

1 **THE REPUBLIC OF UGANDA**
2 **IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO**
3 **MISCELLANEOUS APPLICATION NO. 497 OF 2017**
4 **(ARISING FROM BANKRUPTCY CAUSE NO.6 OF 2017)**

5
6 **1. MIAN AQEEL ASHRAF**
7 **2. ASHRAF MIAN ROHAIL..... APPLICANTS**
8 **VS**
9 **EXIM BANK (U) LIMITED.....RESPONDENT**

10

11 **BEFORE THE HONORABLE LADY JUSTICE MARGARET MUTONYI JUDGE HIGH**
12 **COURT**

13 **RULING**

14 1.This is an application brought by way of Notice of Motion under sections 3(5), 4, 5(3)(4) and
15 264 of the Insolvency Act and regulations 6 and 203 of the Insolvency Regulations.

16 The application seeks for orders that;

- 17 1. The time for applying for the setting aside of the statutory demand sent by the respondent
18 to the applicants via registered mail on the 23rd of March 2017 to postal address 33151
19 Kampala, Uganda be enlarged and or extended.
20 2. The statutory demand dated 22nd day of March 2017 be set aside
21 3. The bankruptcy cause No.6 of 2017 be dismissed
22 4. Costs of the application be provided by the respondent.

23

24 The application is supported by the affidavit of **MIAN AQEEL ASHRAF** dated 7th June 2017.
25 The major grounds briefly are as follows:

- 26 **a)** That no statutory demand was ever served on the applicants, either personally or vide
27 their registered postal address, place of business or on their respective legal
28 representatives.

- 29 b) That the respondent was duly informed or had notice that prior to the 22nd of March 2017
30 that postal address 33151 Kampala, Uganda is not an address of service for the
31 applicants.
- 32 c) That the respondent has since the 11th day of October 2013 been serving and or posting
33 their correspondences to the applicants save for the purported and suspect statutory
34 demand, to that new address, P.O.BOX 009, Lugazi Uganda.
- 35 d) That the respondent was duly informed and or had notice that the 2nd applicant was not
36 within the territorial boundaries of the Republic of Uganda.
- 37 e) That since the bankruptcy petition is premised on a statutory demand which is devoid of
38 service as it was intentionally and or unintentionally sent to a wrong address, it is thus
39 pre-mature, devoid of service and has no merits as required by law.
- 40 f) That the applicants are not debtors since the overdraft and loan facilities were as at the
41 date of filing the petition and writing the statutory demand not due for payment by the
42 principal borrower, Abisha steel industries ltd.
- 43 g) That there is no decree or order from any competent court within the jurisdiction of
44 Uganda declaring the applicants herein to be liable to pay any date on behalf of the
45 principal borrower.
- 46 h) There is a substantial dispute as to whether the overdraft and loan facilities are due and
47 owing that is the subject of a pending/ongoing suit in the High court of Uganda at
48 Mukono vide; Abisha Steel Industries Limited V Exim Bank Uganda Limited HCCS 05
49 of 2017.
- 50 i) There is a decree of the High court of Uganda in Abisha Steel Industries Limited V Exim
51 Bank Uganda Limited HCCS 16 of 2016 preserving the status quo.
- 52 j) That should any court of competent jurisdiction find the overdraft and loan facilities
53 owing and due, the respondent has security covering the same comprising of among
54 others land, buildings and site works.
- 55 k) That this honorable court is enjoined with the requisite jurisdiction to enlarge the time
56 within which to set aside the statutory demand and also to dismiss bankruptcy cause no.6
57 of 2017.

58

59

60 **2. Respondents case:**

61 On the other hand, the respondents filed an affidavit in reply sworn by **LEILA N NALULE** the
62 legal manager/company secretary of the respondent Bank wherein they oppose this application
63 on grounds that;

64 a) That the applicants have not furnished any sufficient cause whatsoever and or sound
65 reasons warranting the setting aside of the statutory demand or the extension of time
66 within which to set aside the statutory demand and by extension dismissing the
67 Bankruptcy petition.

