In re Sovereign Hotel Limited (Insolvency Cause E002 of 2022)
[2023] KEHC 21268 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEHC 21268 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

INSOLVENCY CAUSE E002 OF 2022

MS SHARIFF, J

MAY 29, 2023

IN THE MATTER OF: THE INSOLVENCY ACT NO 18 OF 2015

AND

IN THE MATTER OF: INSOLVENCY REGULATIONS, 2016

AND

IN THE MATTER OF: SOVEREIGN HOTEL LIMITED

BETWEEN

SOVEREIGN HOTEL LIMITED ..... PETITIONER

AND

NATIONAL BANK OF KENYA LIMITED ..... 1ST RESPONDENT

KOLLURI VENKATA SUBBARAYA KAMSASTRY ..... 2ND RESPONDENT

RULING

Introduction

1. In its Notice of Motion dated December 27, 2022 and filed on December 29, 2022, the Petitioner sought that the court be pleased to review its orders dated December 13, 2022 by varying order 6 thereof by substituting the sum of USD 115,000 with Kshs 2,000,000/= (read as USD $ 20,000).

2. James McTough, a Director of the Petitioner swore an affidavit in support of the said application on December 27, 2022.

3. The Petitioner averred that on December 13, 2022, this court extended its interim orders restraining the Respondents from taking over its operations or administering pending the hearing and determination of its application dated November 28, 2022 on condition that it paid the 1st Respondent USD 115,000 on the 30th day of each succeeding month commencing on December 30, 2022.

4. It contended that the court directed it to pay the said sum of USD 115,000 pursuant to the 1st Respondent's allegations that it had committed to pay the same as opposed to its claim that they had through mutual correspondence and conduct settled at it paying the sum of Kshs 2,000,000/= per month (USD 20,000). It pointed out that as at the time the 1st Respondent was making the said allegations, its counsel did not have the documents to back the fact that the USD 115,000 was never agreed upon but that it was a mere proposal by the 1st Respondent which was not consented.

5. It asserted that the order of December 13, 2022 had a proviso for it to file an application for review in the event it traced the letter on repayment it had agreed to make with the 1st Respondent hence the filing of this application. It pointed out that the facility letter of June 19, 2018 was intended to restructure the repayment of the outstanding facility that it had been advanced and to provide it with additional facilities in the form of an overdraft.

6. It was its contention that following the issuance of the said facility letter, it sought to engage the 1st Respondent on the terms of the restructure of the outstanding facility as well as the proposed additional facility but that the negotiations were never concluded and that resulted in no further securities being perfected in favour of the 1st Respondent. It added that that notwithstanding, it continued to repay the outstanding facility as confirmed by the Statement of Account annexed to the Replying Affidavit of 1st Respondent's Recoveries Manager, one Paul Chelang'a.

7. It was categorical that the Covid-19 pandemic greatly hampered its ability to continue with the strict repayment obligations contained in the Letter of Offer dated June 19, 2018 and that it requested the 1st Respondent for flexibility in the monthly instalments. It asserted that in that regard, they engaged in a virtual meeting on September 21, 2020 to discuss the repayment structure and they agreed that the 1st Respondent would inter alia grant it a moratorium on the monthly instalments during the period of the pandemic as well as consider its request against the 1st Respondent's refusal to grant it a further facility of USD 1,800,000.

8. It pointed out that they continued to engage in repayment discussions as well as provision of further facilities and on February 16, 2021, through its Advocates, Daly Inamdar Advocates LLP, it forwarded to the 1st Respondent a draft letter setting out its proposal to repay the outstanding facility by way of monthly instalments of USD 115,000 after an initial six(6) months' moratorium from January 2021 and the proposal being tied to the 1st Respondent availing it with additional facilities.

9. It asserted that in response to the aforesaid proposal, the 1st Respondent through its Head of Credit and Remedial Recoveries Manager, Eustace Nyaga, made a counter offer to the effect that the 1st Respondent was agreeable to a monthly instalment of USD 20,000 out of the business income. It added that it accepted the offer and continued to repay the facility by way of monthly instalments of USD 20,000.

10. It stated that the said Paul Chelang'a would from time to time liaise with its Accountant, one Judy Ochieng', through telephone on the monthly instalments of USD 20,000. It was therefore its case that the 1st Respondent was estopped from relying on the contention that it was obliged to pay enhanced monthly instalments of USD 115,000 as it had not placed any material before this court to support its contention.

11. It was emphatic that it was in the interest of justice that the court reviews the said order because allowing its implementation would be tantamount to the court re-writing the contract between it and the 1st Respondent herein. It pointed out that the application for enhancement of the monthly instalments was purely an afterthought on the 1st Respondent's part having sought to do the same

orally before this court. It contended that failure of the court to review its orders would occasion a travesty of justice.

