

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 43 OF 2020**

**JOMAYI PROPERTY
CONSULTANTS
LIMITED**

.....

APPLICANT

vs

**NC BANK UGANDA
LIMITED**

.....

RESPONDENT

Consolidated With

**COMPANY CAUSE No. 5 OF 2020
IN MATTER OF THE INSOLVENCY ACT, 2011**

AND

THE INSOLVENCY REGULATIONS, 2013

AND

**IN THE MATTER OF PETITION FOR WINDING UP OF JOMAYI
PROPERTY CONSULTANTS LIMITED**

**NC BANK UGANDA
LIMITED**

.....

PETITIONER

VERSUS

**JOMAYI
PROPERTY
CONSULTANTS LIMITED**

.....

RESPONDENT

BEFORE: THE HON MR JUSTICE MICHAEL ELUBU

RULING

This is a consolidated ruling.

Miscellaneous Cause No. 43 of 2020

I will start by laying out the application in **Miscellaneous Cause No. 43 of 2020** which was commenced under Sections 4 and 5 of the **Insolvency Act No. 14 of 2011**, Sections 33 of the **Judicature Act Cap. 13**, Sections 96 and 98 of the **Civil Procedure Act Cap. 71** and Order 52 Rules 1 & 3 of the **Civil Procedure Rules SI 71-1**.

Jomayi Property Consultants Limited is the applicant and **NC Bank Uganda Limited** the Respondent.

The Applicant, Jomayi Property Consultants Limited seeks Orders that:

1. This Honourable Court be pleased to extend time within which to make an Application to set aside the statutory demand dated the 23rd day of January, 2020.
2. Costs for the Application be provided for.

The Grounds on which the application is premised are stated in the Notice of Motion and elaborated in the supporting affidavit of **Joseph Yiga Magandazi**, the Managing Director of the Applicant. He states:

1. That on the 23rd of January, 2020, the Respondent served the Applicant with a statutory demand at its offices in Old Kampala.
2. That the said statutory demand was received by the Applicant's receptionist, one Ounya Bosco.
3. That the same receptionist never transmitted the said statutory notice to the management of the Applicant.
4. That because of the above, management was never aware of the said statutory demand until the 18th day of February, 2020, when it was following up on payments of the Applicant and other company debtors, hence this Application.
5. That all in all, the Applicant is not in default of payment as alleged in the said statutory demand or at all.
6. That the Applicant is able and willing to settle its obligations under the consent judgment dated the 22nd of July 2019.
7. That the Applicant has good cause for filing the said Application to set aside the demand notice, out of time, having had no knowledge of the same.

Brenda Kyokwijuka, the Manager Legal and Regulatory Affairs of the Respondent, NC Bank Uganda Limited, deposed an affidavit in reply on behalf of the Respondent.

Joseph Yiga Magandazi, the Managing Director of the Applicant, affirmed an affidavit in rejoinder.

Company Cause No. 5 of 2020

NC Bank Uganda Limited, had earlier filed Company Cause No. 5 of 2020 against **Jomayi Property Consultants Limited**, the Respondent.

The matter is a petition for winding up the Respondent, Jomayi Property Consultants Limited, and is commenced under Sections 3, 4, 91, 93 and 94 of the **Insolvency Act, 2011** and Regulations 85, 86 and 87 of the **Insolvency Regulations S.I. No. 36 of 2013**.

The Petitioner, **NC Bank Uganda Limited**, seeks Orders that:

1. A Declaration that Jomayi Property Consultants Limited failed to comply with the statutory demand.
2. A Declaration that Jomayi Property Consultants Limited is indebted to the Petitioner in the sum of Uganda Shillings Eight Hundred Sixty Eight Million Two Hundred Fifty Thousand Only (**Ugx 868,250,000/=**).
3. A Declaration that Jomayi Property Consultants Limited is unable to pay its debts and is insolvent.
4. An Order that Jomayi Property Consultants Limited be wound up and a liquidator be appointed over its assets.
5. Costs of this petition be granted.
6. Any other relief that the Court may deem necessary and just in the circumstances.

It is stated by The Petitioner in its Petition that:

1. Jomayi Property Consultants Limited (the Company) is a limited liability Company duly incorporated under the laws of Uganda.
2. The Company carries on the business at Plot 20 Old Kampala Road, Yiga Chambers within the jurisdiction of this Court.
3. The objects for which the Company was established are detailed in its memorandum of Association.
4. The Petitioner is a financial institution licensed to carry on business as a financial institution in Uganda.
5. The Petitioner claims from the Company the Judgment sum of Ugx. 868,250,000/= which arose as below.
6. In 2018, the Petitioner filed a suit, **NC Bank Uganda Limited vs Jomayi Property Consultants Limited** vide High Court Civil Suit No. 234 of 2019, for the recovery of a sum of one billion, one hundred and sixty five million shillings (Ugx 1,165,000,000/=) being the unpaid balance on the purchase price for a parcel of land comprised in Busiro Block 410 Plot 20 located at Sissa, Wakiso District and measuring 63 Acres.
7. A consent Judgment was entered by the Petitioner and the Company in respect to the said suit, where it was agreed that Judgment debtor pay NC Bank Uganda Limited, the Judgment Creditor the sum of nine hundred and twenty five million, two hundred and fifty thousand shillings (Ugx 925,250,000/=) in 10 monthly instalments as follows:

- a. The 1st Instalment of Ugx. 100,000,000/= be paid on or before 30th April 2019.
- b. The 2nd Instalment of Ugx. 100,000,000/= be paid on or before 30th September 2019.
- c. The 3rd Instalment of Ugx. 100,000,000/= be paid on or before 30th October 2019.
- d. The 4th Instalment of Ugx. 100,000,000/= be paid on or before 30th November 2019.
- e. The 5th Instalment of Ugx. 100,000,000/= be paid on or before 30th December 2019.
- f. The 6th Instalment of Ugx. 100,000,000/= be paid on or before 30th January 2020.
- g. The 7th Instalment of Ugx. 100,000,000/= be paid on or before 28th February 2020.
- h. The 8th Instalment of Ugx. 100,000,000/= be paid on or before 30th March 2020.
- i. The 9th Instalment of Ugx. 100,000,000/= be paid on or before 30th April 2019.
- j. The 10th Instalment of Ugx. 52, 250,000/= be paid on or before 30th June 2019.