68 b) That contents of paragraphs 2,3,4,5,6,7,8 and 9 and the Annextures there under are not
69 only false but also misleading before this honorable court and ought to be struck off to
70 the extent of their falsehood.

71 c) That the applicants became elusive ever since they failed to honor their obligations as
72 guarantors to the loan facilities extended to their company called Abisha Steel Industries
73 Ltd and accordingly, they could not be traced physically.

74 d) That the applicants were on the 23rd day of march 2017, properly served with a statutory
75 demand via their postal main address P.O. BOX 33151 and its over two and half months
76 since they were served

77 e) That the respondent has never been served with the notice of change of address dated 11th
78 October 2013 as averred by the applicants.

79 f) That in addition and contrary to the contents of the aforesaid paragraphs in the affidavit
80 of Mian Aqeel, the applicants as directors of the principal debtor in receivership have at
81 all material times carried on business under their postal address of 33151 Kampala upon
82 which they were served via the registered mail.

83 g) That further to the above, Annextures dated 25th and 29th November 2013 attached to the
84 affidavit of the 1st applicant, all signed by the deponent bear the principal debtor's stamp
85 with the same registered postal address of 33151 Kampala upon which they were served
86 with the statutory demand.

87 h) That the applicants have since October 2013 continued doing business with the
88 respondents via the same postal address and on the 28th of April 2014, the applicants

89 under their postal address made an unlimited personal guarantee and indemnity in favor
90 of the respondents for USD 500,000.

91 i) That in September 2016, the applicants received the statutory notices of default and sale
92 addressed to them under their postal address of 33151.

93 j) That the applicants are in essence operating two postal addresses to wit No.009 Lugazi
94 for the physical location of the business in Lugazi and not 33151 Kampala for which they
95 maintain while dealing with the respondent.

96 k) That the instant application is therefore irregular and filed out of time in violation of the
97 provisions of the Insolvency Act and ought to be dismissed as there is no sufficient cause
98 shown, the applicants having been properly served with the statutory demand on their
99 known address.

100

101 **3. *Legal representation***

102 The applicants were represented by Counsel Sebbowa Kabali of M/S Sebbowa and Co.
103 advocates, whereas the respondents were represented by M/S Nangwala, Rezida & Co.
104 Advocates. By consent of both parties, court proceeded by way of written submissions filed by
105 both counsel on court record. I have thoroughly read through the submissions and will refer to
106 them where necessary while writing this ruling.

107 **4. *The law Applicable.***

108 The Insolvency Act No 11 of 2011, and the Regulations there under, Civil Procedure Act, Cap
109 71, The Contracts Act of 2010, The Judicature Act, Cap 13 and case law.

110 **5. *Written submissions and preliminary point of law.***

111 ***I will start with the preliminary point of law.***

112 In his written submissions counsel for the applicant raised a preliminary point of law wherein he
113 submitted that the statutory demand allegedly sent to the applicants arises from a sum subject to
114 a dispute in ***Abisha Steel Industries Limited Vs Exim Bank Uganda Ltd HCCS No.05 of 2017***
115 that is pending before this honorable court. That the applicants guaranteed payment of the
116 amount borrowed in case the principal borrower fails to perform his obligations. The sums

117 borrowed by the principal borrower were secured by creating a mortgage and fixed and floating
118 charges over the assets of the principal borrower. The said securities are still held by the
119 respondent and they are sufficient to pay any amount that the court orders the principal borrower
120 to pay.

121 He cited *section 71 of the Contract Act 2010* which provides for the liability of a guarantor
122 which is to the extent to which a principal debtor is liable and takes effect upon default by the
123 principal debtor.

