attending to her sick husband during the time her lawyers were served with the statutory demand on the 6th August 2020 and was not able to make it to Kampala to instruct her lawyers. He submitted that the evidence of sickness is not rebutted by the respondent.

He further submitted that the sickness of the applicant, non-service of court summons, gross negligence of counsel and failure to comprehend rules of procedure by the applicant who may not be represented though ignorance of the law is no defence may be regarded as sufficient cause as expounded in Mian Aqeel Ashraf v Exim Bank(supra). Counsel submitted that court reserves the right to exercise discretion to grant the extension of time depending on the circumstance of the case.

He submitted that administration of justice requires that the substance of the dispute be investigated and decided on their merits and errors and lapses should not necessarily debar a litigant from pursuit of his rights. (***see; Naapai Publications Ltd & Anor v Baguma Geoffrey M.A No. 23 of 2020)***.

He therefore prayed that court exercises its discretion under section 5 (3) of the Insolvency Act and section 96 of the Civil Procedure Act to enlarge time and validate the period within which this application was filed and served on the respondent.

Analysis

I have put in to consideration submissions from counsel for the applicant and the evidence on file.

Section 5 of the Insolvency Act, No. 14 of 2011 *provides that:*

1) *The court may on the application of the debtor set aside a statutory demand.*

2) *...*

3) *The court may for sufficient cause, extend the time for making or serving an application to set aside a statutory demand and at the hearing of the application, extend the time for compliance with the statutory demand.*

Section 96 of the Civil Procedure Act also provides that where any period is fixed or granted by court for doing of any act prescribed or allowed by this Act, the court may in its discretion from time to time, enlarge that period even though the period originally fixed or granted may have expired.

The essential element of ***Section 5 (1) and (3) of the Insolvency Act*** and ***section 96 of the Civil Procedure Act*** is basically one. The applicant must show sufficient cause which is the basis of judicial discretion. This in essence means that each case may present its own circumstances that inform the judicial mind to exercise its

discretion. The applicant must therefore satisfy court that the application is brought in the interest of justice and not intended to pervert justice.

As submitted by counsel relying on the case of **Mian Aqeel Ashraf & Anor v Exim Bank (U) Ltd (supra)**, sickness of the applicant, non-service of the court sermons, gross negligence of counsel, and failure to comprehend rules of procedure by an applicant who may not be represented though ignorance of the law is no defence may be regarded as sufficient cause.

In this case the applicant under paragraph 22 to 24 of the affidavit in support of this application stated that she was away nursing a sick husband in Tororo during the time her lawyers were served with the statutory demand and could not make back in time to instruct them. This was buttressed by the medical forms as per Annexture J page 56-66 of the Application. This was never disputed by the respondent.

This court therefore finds that the applicant has satisfied court that the applicant has sufficient cause and in the interest of justice, time should be extended to validate filing of Miscellaneous Cause No. 223 of 2020.

Issue 1 is resolved in the affirmative.

Issue 2

Whether the respondent's statutory demand should be set aside.

Counsel for the applicant submitted that the grounds for setting aside a statutory demand are provided for under section 5 (4)(a) to (d) to include; there is a substantial dispute whether the debt is owing or due, the debtor appears to have

a counter claim, set off or cross demand, creditor holds some property in respect of the debt claimed by the debtor and its value is equivalent or exceeds full amount of the debt and court discretion on such grounds as it deems fit.

Counsel further relied on Regulation 6 of the Insolvency Regulations which provides that where a debtor applies to court to set aside a statutory demand, the debtor is not required by court to comply with the demand until the court has determined the application.

Counsel submitted that the statutory demand is premature since the respondent had not demonstrated that it has attempted to execute the yet to be endorsed consent through normal execution proceedings under section 38 of the Civil Procedure Act. It is the applicant's contention that the consent order dated 9th July 2019 in the sum of UGX. 76,508, 560/= that is the subject of the statutory demand is premature as the respondent has not shown any documentary evidence such as court proceedings or court order which shows that the consent order was signed by or endorsed by the registrar, he therefore stated that the court order is yet to be signed and the purported execution through insolvency proceedings is premature and an abuse of court process.

Counsel further relied on section 3 of the Insolvency Act which provides that subject to subsection (2) and unless the contrary is proved, a debtor is presumed to be unable to pay the debtor's debts if; the debtor has failed to comply with the statutory demand, the execution issued the debtor in respect of a judgment debt had been returned unsatisfied in whole or in part or all or substantially all the

property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property.