8. That the consent Judgment provided, under Clause 3, that in the event of any default on the payment of any of the above instalments on the due date, all amounts outstanding shall immediately become due and payable to the Petitioner.
9. On or before 30th August 2019, Jomayi Property Consultants Limited was supposed to pay the 1st Instalment of Ugx. 100,000,000/= instead only an aggregate amount of Ugx. 30,000,000/= was paid on various dates starting with 20th August 2019, then 28th August 2019 and 29th August 2019. Thus creating a default (1st Default).
10. On or before 30th September 2019, Jomayi Property Consultants Limited was due to pay the 2nd Instalment of Ugx. 100,000,000/=. However, only the aggregate sum of Ugx. 35,500,000/= was paid on various dates starting with 3rd September 2019, 5th September 2019, 6th September 2019, 11th September 2019 and 24th September 2019. (The 2nd Default).
11. On or before 30th October 2019, Jomayi Property Consultants Limited was due to pay the 3rd instalment of Ugx. 100,000,000/=. However, only the aggregate amount of Ugx 18,500,000 was paid on various dates starting payments on 10th October 2019, 24th October 2019, 25th October 2019 and 29th October 2019 (The 3rd Default).
12. The 4th and 5th instalment that were due to be paid on or before 30th November 2019 and 30th December 2019 respectively, were not paid at all (the 4th and 5th Default).
13. Following the Company's default in the payment of the instalments as outlined in paragraph 8, 9, 10 and 11 above, the outstanding amount of Ugx 868,250,000/= immediately became due and payable to the Petitioner.

14. The Company was reminded on several occasions to pay the sums due but it failed to pay.

15. A statutory demand in terms of Section 4 of **the Insolvency Act, 2011** demanding the payment of Uganda shillings eight hundred and sixty eight million, two hundred and fifty thousand (Ugx 868,250,000/=) was issued on 22nd January 2020.

16. The statutory demand was duly served on the Company on 23rd January 2020 and service acknowledged by stamping on the statutory demand.

17. The statutory demand gave the Company 20 working days from the date of service to make payment of the amount of Ugx 868,250,000/= due to the petitioner and the company should have therefore paid on or before 20th February 2020.

18. Despite receipt of service of the statutory demand, the Company has failed to pay the amount of Ugx. 868,250,000/= in the statutory demand. The Company is saddled with a huge debt burden and is unable to pay its debt obligations as and when they fall due.

19. The Petitioner contends that:

- a. The company failed to comply with the statutory demand when it failed to pay Ugx 868,250,000/= stated in the statutory demand on or before 20th February 2020.
- b. Owing to its failure to pay the sum of Ugx 868,250,000/=, as stated in the statutory demand, on or before 20th February 2020, the Company is unable to pay its debts within the meaning of **the Insolvency Act, 2011**.

20. To the best of the Petitioner's knowledge and belief there has been no application before this Honourable Court to set aside the statutory demand.

The Petition is supported by an affidavit deposed by one **Brenda Kyokwijuka**, the Manager, Legal and Regulatory Affairs of the Petitioner, NC Bank Uganda Limited. Ms Kyokwijuka also affirmed the affidavit in rejoinder.

Joseph Yiga Magandazi, the Managing Director of the Respondent, Jomayi Property Consultants Limited, swore an affidavit in reply, opposing the petition.

Background

One Ssemwogerere John Baptist was the registered proprietor of land comprised in Busiro Block 410 Plot 20 located at Ssisa, Wakiso District. The land was mortgaged to the NC Bank Uganda Limited to secure loan facilities granted to Value Trading Stores Limited. The borrower defaulted on payment of its obligations to NC Bank Uganda Limited. Upon, the Borrower failing to pay, NC Bank foreclosed on the mortgage. A notice of sale of the mortgaged property by public auction/private treaty, under the Registration of Titles Act Cap. 230 and Mortgage Act No. 8 of 2009, was run at page 33 in the Daily monitor of Tuesday 3rd January 2017. Jomayi Property Consultants Ltd expressed interest in purchasing the mortgaged land.

On 13th July 2017, NC Bank Uganda Ltd and Jomayi Property Consultants Ltd executed an agreement where it was agreed that Jomayi Property Consultants Ltd would purchase a parcel of the land at Ugx. 1,506,000,000/= (one billion five hundred and six million shillings), (measuring 50. 2 acres) out of Block 410 Plot 20. The purchase price was supposed to be paid in 6 equal instalments of Ugx 251,000,000/= as follows:

- i. 1st Instalment of Ugx. 251,000,000/= on 30th July 2017
- ii. 2nd Instalment of Ugx. 251,000,000/= on 21st August 2017
- iii. 3rd Instalment of Ugx. 251,000,000/= on 30th September 2017
- iv. 4th Instalment of Ugx. 251,000,000/= on 31st October 2017
- v. 5th Instalment of Ugx. 251,000,000/= on 30th November 2017

vi. 6th Instalment of Ugx. 251,000,000/= on 31st December 2017.

It was agreed that any unpaid instalment would attract interest at the prevailing prime lending rate at the time (21.5%) from the date when the amount became due to payment in full.

Between 24th July 2017 and 31st July 2017, Jomayi Property Consultants paid Ugx 132,000,000/= on the 1st instalment leaving a balance of Ugx 119,000,000/= outstanding. Jomayi Property Consultants failed to pay any of the 2nd, 3rd, 4th, 5th and 6th instalments in full. It thus breached the terms of its agreement with NC Bank Uganda Ltd. From the 1st of August to the 5th of December 2017, Jomayi Property Consultants made several deposits making a total Ugx. 209,000,000/=.

Jomayi Property Consultants Ltd also subdivided the land and sold plots to various individuals.

On 27th March 2018, NC Bank Uganda Ltd lodged a summary suit against Jomayi Property Consultants Ltd seeking for the recovery of a sum of Ugx. 1,165,000,000/= arising from its agreement of the sale of land to Jomayi Property Consultants Ltd.

On 11th September 2019, the parties reached a consensus and entered a consent Judgment in the following terms:

1. The Defendant shall pay to the Plaintiff the sum of nine hundred and fifty two million two hundred and fifty thousand Uganda Shillings (Ugx. 952,250,000/=) being the unpaid balance on the full purchase price for a parcel of land and or property comprised in Busiro Block 410 Plot 20 land at Ssisa, Wakiso District measuring 63 acres.
2. The sum of Ugx 952,250,000/= shall be paid by the Defendant to the Plaintiff in 10 monthly instalments as follows:
 - a. The 1st Instalment of Ugx 100,000,000/= to be paid on or before 30th August 2019.