124 He also *cited HCCS NO.50/2010 STANBIC BANK LTD VS CELULAR GALORE LTD and 2*
125 *OTHERS*, Wherein, Mr. Justice Christopher Madrama Izama observed that;

126 ***“A guarantor is ordinarily liable for the debt or default of another (principal debtor) who is***
127 ***the party primarily liable for the debt..”***

128 He argued that there is no debt due or contingent against the principal borrower and liability of
129 the guarantors who are applicants herein, in case the principal borrower is a debtor. That the
130 principal borrower filed a suit vide *Abisha steel industries ltd vs. Exim bank (Uganda) limited*
131 *HCCS 05/2017* claiming that the respondent breached the loan obligations/contract and this
132 amount claimed in the statutory demand is subject to determination in this suit. Thus, the
133 applicants cannot be called upon to pay the sum until court determines the suit and a decree is
134 obtained against the principal borrower to clear the balance. If the principal borrower fails to pay
135 the balance, then the guarantors will be called upon to fulfill their obligations under the
136 guarantee.

137 That the respondent who is the creditor in the main suit is holding securities that are sufficient to
138 cover the obligation of the principal borrower. Hence, the applicants herein cannot be called
139 upon to perform their obligations under the guarantee unless the securities are realized and it is
140 determined they are not sufficient to cover the obligation guaranteed.

141 He noted that the creditor’s petition is meant to extort money from the guarantors/applicants and
142 exert pressure to ensure that the pending suit between the principal borrower and the respondent
143 herein is defeated by illegally recovering sums that are not due. The respondent intends to use
144 bankruptcy proceedings to avoid the pending suit where it is claimed to be in breach of the loan

145 agreements. Such breach of the loan agreements by the respondent absolves the applicants from
146 liability.

147 He prayed that consequently, the preliminary point be upheld and the creditor's petition be
148 dismissed with costs.

149 On the other hand, the respondent's submission is that; ***Abisha Steel Industries Ltd Vs Exim***
150 ***Bank (U) Ltd HCCS No.05 of 2017*** pending before this court does not in any way affect the
151 liability of the guarantors or their failure to comply with the demands and the statutory demand.
152 The applicants' inability to pay debts under the insolvency law is proved by non-compliance to
153 the statutory demand; indeed, the applicants failed to comply as required therein. The applicants'
154 submission that the respondent intends to use bankruptcy proceedings to avoid the pending suit is
155 grossly misconceived. The said suit and the bankruptcy proceedings stand on their own and can
156 proceed concurrently.

157 The applicants are indeed liable for the principal borrower's obligations upon its default. As per
158 paragraph 14 of the affidavit in reply, the principal borrower in receivership defaulted on its loan
159 obligations and a demand to the applicants was made to no avail.

160 Counsel therefore prayed that the preliminary point of law is overruled and the creditor's petition
161 stands.

162 In view of counsel's submission, the essence of a guarantee is to ensure the performance of a
163 debt obligation where the principal debtor defaults or is unable for whatever reason to meet his
164 obligation when it becomes due. Section 71 (2) of the Contracts Act 2010 is to the effect that a
165 guarantor's liability takes effect upon default by the principal debtor.

166 This would mean that, the moment the principal debtor fails to meet his obligation as required
167 under the contract, the guarantor automatically takes on the obligation and all responsibilities due
168 and owing to the principal debtor.

169 The applicants' submission in this case is to the effect that the statutory demand allegedly sent
170 to the applicants arises from a sum that is the subject of a suit dispute before this court by the
171 principal debtor and that as such,

172 *“the guarantors (applicants herein) cannot be called upon to pay the sum until court*
173 *determines the suit and a decree is obtained against the principal borrower, the lender realizes*
174 *the security securing the mortgages and if the security is not sufficient a demand is made to*
175 *the principal borrower to clear the balance, if the principal borrower fails to pay the balance*
176 *then the guarantors will be called upon to fulfill their obligations under the guarantee.”*