Counsel cited ***Bahadukali Mohammed Ali vs Springs International Hotel Ltd Company Cause No. 5 of 2019*** where court stated that the judgement creditors should not rush to take up bankruptcy/ insolvency proceedings immediately upon default of payment by debtors but should look to bankruptcy as a last resort for debt recovery and only after all other avenue for recovery have failed or proven unsuccessful. Counsel submitted that there has been no execution of the current and last consent judgement in the sum of UGX. 96, 508, 560/= signed by the parties and their lawyers on the 9th July 2019 and that all other avenues for recovery under execution have not failed or proven unsucceful and as such the issuance of the statutory demand is premature.

Counsel submitted that the respondent's argument under paragraph 8 of the affidavit in reply is of no consequence since the following arrest of the applicant on the 6th may 2019 was followed by subsequently signed consent on the 9h July 2019 which became the new contract and varied the earlier decretal sum from UGX. 83,273,440/= to UGX. 67,038, 560/= thus the latter superseding the original consent cited by the respondent (see; ***Ismail Hirani versus Noorali Esmail Civil Appeal No. 11 of 1954).***

Counsel further submitted that there is no evidence by the respondent's affidavit that the UGX 20, 000,000/= taxed by the court of Appeal was executed through the normal execution procedure. He stated that a taxation certificate and demand letter were sent to the applicant and the former is no actually proof that the

statutory demand is premature. He stated that there was no execution and /or failed execution to resort to bankruptcy proceedings (see; ***Deox Tibeigana versus Numbers Finance & Investments Co Ltd Misc. Cause No. 101 of 2009.***)

The applicant submitted that there was no return of execution proving that the debt is unsatisfied in whole or in part as proof of inability to pay debts under section 3(1) of the Insolvency Act. Counsel stated that what the respondent purports to call return of execution under paragraph 12 of the affidavit in reply are warrants of arrest and nothing to show that the applicant was actually arrested on all those different dates or not. This could only be proved through a return of execution (see; *Nandhubu Katawo v Isabirye William Revision Cause 44 of 2017*). He therefore submitted that the execution was premature and is only intended to embarrass the applicant.

Counsel submitted that the applicant has been at all times willing to satisfy the judgement debt. He stated that the applicant has so far paid off UGX, 6,906,000/= to the respondent in satisfaction of the decretal sum. It is unfortunate that the respondent disputes this amount on grounds that she's not aware. It was submitted that the applicant demonstrated that the desire to make some more payment but the said payment was rejected by the respondent. counsel stated that this defeats the purpose of the purported statutory demand which requires one to pay money.

In respect of the respondent's averments under paragraph 19 of the affidavit I reply as to no known assets within the jurisdiction, counsel submitted that this has not been proved and there was no empirical evidence to show how the respondent

arrived at such a conclusion he stated that courts have held that mere lack of knowledge on the respondent's part cannot amount to the applicant's inability to pay and the respondent ought to provide more substantial evidence on which court can base its decision (see; Bank of Uganda v Nsereko & Others Civil Application No. 7 of 2002)

Counsel therefore submitted that the statutory demand is premature since there has been no execution proceeding, UGX. 6,906,000/= though disputed has been paid and that the UGX. 3,000,0000/= was rejected all showing that the applicant's ability to pay.

Analysis

This court agrees with the submissions of counsel for the applicant. Applicant's counsel properly cited **Section 5(4) of the Insolvency Act of 2011**;

The court may grant an application to set aside a statutory demand if it is satisfied that;

a) *There is a substantial dispute whether the debt is owing or due.*

b) *The debtor appears to have a counterclaim, set off or cross demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount.*

c) *That the creditor holds some property in respect of the debt claimed by the debtor and that the value of the security is equivalent to or exceeds the full amount of the debt;*

It is premature to issue a statutory demand when the parties entered consent which has not yet been endorsed and no execution has been done yet.

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*** stated that the important principle is that bankruptcy, whether personal or corporate is a collective proceeding to enforce rights and not to establish them but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established." 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.

The proper remedy for debt collecting is an execution upon a judgement, a distress, a garnishee order, or some procedure.

The statutory demand was merely used to bring improper pressure to bear on the applicant in order to collect an unascertained 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)***

In the circumstances of this case, it is very clear that the consent that had been entered into by the parties and signed of by their counsel had not been endorsed by court and thus no execution had been issued by court.

Further, the applicant has indicated the willingness to satisfy the judgement debt to the respondent. This therefore defeats the purpose statutory demand which requires one to pay money.

This court therefore finds that the statutory demand was premature and is thus set aside.

This issue is therefore answered in the affirmative.

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

I so order.

SSEKAANA MUSA
JUDGE
15th December 2020