- b. The 2nd Instalment of Ugx. 100,000,000/= to be paid on or before 30th September 2019.
- c. The 3rd Instalment of Ugx. 100,000,000/= to be paid on or before 30th October 2019.
- d. The 4th Instalment of Ugx. 100,000,000/= to be paid on or before 30th November 2019.
- e. The 5th Instalment of Ugx. 100,000,000/= to be paid on or before 30th December 2019.
- f. The 6th Instalment of Ugx. 100,000,000/= to be paid on or before 30th January 2020.
- g. The 7th Instalment of Ugx. 100,000,000/= to be paid on or before 28th February 2020.
- h. The 8th Instalment of Ugx. 100,000,000/= to be paid on or before 30th March 2020.
- i. The 9th Instalment of Ugx. 100,000,000/= to be paid on or before 30th April 2020.
- j. The 10th Instalment of Ugx. 52, 250,000/= to be paid on or before 30th June 2020.

3. If the Defendant shall default on the payment of any of the above instalments on the due date, then in such event, all amounts outstanding shall become due and payable immediately.
4. Upon the Defendant paying to the Plaintiff the full sum of Ugx 952,250,000/=, the Plaintiff undertakes to handover to the Defendant the duplicate certificate of title for the property comprised in Busiro Block 410 Plot 20 land at Ssisa, Wakiso District measuring 63 acres, and the release of mortgage instrument to facilitate the transfer of the suit property into the Defendant's names.
5. The Plaintiff acknowledges that the Defendant has as at the time of this consent judgment made part payments amounting to Ugx. 435,850,000/= being payment for 16.7 acres and, remains indebted to the Plaintiff in the sum of Ugx. 952, 250,000/= being the unpaid balance on the full purchase price for the suit property measuring 46.3 acres.
6. The Defendant shall bear the costs of this suit.

Following the Consent Judgment, Jomayi Property Consultants Limited made some payments to NC Bank Uganda Ltd. As stated in the pleadings, the company did not make a complete payment on any of the instalments.

As a result of the alleged failure to pay, on the 23rd January 2020, NC Bank Uganda Ltd served a statutory demand on Jomayi Property Consultants Ltd. The demand was made in accordance with Section 4 of the **Insolvency Act, 2011** where the company was required to pay the sum of Ugx 868,250,000/= within 20 days of the date of service. NC Bank Ltd notified Jomayi Property Consultants Ltd that if it failed to pay the stated sum, insolvency proceedings would be commenced against it.

In response to the statutory demand, Jomayi Property Consultants Ltd filed Miscellaneous Cause No. 43 of 2020 against NC Bank Uganda Ltd. The application was lodged on the 20th of February 2020. In it the company sought an extension of time within which it could make an Application to set aside the statutory demand.

On the 4th of March 2020, NC Bank Uganda Ltd instituted Company Cause No. 5 of 2020 praying for orders to wind up Jomayi Property Consultants Ltd.

Consolidation

When these two matters were both called for hearing before this court, it was clear from the onset that they were premised on the same questions of fact and law. Consequently, the court issued an order that the parties proceed with the hearing of the petition (Company Cause No. 5 of 2020) as the substantive matter. Written submissions were to be filed where the issues arising from the Application (M.A. No. 43 of 2020) would be dealt with first before the determination of the Petition.

Issues

The following issues were framed in Company Cause No. 5 of 2020:

1. Whether the Respondent complied with the Statutory Demand served on it at its office/place of Business.
2. Whether Respondent is indebted to the Petitioner.
3. Whether the Respondent is unable to pay its debts and is insolvent.
4. Whether the Petitioner is entitled to any remedies.

The Respondent raised preliminary objections to the petition and responded to the issues as framed by Counsel for the Petitioner. The preliminary objections raised are:

1. That the Petition is prematurely before this Honourable Court as there was a pending application for extension of time within which to set aside the statutory demand.
2. That the Petition is an abuse of court process.
3. That the petition is fatally defective in form and the same should be struck out with costs.

Submissions

The written submissions of the Parties are on Court record but they will not be reproduced verbatim. The court has however closely studied them in resolving the issues here.

Resolution of Issues

Preliminary Objections.

The Respondent, Jomayi Property Consultants Ltd raised three preliminary questions of law in regard to Company Cause No. 5 of 2020.

This Court reminds itself of the principle stated in **NAS Airport Services Ltd Vs A.G of Kenya [1959] EA 53**, that though the object of a preliminary objection is expedition, the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not rise if some fact or facts in issue should be proved.

With this principle in mind, each objection will be resolved in turn.

1. That the Petition is prematurely before this Honourable Court as there was a pending application for extension of time within which to set aside the statutory demand.

It was submitted for the Respondent, that the Petition in Company Cause No. 5 of 2020 is prematurely before this Court; and that it is an illegality that should not be condoned. That the Respondent had filed Miscellaneous Cause No. 43 of 2020, under Section 5 (3) of the **Insolvency Act, 2011**, seeking for the extension of time within which to apply to have the statutory demand set aside. That the Respondent served the application on the petitioner. That notwithstanding, on 4th March 2020, the petitioner went ahead to file its petition but concealed the fact that Miscellaneous Cause No. 43 of 2020 was pending before this Court. That Regulation 86 (g) (ii) of the **Insolvency Regulations, 2013** directs that a petition should be in the prescribed form and state whether there is an application to extend time within which to comply or set aside the statutory demand. That under Regulation 6 (3) of the **Insolvency Regulations, 2013**, a debtor who initiates proceedings to set aside is not under a legal obligation to comply with the statutory demand. The Respondent cited and relied on the decision in **Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor (1982) HCB 11**.

The Petitioner's response to these arguments was that there is no application for setting aside the statutory demand before this Court. That the time for making such an application expired on the 6th of February, 2020. No extension of time has been granted in respect of Miscellaneous Cause No. 43 of 2020. That the accidental failure to mention the pending application for extension of time in the petition caused no prejudice to the Respondent. That there is no illegality as alleged by the Respondent. The Petitioner relied on Section 5 (2) of the **Insolvency Act, 2011** and Regulations 6 (3) and 86 (g) (ii) of the **Insolvency Regulations, 2013**.

Determination

Section 5 of the **Insolvency Act, 2011** stipulates:

- (1) The court may, on the application of the debtor, set aside a statutory demand.
- (2) An application under subsection (1) shall—
 - (a) be made within ten working days after the date of service of the demand;
 - (b) be supported by an affidavit; and
 - (c) be served on the creditor with the affidavit, within ten working days after the date of service of the demand.

The applicant here seeks Orders to extend time within which to make an Application to set aside the statutory demand dated the 23rd day of January, 2020.

Section 5 (3) of the **Insolvency Act, 2011** empowers the court, for sufficient cause, to extend the time for making or serving an application to set aside a statutory demand and after the hearing of the application, may extend the time for compliance with the statutory demand.