177 The law as clearly cited by both parties above is to the effect that, the guarantor’s obligation
178 takes effect upon default by the principal debtor. In the case of **BARCLAYS BANK LTD VS.**
179 **JING HONG AND GUO DONG, H.C.C.S NO.35 OF 2009**, court Justice Madrama Christopher
180 Izama stated that:

181 *“The liability of a guarantor arises only upon the default of the principal debtor in his or her*
182 *obligations as per HALSBURY’S LAWS OF ENGLAND 4TH EDITION VOL.20 AT PARA*
183 *193... A guarantee is defined by oxford dictionary of law at page 246, as a secondary*
184 *agreement in which a person (the guarantor) is liable for the debt on default of another (the*
185 *principal) who is the party primarily liable for the debt. The contract of the guarantor in the*
186 *strict sense (surety ship) and is secondary or ancillary to the contract of the principal debtor.*
187 *Liability of a guarantor depends on the liability of the Principal borrower as held in the Bank*
188 *of Uganda Vs Banco Arabe Espanol CA NO 23 OF 2000. According to LAW OF*
189 *GUARANTEES By Geraldine Mary Andrews and Richard Millet at page 193, the fact that the*
190 *obligations of the guarantor arise only when the principal has defaulted in his obligation to*
191 *the creditor does not mean that the creditor has to demand payment from the principal or from*
192 *the surety, or give notice to the surety before the creditor can proceed against the surety. The*
193 *learned authors noted that the question of whether demand is necessary is a matter of*
194 *construction of the relevant contracts. In other words, it is a matter on the merits. Simply put,*
195 *the question of the right to sue is determined by the nature OR type of the guarantee contract*
196 *and its construction. I agree with the right to sue discussed in the House of Lords case of*
197 *MOSCHI V LEP AIR SERVICES LTD [1973] AC 331, per Lord Simon; “On the default of*
198 *the principal promisor causing damage to the promisee the surety is, apart from special*
199 *stipulation, immediately liable to the full extent of his obligation, without being entitled to*
200 *require either notice of the default or previous recourse against the principal, or simultaneous*
201 *recourse against co-sureties”*

202 Last but not least according to Hulsbury's laws of England 4th Edition volume 20 paragraph
203 215, the plaintiff may join as defendants to the action on guarantee all or any of the persons
204 liable under it ,whether their liability is joint, joint and several or severa]. The Principal debtor
205 and the guarantor may but need not be sued in the same action. There is generally no need to
206 sue or arbitrate against the Principal debtor even if the principal debtor is insolvent

207 *In the case of several sureties at page 209, the authors of the Law of Guarantees (supra) note*
208 *that “Quite apart from the difficulties which may arise when the creditor has a free choice*
209 *whether or not to sue both the principal and the surety, there may be situations in which he is*
210 *bound to sue them both, or to sue all the sureties in the same proceedings. As a general rule, if*
211 *the liability of the surety is several, or joint and several, the creditor may sue the surety*
212 *independently without joining in other parties to the action, or he may sue some or all of*
213 *them.”*

214 *In other words, the creditor could have proceeded simultaneously against the principal debtor*
215 *and the guarantors at the same time. The creditor could have sued them in the same action or*
216 *in separate suits... Any winding up action against the principal debtor or receivership per se is*
217 *not a bar of the suit against the guarantors provided there is some money due and owing. To*
218 *emphasize the point, a liquidator or trustee in bankruptcy can file an action against the*
219 *guarantors of the company in trouble or the guarantors of the principal debtor in respect of*
220 *whose estate a receiving order has been made. Where liability of the guarantors can be barred*
221 *through construction of the deed of guarantee, this becomes a triable issue on the merits of the*
222 *suit...”*

223 The above quotation which I entirely agree with implies that; where default is established on the
224 part of the principal debtor, the guarantors are immediately liable to the full extent of the
225 obligation and it does not matter whether or not there has been any notice to them or even other
226 options explored by the creditor in a bid to recover the debt. For as long as there is money due
227 and owing to the creditor, the guarantors are automatically liable and prone to any proceedings or
228 measures whatsoever employed by the creditor to recover their monies legally, this maybe done
229 jointly against both the guarantors and the principal debtor or separately in different kinds of
230 proceedings.

