



REPUBLIC OF KENYA



KENYA LAW
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**Elgon Kenya Limited v Muchiru & 5 others (Civil Suit E760 of 2021)
[2023] KEHC 539 (KLR) (Commercial and Tax) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E760 OF 2021
A MSHILA, J
JANUARY 20, 2023**

BETWEEN

ELGON KENYA LIMITED PLAINTIFF

AND

KURIA MUCHIRU 1ST DEFENDANT

**MUNIU THOITHI (BOTH SUED AS FORMER JOINT RECEIVERS
AND MANAGERS OF KARUTURI LIMITED THEN IN
RECEIVERSHIP AND AS LIQUIDATORS OF KARUTURI LIMITED IN
LIQUIDATION) 2ND DEFENDANT**

KIERAN DAY 3RD DEFENDANT

**IAN SMALL (BOTH SUED AS FORMER JOINT RECEIVERS AND MANAGERS
OF KARUTURI LIMITED (THEN IN RECEIVERSHIP) 4TH DEFENDANT**

KARUTURI LIMITED 5TH DEFENDANT

STANBIC BANK KENYA LIMITED 6TH DEFENDANT

RULING

Background

1. The Notice of Motion dated 1st October 2021 was brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010 and Article 165 of [the Constitution](#) of Kenya for the following orders;
 - a. Pending the inter-partes hearing and determination of this Application, the Court to grant an order staying further proceedings in this matter.



- b. Pending the sale of the 5th Defendant's assets by its receivers and distribution of proceeds of the said sale to the creditors of the 5th Defendant including the Plaintiff the Court to grant a stay of proceedings in this matter.
 - c. The court do issue any such further orders as may be in the interest of justice.
 - d. The costs of this application be in the cause.
2. The Application was supported by the sworn Affidavit of Muniu Thoithi who stated that the 1st, 2nd and 6th Defendants had up to the 4th of October 2021 to file their Defence. Filing the Defences will only escalate costs in a situation where there is an on-going legal process that addresses the claim.
 3. The claim in this matter is for recovery of money on account of supply of goods made to the 5th Defendant in Receivership. The assets of the 5th Defendant, which is in receivership and liquidation, have been put up for sale by the receivers of the 5th Defendant with the aim of settling creditors of the 5th Defendant in accordance with the relevant insolvency laws. The Plaintiff is one of the creditors. The Plaintiff's claim in so far as it is for post receivership credit ranks as a preferential claim.
 4. It is therefore urgent that the process in this suit is stayed to allow the legal process of selling the assets of the 5th Defendant and distributing the proceeds of the sale to its creditors who include the 5th Defendant to first conclude as sought in the application.
 5. Further, the Applicants stated that unless this Application is heard on an urgent basis unnecessary but very substantial costs will be incurred to the detriment of all parties.

Applicants' Case

6. The Applicants submitted that it is common ground that the 5th Defendant is in Liquidation and that it also has receivers appointed over it by the 6th Defendant. It is also common ground that the root of the Plaintiffs claim is for goods supplied to the 5th Defendant thus the Plaintiff is a creditor of the 5th Defendant.
7. It was the Applicants' argument that a company in liquidation is a ward of the court where the courts primary duty is to ensure that there is no disorderly scramble over assets by creditors and that creditors adhere to the statutory framework for resolving their claims. Further, it is for this reason that even leave of the court must be sought before litigation is commenced or continued against a Company in Liquidation (Section 228 of the Repealed *Companies Act* and Section 432(2) of the *Insolvency Act*).
8. The receivership and liquidation of the 5th Defendant are statutory processes that provide for resolution of creditors to an insolvent entity such as the 5th Defendant. The essence of the statutory framework for resolving creditors' claims of an insolvent company was alluded to in *Geoffrey Kipkoech v I-JAP Provincial Insurance Company Limited & another* [2020] eKLR where it stated that: -

“The main focus of; a company and its liquidators once winding up has commenced should be to prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent. In other words, returns to legitimate creditors should be maximized; the process of collecting assets and returning them to legitimate creditors should be attended to with all practicable speed. Unnecessary costs should not be incurred...”
9. In submission, the Applicants stated that it is premature for the Plaintiff to press prosecution of their claim in litigation when there is a legal process that is ongoing for resolution of all creditors. There is



an undisputed legal process to resolve the creditors of the 5th Defendant including the Plaintiff and its claim that gives rise to this suit.

10. It is in the interest of justice that the orders sought in the instant application are granted to protect and preserve the assets of the 5th Defendant/Respondent and prevent the company from being further burdened by expenses incurred in defending avoidable litigation. The Applicants urged the Court to exercise its discretionary powers to grant orders staying further proceedings in this matter pending the realization of assets of the 5th Defendant/Respondent and distribution of proceeds to creditors who include the Plaintiff.