12. Michael M Mwita, Head of Credit Remedial Collections and Recoveries within the 1st Respondent's Credit Department, swore a Replying Affidavit on January 4, 2022 in opposition to the present application. The same was filed on January 5, 2023.

13. It averred that its Advocate, James Tugee, attended court on December 13, 2022 when the application herein came up for directions and that upon hearing both parties, the court gave timelines for filing of various documents by parties and imposed a condition on the extension of the interim order of November 30, 2022.

14. It stated that the condition imposed was that the Petitioner would pay monthly instalments of USD 115,000 by December 30, 2022 and by the 30th of every subsequent month. It pointed out that the said sum was based on the agreed monthly instalments in the Letter of Offer dated June 19, 2018 which was annexture JMT-3 annexed to the Affidavits of James McTough in support of both the Petition and the application herein. It added that before the court settled on the aforesaid figure, the Petitioner's Advocate had requested for time to demonstrate that the monthly instalments had been varied but failed to produce any document to demonstrated that even after the file was placed aside to allow him time to obtain the alleged documents.

15. It was its case that the failure by the Petitioner to file the application for review earlier was mischievous and an abuse of the court process in that the delay was to enhance its chances of obtaining an order ex parte. It asserted that if the application had been filed earlier, it would have been possible for the court to hear both parties on the application before making any order. It termed the Petitioner's conduct as in bad faith and an abuse of the court's process.

16. It pointed out that none of the documents relied upon by the Petitioner as evidence of variation of the monthly instalments supported its contention that it ought to pay monthly instalments of USD 20,000 but that the aforesaid documents demonstrated that its proposals were never accepted and that the period under discussion had long lapsed.

17. It further averred that the email dated February 17, 2021 from Eustace Nyaga, marked as annexture JMT-3 produced by the Affidavit of James McTough sworn on December 28, 2022 showed that the Petitioner had made three(3) separate proposals to it in which it sought clarification outlining the projected inflow from the business and the directors and additional details including the expected source of funds for the bullet payment but that the Petitioner did not provide any of the required information.

18. It was categorical that the submission of the supporting documents was vital for it to consider the proposals and pursue the necessary approvals from the bank's decision-making organs. It asserted that in its letter dated August 16, 2021, it had also pointed out that the statutory notices it had issued would continue to run unabated until or unless a settlement agreement of the entire outstanding debt was reached.

19. It was emphatic that after its letter dated August 16, 2021, the Petitioner did not respond and thus there was no settlement agreement reached between the parties although there were some discussions in that regard. It added that the discussions were based on the effects of Covid-19 on the business and particularly the effects of lockdown measures issued by the Government but that those measures had not been in place for a long time and the hospitality industry had since recovered.

20. It further contended that Clause 15 of the Letter of Offer dated June 19, 2018 provided that irrespective of any review of the facility, the terms and conditions under the said Letter of Offer would

continue to apply unless amended by a letter and that any security provided by or on behalf of the borrower would continue to have full force and effect. It added that the Petitioner had not produced any letter of amendment and the terms of the Letter of Offer therefore continued to apply, including the monthly instalment of USD 115,000.

21. It was its case that it was in the banking business which only operated effectively if borrowers repaid the credit facilities advanced to them as the funds advanced were obtained from deposits made by the bank customers and unless those sums were repaid, the bank would not be able to meet its obligations to its customers. It pointed out that the Petitioner did not dispute that there had been a default in meeting the repayment terms of the credit facility advanced to it but that it was using the court to stop it from recovering the debt.

22. It asserted that that was an abuse of the court process and that the court should not entertain such behaviour from the Petitioner. It further stated that the Petitioner was in effect asking the court to re-write the terms of its agreement with it to pardon its default in the past and also impose amended terms as to the monthly instalments payable, going forward. It was emphatic that the court had no powers to re-write parties' contracts and thus urged the court to dismiss the present application for lack of merit.

23. The Petitioner's Written Submissions were dated and filed on January 16, 2023 while those of the Respondents were dated and filed on January 20, 2023. The 2nd Respondent did not file any response or Written Submissions in respect of the present application. This Ruling was therefore based on the Petitioner's and 1st Respondent's Written Submissions which they both relied upon in their entirety.

Legal Analysis

24. The Petitioner reiterated the averments in its Supporting Affidavit and contended that it was in the interest of justice that the order be vacated because allowing its implementation would be tantamount to the court re-writing the contract between the parties.

25. It submitted that the jurisdiction of this court to review was embodied in Sections 1A & 1B, 63(e) & 80 (a) of the *Civil Procedure Act* and Order 45 Rule 1(a) of the *Civil Procedure Rules* which provide that a person who was aggrieved by a decree or an order from which an appeal was allowed, could within reasonable time apply for review of the judgment or ruling. It contended that it had sufficient reason to warrant the review.