231 It is therefore immaterial as whether or not the creditor is holding the debtor's properties as
232 security and as to whether they satisfy the debt due or not. Those are triable issues that must be
233 proved with evidence.

234 It is a grave misconception of the law by counsel for the applicants to allege that the respondent
235 bank had to first exhaust all the available options by first of all seeking a decree from court to
236 demand the debt owing to the respondent and or authority to realize security from the mortgages
237 and floating debenture and if there is any deficit, that is when the Respondent Bank should
238 demand the liability of the guarantors.

239 ***It is now settled law that the guarantors are automatically liable in case of default and where***
240 ***the money is supposed to be paid in instalments, liability of the guarantors starts from the***
241 ***moment any instalment due is not paid as this in essence may entitle the creditor to recall the***
242 ***entire outstanding for breach of an essential term of the contract- the term of paying the***
243 ***instalment on the due date.***

244 In therefore do not agree with counsel for the applicant that civil suit filed by the Principal debtor
245 , Abisha Steel Industries Limited Vs Exim Bank Uganda Limited HCCS No.05 of 2017 acts as a
246 bar to any action by the creditor to proceed against the guarantor. The Bankruptcy proceedings
247 against the guarantors stands out on its own. The guarantors are at liberty to proceed against the
248 Principal debtor if he or she puts them in a financial loss where they pay more than they
249 anticipated because of the Principal debtors breach or financial misconduct.

250 In the premises the preliminary point of law is over ruled .The application shall proceed to be
251 determined on its merits.

252 6. The application raises the following issues for court's resolution:

253 ***1. Whether the court ought to extend the time within which to file the application setting aside***
254 ***the statutory demand.***

255 ***2. Whether the statutory demand should be set aside and Bankruptcy Cause No. 6 of 2017 be***
256 ***dismissed with costs.***

257 ***7. Resolution of issues***

258 **Issue 1; Whether the court ought to extend the time within which to file the application setting**
259 **aside the statutory demand.**

260 Counsel for the applicant quoted **Rules 5 and 6 of the Insolvency Regulations** with regards to
261 serving and setting aside a statutory demand. He further cited the case of **GODFREY MAGEZI**
262 **AND ANOTHER VS SUDHIR RUPARELIA CIVIL MISCELENEOUS APPLICATION**
263 **NO.10 OF 2002**, Wherein the supreme court held that; court may for sufficient reason extend the
264 time presented by these rules (supreme court rules) or by any decision of court or for the court of
265 appeal for the doing of any acts authorized or required by the rules, whether before or after the
266 expiration of that time and whether before or after the doing of the act”

267 To this, he submitted that the applicants were never served with a statutory demand as the same
268 was sent to an address not used/owned by the applicants and as such, no service was effected.
269 That the applicant changed its address to postal 09 Lugazi on 11th October 2013 and the same
270 was allocated to a different company. That this change in address was communicated to the
271 respondent by way of letter and various correspondences were made between the parties on the
272 new address (P.O.BOX 09 Lugazi).

273 That at the time when the statutory demand was sent, the 2nd applicant was out of the country and
274 has to date never received any statutory notice.

275 That there is a pending high court civil suit vide Abisha Steel Industries Limited Vs Exim Bank
276 Uganda Limited HCCS No.05 of 2017 that is pending hearing before this court and was filed in
277 February 2017. That the advocates representing the parties are the same ones appearing in this
278 application for the respondent and are aware of the address of counsel for the applicant but they
279 did not serve the advocates with a statutory demand.

280 The 1st applicant has a known office and has met with the representatives of the respondent and
281 has carried out banking with the respondent and it is unclear why he was never served in person
282 despite being available for service.