Miscellaneous Cause No. 43 of 2020 seeks an extension of time within which to make an application to set aside a statutory demand.

It is now settled that when dealing with time, reference to sufficient cause or reason must relate to the inability or failure to take the particular step in time (see **Mugo and others vs Wanjiri and another [1970] EA 481 at 483; Njagi v. Munyiri [1975] EA 179 at 180**).

In **Bishop Jacinto Kibuuka Vs the Uganda Catholic Lawyers' Society and two others, H.C. Miscellaneous Civil Application No. 696 of 2018** it was held that:

By judicial practice however, “sufficient cause” is liberally constructed in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed. They include mistakes by an advocate through

negligence, ignorance of procedure by an unrepresented litigant and illness by a party.

The reason given by the applicant, as outlined by Joseph Yiga Magandazi in his supporting affidavit, is that the statutory demand was served on the Applicant on the 23rd day of January 2020. It was received by a receptionist, one Ounya Bosco, who did not bring it to the attention of the company management. The company only discovered it had been served, when on the 18th of February 2020, it was following up on the respondent's payments. By then the time within which to apply to have the statutory demand set aside elapsed.

The mode of service for a statutory demand is regulated by law.

Section 4 (2) d of the **Insolvency Act, 2011** stipulates that a statutory demand shall be served on the debtor.

Regulation 5 of the **Insolvency Regulations, 2013** provides that:

- (1) Subject to sub regulation (2) a statutory demand shall be served personally on the debtor.
- (2) Where the debtor cannot be found, the demand may be served on the debtor—
 - (a) at the registered office or place of business of the debtor;
 - (b) by sending it to the address of the debtor by registered mail;
 - (c) by serving the legal representative of the debtor, if known;
 - (d) in any other manner determined by the court.
- (3) Proof of service of a statutory demand shall be by an affidavit of service stating the time and manner of service.

Taking all the above into consideration, it is evident sub regulation (2) does not apply as the debtor in the instant petition is a company. The statutory demand was served at the official or principle business address of the company. Therefore the reason given by Yiga Magandazi, who deposed the affidavit in this application, that he was

not personally served, does not hold in the circumstances. What is key is that he acknowledges service was effected on the company. In this case, the company was properly and effectively served with the statutory demand and the service acknowledged.

Ordinarily where the application for setting aside is properly filed, then Regulation 6 (3) of the **Insolvency Regulations, 2013**, would apply. The regulation states that where a debtor applies to the court to set aside a statutory demand, the debtor is not required to comply with the demand until the court has determined the application.

In the circumstances of this case however, the company was properly served with the statutory demand. The time within which the company should have filed for an extension of time had elapsed by the time the application was filed in this case. The application is therefore out of time. Consequently, there was no legitimate application for the extension of time within which to apply set aside the statutory demand.

In the result the petition was properly before this court and the first preliminary objection is dismissed.

2. That the petition is fatally defective in form and the same should be struck out with costs.

It was submitted for the Respondent that the petition in Company Cause No. 5 of 2020 is incomplete as it was not accompanied by a valid affidavit. That this offends Regulation 87 of the **Insolvency Regulations 2013**. The petition should therefore be struck out with costs.

That the Respondent was prejudiced by the Petitioner's omission to serve it with a copy of the affidavit in support of the petition as it was unable to respond to most of the points raised therein. Further, that in the case of **Friecca Pharmacy Limited vs Anthony Natif Miscellaneous Application No. 498 of 2019**, it was held that:

Where a person swearing the affidavit is one authorised by the company, such a person should attach the written authorization from the directors of the

Company to his affidavit and failure to do so renders the affidavit incurably defective and the Application incompetent and the same should be struck out.

That Brenda Kyokwijuka who swore the affidavit in support of the petition is neither a director nor a secretary of the company. Nor did she swear the affidavit as an advocate in personal conduct of a non-contentious issue, she affirmed as a person authorised to swear the same on behalf of the company.

It is also argued that the affidavit on the court record is not commissioned and does not mention the person before whom the oath was taken. That upon the Respondent's initiative during the first court appearance, the lawyers retrieved a copy of an affidavit from the court file and noted that it was not commissioned.

For the Petitioner, the submission in reply was that the Petition is supported by an affidavit as required by Regulation 87 (2) (a) of the **Insolvency regulations, 2013**. That the affidavit is deposed by Brenda Kyokwijuka who states that she is the Manager Legal and Regulatory Affairs of the Petitioner. That the manager Legal and Regulatory Affairs is an officer of the petitioning company who did not need authorization from the company considering she is one of its principal officers. That the decision in **Friecca Pharmacy Limited vs Anthony Natif** (Supra), cited by the Respondent does not support the Respondent's argument.

It is stated further, that the claim that no affidavit in support was served on the Respondent is totally new. That it was not raised on the two occasions the parties appeared in court. Therefore, the allegation by the Respondent is false.

Regarding the affidavit on record not being commissioned, it was the contention that 4 copies the petition (supported by the affidavit deposed by Brenda Kyokwijuka on 2nd March 2020 and sworn before the Commissioner for Oaths - Obiro Ekirapa Isaac) were filed. That the affidavit in support bears the stamp of this Court dated 4th March 2020 and the signature of a court official. That through error and inadvertence of the Commissioner for Oaths, he omitted to stamp and sign on one of the copies of the affidavit in support (the 4th Copy). He however commissioned the annexures. That

this Court should look at the annexures which bear the signature of the commissioner for oaths to confirm that he indeed commissioned the affidavits. That the clerk did not realise this mistake and the petition with a copy of the unsigned affidavit were left on the court record.

It is the petitioner's contention that the settled position of law is that mistakes and inadvertence by counsel should not be visited on litigants who come to court seeking substantive justice. The petitioner urged this court to exercise its powers under Sections 98 and 100 of the **Civil Procedure Act** to make an Order allowing the record of court to be corrected by substituting the 4th Copy with one of the two copies retained by counsel for the Petitioner as they clearly bear the signature of the commissioner of oaths. The petitioner cited Article 126 (2) (e) of the **Constitution of the Republic of Uganda 1995**. The decisions in **Horizon Coaches Ltd Vs Edward Rurangaranga & Anor Supreme Court Civil Application No. 18 of 2009** were also relied on.

Determination

The Respondent has raised 3 points under this preliminary objection.

Firstly, that the Petition is not accompanied by a valid affidavit; Secondly, the affidavit on court record is not commissioned; and thirdly, the capacity of Brenda Kyokwijuka to properly swear the affidavit in support of the petition since she is neither a director nor secretary of the Petitioner, and she did not swear the affidavit as an Advocate in personal conduct of a non-contentious matter but rather as a person authorised to depose on behalf of the company.