Respondent's Case

11. In Response, the Respondent stated that the Applicants have not advanced any grounds to warrant issuance of orders of stay of the proceedings in this suit. From the contents of the Supporting Affidavit and in particular Paragraph 8, the 1st, 2nd and 6th Defendants admitted the debt and there is therefore, no basis to stay the suit.
12. In addition, this Application, goes against the spirit of expeditious disposal of cases, a crucial tenet of a fair hearing. The Plaintiff has a right to have its case, which is by and large over an admitted debt, determined expeditious and an unwarranted stay of proceedings goes against that right. The grant of stay of proceedings is an exercise of judicial discretion where the Court determines whether it is in the interest of justice to do so. It was the Respondent's submission therefore that the exercise of that discretion should be a conscientious and judicious decision based on defined principles.
13. The Plaintiff's claim herein as per the Plaint is for Kshs.42, 680,982.06 and USD 1,833,998.55; being the value of goods supplied to the receivers of the 5th Defendant during the receivership i.e. between the date of placement of the 5th Defendant in receivership by the 6th Defendant (on or about 9th February 2014) and the date the court made a liquidation order (6th April 2016).
14. The claim is therefore not a debt purely as against the 5th Defendant and cannot await the process of realization of the assets of the 5th Defendant Company in liquidation. The 1st, 2nd, 3rd, 4th and 6th Defendants indeed personally bear the liability to settle the debts they incurred in their process of carrying out the 5th Defendant's Receivership.
15. As an expense/cost of the receivership, the Plaintiff's claim is preferential not only to the settlement of other claims by creditors of the 5th Defendant but preferential to the payment of the 6th Defendant's secured debt against the 5th Defendant. The 6th Defendant, by opting to place the 5th Defendant in receivership as a mode to recover its debt, accepted to bear liability for any expenses it would incur in carrying out the receivership, including any supplies done at the receivers' request.
16. The Plaintiff argued that it has been patiently waiting for the receivers to settle their indebtedness but they have failed to do so. The receivers have been taking the Plaintiff in circles and their promises to pay did not come to fruition, which prompted the filing of this case.
17. It was the Plaintiff's submission that the liability of the receivers is personal and relied on the case of *Top Time Enterprises Limited v P V R Rao as Receiver/Manager appointed by Kenya Commercial Bank Limited to run Nyali Beach Hotel Limited in Receivership* & another [2014] eKLR where the Court of appeal expounded in extensor the liability of receivers and their appointing agents (in the event of receivers appointed by Banks).
18. Further to the above, if the orders of stay are granted, the Plaintiff shall be greatly prejudiced as it shall be kept away from recovering amounts which it has been pursuing since 2016. The Receivers and the



Bank should own up, admit indebtedness and give proposals on settlement of the amount owing and not approach this court for stay of proceedings in an attempt to delay the hearing of the suit and by extension avoid their obligation to pay the Plaintiff.

Issues for Determination

19. After considering the Application, Response and the written submissions the Court frames the following issue for determination;
 - a. Whether the Applicant should be granted the order for stay of proceedings in this suit?

Analysis

20. Stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. In the case of *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR the court quoted Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

21. It is not in dispute that the 5th Defendant is in receivership and it was therefore the Applicants' argument that the assets of the 5th Defendant, which is in receivership and liquidation, have been put up for sale by the receivers of the 5th Defendant with the aim of settling creditors of the 5th Defendant in accordance with the relevant insolvency laws. Section 428 of the *Insolvency Act* provides;

Power to stay or restrain proceedings against company when liquidation application has been made

- (1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may
 - (a) if legal proceedings against the company are pending in the Court—apply to the Court for the proceedings to be stayed; and
 - (b) if proceedings relating to a matter are pending against the company in another court—apply to the Court to restrain further proceedings in respect of that matter in the other court.



- (2) On the hearing of an application under subsection (1)(a) or (b) , the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.

Section 432 - Consequences of liquidation order

- (1) Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver.
 - (2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.
 - (3) An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them.
22. The import of the above is that once the liquidation process commences then proceedings leading up to execution against the Company are put on hold awaiting the finding on whether the liquidation order shall be issued and liquidator appointed or not.
23. Secondly, legal proceedings against the company may be began or continued only with the approval of court which approval was not sought in this case. 24. This court finds the application to be nonetheless superfluous as there is a stay of proceedings already in existence but the same will be allowed in order to boost/supplement such other orders already in place; the Plaintiff being one of the creditors should await its share of settlement just like the other creditors.

Findings and Determinations

24. The Application is found to be meritorious on the issue for stay of proceedings which order for stay of proceedings in this suit is hereby granted;
25. Each party to bear its/their own costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Glory Kimani holding brief for Elijah Mwangi for the Plaintiff

Odera holding brief for Mr. Oguda for the 1st, 2nd and 6th Defendants

No other for others

Lucy-----Court Assistant