283 He thus submitted that, it was evident that no statutory demand was served on the applicants and
284 this is why the application to set aside was filed after the statutory 10 days set under the law.

285 That the applicants had demonstrated sufficient cause to warrant this court to extend the time
286 within which to file an application to set aside a statutory demand.

287 In response, respondent counsel submitted that there are two underlying components to **section 5**
288 **(3) of the Insolvency Act No.11/2011** to wit “sufficient cause” and “court’s discretion”. He **cited**
289 **SHANTI VS HINDOCHA AND OTHERS [1973] EA 207** which is to the effect that; “the
290 position of an applicant for an extension of time is entirely different from that of an applicant for
291 leave to appeal. He is concerned with showing sufficient reason (special circumstances) why he
292 should be given more time and the most persuasive reason that he can show is that the delay has
293 not been caused or contributed to by a dilatory conduct on his own part.

294 He further submitted that; the respondent has at all material times dealt with the applicants at
295 their postal address of P.O.BOX 33151, Kampala, Uganda. No change of address has ever been
296 communicated to the Respondent as alleged by the applicants. The burden to prove that there
297 was any such communication lies with the applicants.

298 That on 23rd march 2017; the respondent duly served the applicants with the statutory demand via
299 their registered postal address of P.O.BOX 33151, Kampala. On 8th June 2017 that is after two
300 and a half months the applicants filed this application to set aside the statutory demand, way after
301 the ten working days alleging that the Respondent herein never served them and that it was sent
302 to an address not used /owned by the applicants.

303

304 He submitted that the applicants’ alleged change of address dated 11th October 2013 was never
305 served on the respondent bank and further to that, the applicants continued transacting in 2014-
306 2015 using their stamp bearing the address of P.O.BOX 33151,Kampala. The respondent
307 therefore acted within the law when it served the applicants via the postal address that they had
308 always known as provided by the applicants as directors of the principal borrower.

309 I have put in to consideration submissions from both counsel.

310 **Rule 5 of the Insolvency Regulations** No 35 of 2013 provides that;

311 **“Subject to sub regulation (2), a statutory demand shall be served personally on the debtor;**

312 ***(2) Where the debtor cannot be found, the demand may be served on the debtor;***

313 ***a) At the registered office or place of business of the debtor***

314 ***b) By sending it to the address of the debtor by registered mail.***

315 ***c) By serving the legal representative of the debtor if known.***

316

317 Rule 6 of the same regulations provides that:

318 ***1) An application to set aside a statutory demand under section 5 of the Act shall be made***
319 ***by motion.***

320 ***Section 5 of the Insolvency Act (supra) provides that:***

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

322 ***2) ...***

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

326

327 Section 96 of the civil procedure Act (Supra) provides that ***where any period is fixed or***
328 ***granted by court for doing of any act prescribed or allowed by this act , the court may in its***
329 ***discretion from time to time, enlarge that period even though the period originally fixed or***
330 ***granted may have expired.***

331 The essential element of ***Section 5 (1) and (3) of the Insolvency Act*** and ***section 96 of the Civil***
332 ***Procedure Act*** is basically one. The applicant must show sufficient cause which is the basis of
333 judicial discretion. This in essence means that each case may present its own circumstances that
334 inform the judicial mind to exercise its discretion. The applicant must therefore satisfy court that
335 the application is brought in the interest of justice and not intended to pervert justice.

336 ***Sickness of the applicant, non-service of the court sermons, gross negligence of counsel, and***
337 ***failure to comprehend rules of procedure by an applicant who may not be represented though***
338 ***ignorance of the law is no defence may be regarded as sufficient cause.***

339 In this case the main reason for the application is alleged non service of the statutory demand or
340 service to a wrong address. This allegation is a question of fact. It must be proved that the
341 applicant was actually not served. Once it is established as the truth, the court may have no
342 choice but allow the application because service of court process is very essential in any court
343 process as it is trite law that no party should be condemned unheard.