The first two questions or 'sub-objections' are interrelated.

The copy of the petition filed on the court record is accompanied by an affidavit in support deposed by Brenda Kyokwijuka on the 02nd of March 2020. I note that this copy of the affidavit is not signed on the provision for the commissioner for oaths to

sign. However the annexures to the affidavit were on the 2nd of March 2020 commissioned by the commissioner for oaths.

I will deal with the next sub-objection which is that because the affidavit on the court record is not commissioned there is no accompanying affidavit to the petition. The explanation proffered is that this error was committed by the commissioner for oaths who omitted to stamp one of the four copies of the petition and the unstamped copy was left on court record.

In Kasaala Growers Co - Operative Society Vs Kakooza Jonathan & Another, Supreme Court Civil Application No. 19 of 2010 the Supreme Court made a distinction between a defective affidavit and an incurable affidavit. It was held that the one which is defective is curable and the one which does not comply with the law is incurable.

At the time of filing the submissions in rejoinder, Counsel for the petitioner filed two copies of the petition that they had retained. These copies, were all properly received by the court registry on the 4th of March 2020. The copies of the accompanying affidavits in support are also well commissioned on the 2nd of March 2020.

The above circumstances therefore support the contention that the commissioner for oaths omitted to stamp one of the copies of the affidavit accompanying the petition when the affidavits were commissioned. It also manifests gross negligence on the part of counsel representing the petitioner, for failing to cross check the propriety of the documents before they were filed.

In Horizon Coaches vs. Edward Rurangaranga and Mbarara Municipal Council SCCA No. 18/2009 stated thus:

Article 126 (2) (e) of **the Constitution** enjoins Courts to do substantive justice without undue regard to technicalities. This does not mean that courts should not have regard to technicalities. But where the effect of adherence to technicalities

may have the effect of denying a party substantive justice, the Court should endeavour to invoke that provision of the Constitution

This court takes the view that the error in this case is curable. Besides it falls squarely to counsel and the commissioner for oaths. There is no evidence of illegality or intention to misrepresent the facts. This was clearly a scenario where the commissioner, by inadvertence omitted to sign one of the affidavits. By sheer coincidence, it was the copy that ended up on the court record.

Therefore, this court invokes its powers to substitute the petition on the court record with the one which is accompanied by a commissioned affidavit.

Thirdly, as a sub issue, the applicant queried the capacity of Brenda Kyokwijuka to swear the affidavit in support of the petition.

Suits by or against corporations are governed by Order 29 Rule 1 of the **Civil Procedure Rules** which stipulates:

In a suit by or against a corporation any pleading may be signed on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

While dealing with a similar objection in **Bankone Limited vs Simbamanyo Estates Limited Miscellaneous Application No. 645 of 2020** the court held that a principal officer of the corporation “who is able to depose to the facts of the case” is deemed competent.

In **Mbarara Municipal Council vs Jetha Brothers Ltd S.C. Miscellaneous Application No. 10 of 2021**, it was held that affidavits can be sworn by anyone to prove a certain set of facts.

It is clear and uncontested that in this instant petition, Brenda Kyokwijuka who deposed the affidavit in support of the petition, is the Manager Legal and Regulatory Affairs. That makes her one of the principal officers of the petitioner, NC Bank, who has clearly deposed to matters within her personal knowledge.

In view of my finding on this, Brenda Kyokwijuka, did not need written authority from the company to depose to matters as she did.

In sum, the 2nd Preliminary Objection is overruled.

3. That the Petition is an abuse of court process.

It was submitted for the Respondent that the petition in Company Cause No. 5 of 2020 is an abuse of court process. That it arises from a judgment of Court. That according to Section 3 (1) (b) of the **Insolvency Act, 2011**, for a debtor to be presumed to be unable to pay his or her debts in respect of a judgment debt, execution must have issued against the debtor in respect of that Judgment debt and the same returned unsatisfied. Regulation 86 (h) of the **Insolvency Regulations, 2013** also emphasises the same point. That the petitioner in the instant case, rather than exploit the available modes of executing the judgment debt initiated winding up proceedings. The Respondent cited the case of **Springs International Hotel Ltd vs Hotel Diplomat Ltd & Anor Miscellaneous Cause No. 42 of 2015**, where the Court held that:

This Court is of the view that when the debt arises out of court proceedings like in the present case, the successful party i.e. judgment creditor should try to enforce the judgment through the known execution procedures rather than running to court to initiate insolvency proceedings through a statutory demand.

That it was an abuse of the court process to initiate winding up proceedings instead of exploiting the execution window.

For the Petitioner, it was submitted in reply that the Respondent misdirected itself on the law and facts of the petition. That the instant petition was filed under Section 3 (1) (a) and not Section 3 (1) (b) of the **Insolvency Act, 2011**. That Section 3 (1) (b) of the **Insolvency Act, 2011** is not applicable to this petition.

The petitioner argues farther that the decision in **Springs International Hotel Ltd vs Hotel Diplomat & Anor (Supra)** was decided *per incuriam* and is not supported

by any legal authority and is therefore bad law. That the position in that case is contrary to long established insolvency principles and case law.

The petitioner also contends that under Section 3 (2) of the **Insolvency Act, 2011**, unless the contrary is proved, a debtor is presumed to be unable to pay the debtor's debt if:

- a. The debtor has failed to comply with a statutory demand.
- b. The execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part.
- c. All or substantially all the property of the debtor is in possession or control of a receiver or some other person enforcing a charge over that property.

That in any of the above circumstances the company is deemed unable to pay its debts. That as long as a debtor has a claim of a value exceeding the statutory limit of twenty million shillings (20,000,000/-) and that debt remains unpaid after a statutory demand has been served, and the period provided for payment has expired, then that the debtor is entitled to present a petition for winding up.

For this reason, the petitioner argues that the decision in **Springs International Hotel Ltd (supra)** was erroneous in assuming that a judgment creditor who files a petition for winding up a company is carrying out a form of execution against the judgment. That the true position of the law is that petitioning to wind up a company for not satisfying a judgment debt is not enforcing the judgment but is a different mode of recovering the debt where the petitioner is invoking class rights on behalf of himself and all others of his class.

That the abuse of process in winding up cases, only arises where a judgment creditor who commences winding up proceedings brings a petition which does not benefit the body of creditors as a whole but only benefits the judgment creditor alone. That the duty of the Court is to interpret the law as is and Acts of Parliament should be construed according to their object and intent.

Determination.

In **Uganda Land Commission vs James Mark Kamoga & Anor SCCA 08/2004** the Supreme Court of Uganda defined abuse of court process in the sense that “it involves use of process for improper purpose”.

In **Attorney General vs Baker [2000] EWHC 453 (Admin)**, abuse of legal procedure was defined to mean:

"a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process" For example, bringing a frivolous or vexatious action, or issuing proceedings seeking judgment on a claim or an issue which has already been decided (or should have been decided) by a competent court.

It was submitted for the Respondent that the presentation of the Winding Petition in Company Cause No. 5 of 2020 is an abuse of court process.

In the context of insolvency proceedings, when does abuse of court process arise? I find the authority of **Coilcolor Ltd Vs Camtrex Ltd [2015] EWHC 3202 (Ch)** instructive and persuasive on when abuse of court process arises in insolvency proceedings. It is stated in this decision that:

The court will grant an injunction to prevent presentation of a winding-up petition where it considers that the petition would be an abuse of process and/or that the petition is bound to fail.

The Court will restrain a company from presenting a winding-up petition if the company disputes, on substantial grounds, the existence of the debt on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the Court's settled practice to dismiss the petition. ...

The Court will also restrain a company from presenting a winding-up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. *Re Pan Interiors* [2005] EWHC 3241 (Ch) at [34] – [37] ...

Further, it is an abuse of process to present a winding-up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed: *Re a Company (No 0012209 of 1991)* [1992] BCLC 865.

However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The Court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual inquiry and suggest that in all fairness cross-examination is necessary will not do.

The above holding is very persuasive regarding the circumstances the court should take under consideration to determine whether the petition amounts to an abuse of court process.

Back to this instant case, The Respondent, Jomayi Property Consultants, argues that because the Petitioner has not executed the consent judgment, then the application to windup the respondent company in Company Cause No. 5 of 2020, is an abuse of court process. The stated judgement was entered by Commercial Court in **Civil Suit No. 234 of 2018** between **NC Bank Uganda Ltd vs Jomayi Property Consultants Ltd**.

The respondent relies on Section 3 (1) (b) of the **Insolvency Act, 2011**, which specifies that for a debtor to be presumed to be unable to pay his or her debts in respect of a judgment debt, execution must have issued against the debtor in respect

of that Judgment debt and the same returned unsatisfied. That in the instant case, the petitioner neglected to exploit the available modes of executing the judgment debt and instead initiated winding up proceedings.

The Respondent has relied heavily on the cited decision in **Springs International Hotel Ltd (Supra)**. The court in that case relied on the holding in the decision of **In Re A Company (No. 001573 of 1993) [1983] B.L.C 492**. The facts in that case give perspective to why the Company Court decided as it did:

A dispute arose between the parties following which, on 10th February 1983, a statutory demand was served by the petitioner requiring the company to pay E 2,700-odd. The company instituted an action to restrain the petitioner from proceeding on its statutory demand. The ground for stopping the petitioner from proceeding with the statutory demand was that the debt is disputed. On 14th March 1983, following the advice of the company's solicitors, the company paid the debt of E 2,700-odd in full. On 15th March 1983, the motion and the action (to restrain the petitioner from proceeding with the statutory demand) were both dismissed with costs.

On the same date of 15th March 1983, the order for costs having been made in the morning, a petition to wind up the company was presented to the court.

It was argued for the company that the debt based on costs was not a prospective debt. That a prospective debt meant a certain liability to arise at a future date, for example a bill of exchange due in three months. Secondly, it was argued for the company that the petition was presented not for the purpose of obtaining relief of a winding up order but for the purpose of enabling the petitioner to obtain the benefit of the company's lease of its Scottish premises.

Harman J dismissing the winding petition held:

Whether or not the petitioner was a prospective creditor, it was not a proper use of the companies court to present a petition based on an unascertained

debt which had never been demanded and which the company had never had the chance to pay.

It may have been that the “prospective debt” was still in the state of a disputed debt. It would become ascertained and undisputed only upon taxation or agreement. Until then each item in the bill of costs could be challenged. It was concluded that the petition was an abuse of the process.

It is trite law that the Companies Court is not, and should not be used as a debt-collecting court. The proper remedy for debt collecting is an execution upon a judgment, a distress, a garnishee order, or some such procedure.

It was in those unique circumstances of **In Re A Company (No. 001573 of 1993) [1983] B.L.C 492; B.C.L.C** (Supra), that the court noted that companies court should not be used as a debt collecting court. It cannot be read from the reproduced judgment that the intention was to shut down any use of liquidation of a company to recover a debt arising out of court proceedings, especially where the debtor was failed to meet a statutory demand.

Nevertheless the respondent placed great stock on the holding of court in the **Springs International Hotel Ltd** case (Supra) held that when the debt arises out of court proceedings, the successful party should try to enforce the judgment through the known execution procedures rather than initiate insolvency proceedings through a statutory demand.

For that reason the argument is that it was an abuse of court process to file a petition to wind up the company. That the Petitioner should have initiated execution proceedings instead of filing these proceedings where the petitioner issued a statutory demand.

The key question is whether the petitioner’s action was indeed wrongful and an abuse for failing to initiate execution.

As earlier pointed out, the key reason why the court made the observation in **In Re A Company (No. 001573 of 1993) [1983] B.L.C 492; B.C.L.C** (Supra), which was

relied on by the court in the **Springs international Hotel Ltd (supra)**, was costs to be paid by the company in that case had not been ascertained and it would be an abuse of the process to file a petition based on a bill of costs that was not yet ascertained and could therefore be challenged.

There is persuasive precedent that just as stated in Section 3 (1) of **The Insolvency Act, 2011** a judgment creditor may petition an insolvency court to liquidate a debtor where there has been failure to comply with a statutory demand arising out of court proceedings.

In **BNY Corporate Trustee Services Limited and others (Respondents) Vs Neuberger Berman Europe Ltd** (on behalf of Sealink Funding Ltd) and others (Appellants) and **BNY Corporate Trustee Services Limited and others (Respondents) Vs Eurosail-UK 2007-3BL PLC (Appellant) [2013] UKSC 28** at the Supreme Court of United Kingdom while considering Sections 122 and 123 of the **Insolvency Act of UK 1986** which are in pari materia with our Section 3 of the **Insolvency Act 2011** held that:

The four cases in paragraphs (a) to (d) of section 123(1) are true deeming provisions. A company's non-compliance with a statutory demand, or non-satisfaction of execution of a judgment debt, is a matter that can be proved quite simply, usually by a single short witness statement. If proved, it establishes the court's jurisdiction to make a winding up order, even if the company is in fact well able to pay its debts. If however a debt which has been made the subject of a statutory demand is disputed on reasonable grounds, the petitioner is adopting what has been called a high-risk strategy, and the petition may be dismissed with indemnity costs.