344 Close scrutiny of the Annexure **A1 which is the purported notice of change does not in any**
345 **way reflect that it was ever received by the respondent's office. Under the law, where one,**
346 **more so a company receives any document, they ought to acknowledge receipt of it by**
347 **appending their signature or stamp or both the document as proof of service and receipt of**
348 **the same. Whereas A1 is dated 11/10/2013 there is no evidence to show that the document**
349 **was ever SERVED to the Respondent .The applicants led no evidence whatsoever in proof**
350 **of the same, un like all the other correspondences that are duly stamped and signed on by**
351 **the Respondent's manager. Annexure does not bear any stamp or signature. This therefore**
352 **makes such a document suspect as already alleged by respondent's counsel.**

353 It was the duty and sole responsibility of the applicant to effectively communicate such change
354 of address if at all it was made and cease to use the old address in all the communications from
355 the alleged date of notice.

356 Court observed that even after the alleged change of postal address in 2013, the applicants
357 continued doing business under its officially registered address with the respondent as per
358 Annexure EB2 attached to the Respondent's affidavit in reply. For instance, on 26th and 29th
359 November 2013, the applicants sent correspondences to the respondent on a letter headed
360 P.O.BOX 009, Lugazi Uganda and yet bearing a stamp of their old address to wit P.O.BOX
361 33151

362 Court has construed this to mean that the applicants never surrendered the old address as they are
363 claiming now but continued to use it on their stamp.

364 Ideally, where one is using headed paper ,there is no need for stamping against the signature .But
365 where an official signature is accompanied with an official stamp, the recipient of the letter has
366 every right to presume that the address on the stamp is the official one.

367 Also, in relation to Annexure EB4 to wit; notices of default dated 4th may 2016 and 14th
368 September 2016, the notices were addressed by the respondent bank to the applicants as
369 guarantors to their official address to wit P.O.BOX 33151, Kampala and the same were duly
370 received and receipt acknowledged by Ashraf Mian Aqeel by appending his signature on the said
371 documents. This evidence has not been disputed by the applicants.

372 In view of the above glaring fact on the documentary evidence on record, court has approached
373 the allegation by the applicants with a lot of caution. It raises a lot of suspicion on the part of the
374 applicants. It is surprising that the applicants are alleging that a few months later after they were
375 served with the statutory demand, they had changed their address.

376 It is this court's firm finding that the statutory notice was served through the official address
377 that had been registered with the bank as the official address of the applicants and there was no
378 official communication of change of postal address.

379 It is the respondent's submission that the applicants had become evasive hence prompting them
380 to opt for the alternative option of sending the demand through their registered mail as per Rule 5
381 (2) (c) of the Insolvency Regulations.

382 This court therefore cannot fault the respondent for exercising their available option within the
383 ambit of the law to ensure service on their defaulters. Given the reasons explained above
384 therefore, I find that the applicants have not furnished this court with any sufficient reason to
385 justify the enlargement of time within which to file an application to set aside the statutory
386 demand since this was occasioned by the applicant's own mischief or sheer negligence in failing
387 and or omitting to file a response to the petition within the stipulated timelines of the law.

388 The first issue is resolved in favour of the Respondents.

389 **Issue 2:**

390 ***Whether the statutory demand should be set aside and Bankruptcy cause No. 6 of 2017 be***
391 ***dismissed with costs.***

392 Applicants' counsel properly cited Section 5(4) of the Insolvency Act of 2011;

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

394 a) There is a substantial dispute whether the debt is owing or due.
395 b) The debtor appears to have a counterclaim, set off or cross demand and the amount
396 specified in the demand less the amount of the counterclaim, set-off or cross-demand is
397 less than the prescribed amount.

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

400 His submission is that there is no debt due and contingent against the principal borrower and
401 liability of the guarantors who are applicants herein arises in case the borrower is a debtor.