Several other cases clearly establish that where a statutory demand has been made and no payment effected; where the debt is undisputed; the debtor persists in its failure or refusal to pay, then it would not be an abuse of process to present a petition

to liquidate the debtor (see **Mann Vs Goldstein [1968] 2 ALLER 769; Cornhill Insurance plc vs Improvement Services Ltd and others [1986] BCLC 26**).

In **Sell your Car with Us Ltd Vs Anil Sareen EWHC 2332** at **para 52-53** cited by Counsel for the Petitioner, it was held:

Whilst winding-up proceedings are a class remedy and it is an abuse of the process of the court to present a winding-up petition based on a claim in respect of which there is a triable issue, an unpaid creditor of even a substantial and prosperous company, whose debt is not disputed, is entitled to petition for its winding up. I do not therefore accept the Applicant's contention that insolvency proceedings should not be used as a method of debt collection.

Whilst the courts have historically looked dimly on the use of such proceedings for debt collection, there is a long line of authority leading up to and following *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 which confirms the right of a creditor owed an undisputed debt to petition the court for winding-up. This is because a failure by a company to pay even one, relatively small debt, is evidence that the company is unable to pay its debts as they fall due. The position is helpfully summarised in *Goode on Principles of Corporate Insolvency Law* where, on page 195 of the Fifth Edition the author states:

Admittedly, it has been said on more than one occasion that the winding-up procedure in the Companies Court cannot properly be used for the purpose of debt collection. In *Re A Company (No.001573 of 1983)*, for example, Harman J stated:

"... it is trite law that the Companies Court is not, and should not be used as (despite the methods in fact often adopted) a debt-collecting court. The proper remedy for debt collecting is execution upon a judgment, a distress, a garnishee order, or some such procedure."

However, if this statement means that it is somehow improper for a creditor to resort to winding-up instead of execution in the hope of inducing the company to pay the debt, then it undoubtedly goes too far. Very often that is precisely the reason why the petition is launched, and the courts have emphasised that a petition presented in order to bring pressure on a company to pay a debt which is indisputably due is perfectly proper, even where other proceedings are in train for recovery of the debt and even if the winding-up proceedings are being pursued "with personal hostility or even venom".

In view of Section 3 of **The Insolvency Act, 2011** and these very persuasive holdings this court finds that insolvency proceedings can well be resorted to as a mechanism for debt collection. A creditor (including a judgment creditor) of an undisputed debt is entitled to present a petition for winding up and such presentation cannot be deemed to amount to an abuse of court of process.

In the present circumstances therefore, the filing of the winding up petition in company cause No. 5 of 2020 is not an abuse of court process.

The 3rd Preliminary objection is overruled.

Issues in Company Cause No. 5 of 2020

Issue 1

Whether the Respondent complied with the statutory Demand served on it at its office/place of Business.

It was submitted for the Petitioner that a petition to liquidate a company may be presented to the Court where a company has been served with a statutory demand and is unable to comply with the demand (see Regulation 85 (2) (a) of **The Insolvency Regulations, 2013**).

As already stated a statutory demand was duly served on the Respondent at its registered office or place of business on the 23rd of January 2020 and receipt

acknowledged by Ounya Bosco. That one Angelo Ochwo, a process server, swore an affidavit of service dated 2nd March 2020 which is Annexure D to Ms. Brenda Kyokwijuka affidavit. That even after service of the demand on the Respondent, no payment was made by the Respondent within the 20 working days as required.

The Respondent therefore failed to comply with the statutory demand as required in Section 3 (1) (a) of the **Insolvency Act, 2011**.

The contention of the Respondent in reply that this petition was prematurely filed before this court as the Respondent had already initiated the setting aside process of the statutory demand.

That the Respondent was not under any legal obligation to comply with the same before the final determination of that Application.

That in the instant case, the Respondent on learning of the statutory demand, filed Miscellaneous Cause No. 43 of 2020 where in it sought for extension of time within which to set aside the statutory demand.

Further that that service of the statutory demand on the receptionist was not effective service. That under Order 29 Rule 2 of the **Civil Procedure Rules SI 71-1**, service of any pleading or court process on a corporation must be on its secretary, any director or other principal officer of the corporation.

That Regulation 86 (g) (ii) of **The Insolvency Regulations, 2013** makes it mandatory for the petitioner to disclose whether there is no application for extension of time to comply with the statutory demand. That the omission by the petitioner misled court and may cause it to handle the petition before resolving underlying issues concerning the statutory demand. The respondent cited **Kyambogo University vs the Heights Ltd HCMA 0954 of 2015** where it was held that:

A clerical secretary is not an authorised person to receive court summons or official documents on behalf of the university.

In Rejoinder, it was submitted for the petitioner that a statutory demand issued by a creditor to a debtor is not a summons issued by the court under the Civil Procedure Rules. That a statutory demand is not signed by a court official.

That service of a statutory demand is governed by a specific procedure set out in the **Regulation 5 of The Insolvency Regulations, 2013.**

On the submission that, the Respondent was is not under any obligation to comply with a statutory demand after having filed Miscellaneous Cause No. 43 of 2020, it was submitted that there is no Application to set aside the statutory demand and in any event, that an Application for extension of time within which to make an Application to set aside a statutory demand does not exempt the debtor from complying with the statutory demand. Therefore Regulation 6 (3) of the **Insolvency Regulations, 2013** does not apply to the Respondent.

Determination

I have already held, earlier in this ruling, that the statutory demand was properly served on the respondent.

Secondly no evidence was adduced to show that the Respondent complied with the statutory demand.

This Issue is answered in the negative.

Issue 2

Whether Respondent is indebted to the Petitioner.

Issue 3

Whether the Respondent is unable to pay its debts and is insolvent.

I shall handle both issues jointly.

The Petitioner's contention is that the Respondent is indebted to the Petitioner. As a creditor, the petitioner is owed Eight Hundred and Sixty-Eight Million Two Hundred

and Fifty Thousand Shillings (Ugx 868,250,000/=) an amount that exceeds the statutory minimum of the one million shillings prescribed in Section 4 (2) (a) of the **Insolvency Act, 2011**.

That the debt arises from a consent judgment in HCCS No. 234 of 2019 which has never been set aside and is still binding on the parties. That as evidenced by paragraph 4 of Joseph Yiga Mugandazi's affidavit in reply, the Respondent does not dispute the contents of the consent judgment. That the Respondent committed several defaults towards payment of the instalments on the outstanding sum owed (Ugx. 868,260,000/=) making the total sum due immediately (see clause 3 of the Consent Judgment).

The submission in reply from the Respondent was that whereas there was an initial debt by virtue of the consent Judgment, the same became disputed when the Respondent's clients on the subject land were evicted, and successfully sued the Respondent for a refund of their money. This for example happened in **Kanabi Said vs Jomayi Property Consultants Limited Civil Suit No. 994 of 2018** and **Bakulimpagi Martin Vs Jomayi Property Consultants Ltd Civil Suit No. 609 of 2020**.

Further, Plot 20 which the Respondent purchased has since been subdivided by the Petitioner's agents and sold to other individuals. That has put the entire debt in dispute. That it would be unfair for this Court to wind up the Respondent on a debt that is disputed and which it is in the process of setting aside including by challenging the statutory demand.

The Respondent relied on **Bahadukali Mohammed Ali Viran vs Springs International Hotel Ltd Company Cause No. 005 of 2019** where it was held that:

If the company can demonstrate that the alleged debt on which the petition is founded is genuinely disputed on substantial grounds, the court will strike out the petition

In Rejoinder, the Petitioner argues that the sum of Ugx 868,250,000/= claimed by the petitioner under the statutory demand arose out of a consent judgment freely entered into by the parties. That all the grounds raised by the Respondent to contest the debt are unfounded and meant to create a non-existent dispute aimed at avoiding the winding up.

That a consent judgment is an agreement. It cannot be discharged or varied unless it was obtained by fraud, collusion or by an agreement contrary to the policy of the Court. That the Respondent has not taken any steps to set it aside nor applied to stay the execution. That the Respondent has not initiated any other legal proceedings against the Applicant in respect of the allegations. That the Respondent admitted the debt. Therefore in the absence of an Order setting aside the consent judgment, the Respondent remains a judgment debtor and is estopped from disputing its admitted indebtedness. The consent judgment operates as an estoppel against the parties asserting any contrary position.

That the dispute between the parties regarding the suit land, possession and payment was directly and substantially in issue and settled by Civil Suit No. 234 of 2018. It is Res judicata. That not every dispute would lead a petition to being dismissed. The dispute must be substantial.

Determination

The petitioner's statutory demand was based on the consent judgment entered in Commercial Court Civil Suit No. 234 of 2018 NC Bank Uganda Ltd vs Jomayi Property Consultants Ltd. The terms of the judgment were well laid out and assented to by the parties. This consent judgment has never been contested in any way.

This court is mindful that by its very nature a consent judgment is a settlement agreed to by the parties. For that reason, it cannot be varied unless there is proof it was arrived at through the use of fraud, collusion or by an agreement contrary to the policy of the Court.

Specifically in this case, the Respondent has not taken any steps to set it aside nor applied to stay its execution. That the Respondent has also not initiated any other legal proceedings against the Applicant in respect of the judgment.

As a part of the consent judgment, the parties agreed a schedule for payments by the respondent.

When the respondent did not meet the schedule, the statutory demand was served on the Respondent on the 23rd of January 2020 requiring the payment of Ugx. 868,250,000/= on or before the 20th February 2020. Again the sum was not paid.

In these circumstances, and within the meaning of Section 3 (2) of **the Insolvency Act**, it could be said that the respondent has failed to pay its debts. This is because the debt is undisputed and the default on the payment is sufficient evidence of inability to pay the debt owed to the Petitioner by the Respondent.

It is pertinent that even before the suit was filed, there was a failure to pay the petitioner filed the suit. After the suit was filed, the parties agreed on a schedule of payment. There was again no payment. None of the instalments agreed were paid in full after the consent judgment had been agreed. The relationship between these two parties has been characterised by the respondent not meeting its payment obligations.

It is now alleged that the respondent disputes the substance of the debt thus imputing a pending dispute. The argument also arises that because the debt is disputed the respondent was under no obligation to pay. A farther argument is that the respondent has the ability to pay.

These arguments are untenable. First if the respondent had the ability to pay then it would have done so and the dispute over payment would never have arisen.

Additionally, the court has not been properly furnished with any evidence establishing a dispute. For example, it would appear the attempt to impute lack of possession is only raised to detract from the issue at hand - that the respondent has reneged on paying what it owed. None of these matters were ever raised prior to the

petitioner taking action to serve the applicant with a statutory demand. I therefore do not find that the allegations are genuine or substantiated.

The respondent also argued that the fact that the debt arose out of court proceedings then execution proceedings should have ensued instead of filing a statutory demand. This matter has already been resolved when this court considered the question whether the petition was an abuse of court process. It has been resolved that the petitioner was well within its rights to demand payment through the process of serving the respondent with a statutory demand.

On the basis of the consent judgment, and the failure to pay the instalments as outlined, the Petitioner issued the Respondent a statutory demand requiring the Respondent to pay the sum of eight hundred and sixty-eight million two hundred and fifty thousand shillings (Ugx 868,250,000/=). As earlier established, this too was not paid.

Section 3 (1) (a) of **The Insolvency Act, 2011**, stipulates that unless the contrary is proved, a debtor is presumed to be unable to pay the debtor's debt if the debtor has failed to comply with a statutory demand.

From the above therefore, this court is satisfied that the Respondent is indebted to the Petitioner and was unable to pay its debts.

Issue 4

Whether the Petitioner is entitled to any remedies.

These are consolidated matters and this Court will pronounce itself on each matter.

The Orders sought in these two matters have already been set out above.

Following its findings on all the issues above, this Court directs as follows:

Miscellaneous Cause No. 43 of 2020

1. Miscellaneous Cause No. 43 of 2020 is dismissed with Costs to the Respondent, NC Bank Uganda Ltd.

2. The Costs of the Respondent will be met from the proceeds of the winding/liquidation process of the Applicant (Jomayi Property Consultants Ltd).

Company Cause No. 05 of 2020

1. A Declaration is hereby made that the Respondent, Jomayi Property Consultants Ltd failed to comply with the statutory demand.
2. A Declaration is hereby made that the Respondent, Jomayi Property Consultants Ltd is indebted to the petitioner in the sum of eight hundred and sixty-eight million two hundred and fifty thousand shillings (**Ugx. 868,250,000/=**).
3. A Declaration is hereby made that Jomayi Property Consultants Ltd is unable to pay its debts and is insolvent.
4. An Order to wind up/liquidate Jomayi Property Consultants Ltd is hereby issued.
5. The Costs of the Petitioner in this company cause will be met from the proceeds of the winding up/liquidation process.

A handwritten signature in black ink, appearing to read 'Michael Elubu', written over a horizontal dotted line.

Michael Elubu

Judge

27.04.2024