402 That the principal borrower filed a suit vide ***Abisha Steel Industries Limited Vs Exim Bank***
403 ***Uganda Limited HCCS No.05 of 2017*** claiming that the respondent breached the loan
404 obligations and the amount claimed in the statutory demand is subject to determination in the
405 above suit. That the applicants therefore cannot be called upon to pay the sum until court
406 determines the suit and a decree is obtained against the principal, the lender realizes the security
407 securing the mortgages and if the security is not sufficient, a demand is made to the principal to
408 clear the balance and if he fails, then the guarantors will be called upon to fulfill their obligations
409 under the guarantee.

410 I have already pronounced myself on the above submission while resolving the preliminary
411 objection on the question of law. I need not repeat myself.

412 Counsel for the respondent based his submission on section 3 (1) (a) of the Insolvency Act,
413 which is to the effect that unless the contrary is proved, a debtor is presumed to be unable to pay
414 his creditors' debts if the debtor has failed to comply with the statutory demand.

415 It is apparent from the pleadings that the principal borrowers Abisha is owing money to the
416 respondent Bank which money the applicants claim is under dispute as regards the actual sums
417 owing.

418 The civil suit was filed after the statutory notice demanding for payment was issued. The
419 respondent Bank has every legal right to pursue the applicants who guaranteed payment of the
420 borrowed funds and all expenses arising out of the loan contract agreement.

421 They don't have to wait for the matter to be resolved before court.

422 As mentioned earlier they are at liberty to proceed against Abisha steel Industries LTD in Case
423 they pay more than what they guaranteed to pay.

424 The applicants apart from alleging through their counsel that there is no sums owing or due to
425 the RESPONDENT BANK did not adduce any evidence to that effect by way of affidavit
426 attaching the bank statements of the Principal borrower Abisha steel Industries limited showing
427 credit balance or zero balance.

428 Submission of counsel however spicy it may be, is useless without supportive evidence.

429 It is trite law that the guarantors of the principal debtor immediately become liable for the debt of
430 the principal borrower upon its default and at all material times, the applicants' obligations were
431 not less or more than the principal borrower.

432 It is also trite that the moment the principal debtor fails to comply with the statutory demand, the
433 presumption is that he or she is unable to pay their debts. The applicants were duly served with
434 statutory demand on 23rd March 2017. They did not respond positively. Filing a civil suit perse
435 against the Respondent Bank by the Principal debtor does not operate as a bar to demand
436 recovery of the outstanding debt from the guarantors who are applicants in this case.

437 The Applicants did not controvert the evidence contained in the affidavit of the legal manager of
438 the Respondent Bank M/S Leilah N. Nalule. I find the applicants untruthful in saying that there
439 is no debt due or contingent against the principal borrower because under para 14 of the
440 respondent's affidavit in reply, the principal debtor in receivership defaulted on its loan
441 obligations towards the respondent and a demand was made to the applicants to no avail
442 (Annexure EB5). The respondent appointed a receiver over the assets of the principal debtor on
443 14th November 2016 after the applicants had been served and acknowledged receipt of the
444 statutory notices of default dated 14th May and 14th September 2016.

445 The Respondents prayed that court bankruptcy order be made in respect of Bankruptcy cause No
446 6 of 2017 in response to the prayer by the Applicants that the Bankruptcy cause be dismissed.
447 With due respect to both counsel they all exceeded the limits of this application. There is no way
448 this court can pronounce itself on the matter that is before it and not yet argued by the parties.

449 I am therefore restricting myself to this application.

450 I have not found any cogent reasons from the applicants to warrant the setting aside of the
451 statutory demand and much less the dismissal of Bankruptcy Cause No. 6 of 2017.

452 In the result this application is dismissed with costs to the Respondent.

453 **DATED at MUKONO this 14th day of November, 2018.**

454

455 _____

456 Margaret Mutonyi

457 **RESIDENT JUDGE,**

458 **MUKONO HIGH COURT**