26. In that regard, it relied on the case of *Zablon Mokua vs Solomon M Choti & 3 Others* [2016] eKLR where it was held that a review application was not an appeal and it could not be allowed to be an appeal in disguise where the merit was revisited and sufficient reason ought to include the statutory grounds for review as outlined in the Civil Procedure Rules.

27. On its part, the 1st Respondent submitted that a party seeking the review of an order under Order 45 of the *Civil Procedure Rules* had to demonstrate that there was sufficient reason for the review which could either be one of specific grounds set out therein or any other sufficient reason analogous to those specific grounds. It relied on the case of *Nasibwa Wakenya Moses vs University of Nairobi & Another* [2019] eKLR to support its argument. However, it did not set out the holding it was relying upon.

28. It contended that the Petitioner had failed to discharge the aforesaid burden and that it had adduced evidence that demonstrated that its application for review lacked merit.

29. It added that parties were bound by the terms of their contract and that the duty of court was to interpret their contract and determine their rights based on the contract as was held in the case of *National Bank of Kenya Limited vs Pipeplastic vs Samkolit (K) Ltd & Another* [2001] eKLR. It was emphatic that it was not for the court to re-write the parties' contracts.

30. It was categorical that the present application was an attempt by the Petitioner to avoid its legal and contractual obligations and to steal a march on them. It pointed out that this court considered various factors before issuing the orders and the same ought not be interfered with unless there were cogent grounds to do so.

31. Notably, the Petitioner herein was seeking a review of the orders of this court. It is common ground that the High Court has power of review but that such power must be exercised within the framework of Section 80 of the *Civil Procedure Act*, Cap 21 (Laws of Kenya). The said Section provides:

> " Any person who considers himself aggrieved-
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

32. Further, Order 45(1)(a) and (b) of the *Civil Procedure Rules*, 2010 provides the conditions under which a court can allow an application for review. It stipulates as follows:-

> " Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment (emphasis court) to the court which passed the decree or made the order without unreasonable delay."

33. In the case of *Pancras T. Swai vs Kenya Breweries Limited* [2014] eKLR, the Court of Appeal reiterated that for an applicant to succeed in an application for review, he had to establish to the satisfaction of the court any one of the conditions that have been set out in Order 45 Rule (1) as aforesaid.

34. In its order of December 13, 2022, this court gave several directions amongst them:-

> " ....THAT interim orders be and are hereby extended to January 23, 2023 and/or until further orders and/or directions of the court, on condition that the Petitioner shall effect the instalments repayments of USD 115,000 to the 1st Respondent as it was required to do before the entire amount was recalled, with the first payment being effected by December 30, 2022 and subsequent payments to be made by 30th of every month, pending the hearing and determination of the Petitioner's Notice of Motion application dated and filed on November 28, 2022....
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> That for the avoidance of doubt, in the event of default of any one (1) instalment, the Respondents be and are hereby at liberty to enter into the Petitioner's property for Administration as provided for in the *Insolvency Act*, 2015....

That the Petitioner is at liberty to file an Application for Review in the event it traces the letter on repayments it had agreed to make with the 1st Respondent (emphasis)."

35. As the orders the Petitioner sought to review were made on December 13, 2022 and it filed the instant application on December 29, 2022, it was this court's view that the application was filed without unreasonable delay. The Petitioner had therefore satisfied one of the conditions that had been stipulated in Order 45 (1) of the *Civil Procedure Rules*.

36. It was clear that an application for review can be allowed in the event of discovery of new and important evidence which after due diligence was not within the knowledge of the party or could not have been produced when the order was being made.

37. The court granted the Petitioner leave to file an application for review after heated exchange between it and the 1st Respondent on the amount that the Petitioner was required to pay as it had not annexed the said communication in its Notice of Motion application dated and filed on November 28, 2022.

38. The Petitioner placed reliance on an email of the aforesaid Eustace Nyaga that was sent to its director, James McTough, on February 17, 2021. A reading of the same did not show consensus between the Petitioner and the 1st Respondent herein for payment of instalments at USD 20,000. It was a response to three (3) proposals that the Petitioner had made to the 1st Respondent to pay the outstanding monies it owed the 1st Respondent. It required the Petitioner to review and confirm its position to enable the securing of a specific approval that would be necessary to both parties.

39. The email stated as follows:-

    1. On your proposal to enjoy a moratorium to July 2021, resuming quarterly instalments covering monthly payment of USD 115,000 from August till debt is paid, a more acceptable proposal will be to pay from marginal business income of USD 20,000 monthly till July after which enhanced payments could commence as proposed.

    2. On the second proposal to pay USD 115,000 but as an aggregate amount payable quarterly till settlement, we do not have an objection. It will however be important to us to appreciate the source of the amount above what the business is able to generate at the moment. Please therefore clarify outlining projected inflow from business and directors respectively.

    3. On the 3rd proposal, where all payments as indicated in 1 and 2 above will only be expected with a projected bullet payment in January 2022, this is most appropriate as interest could significantly be saved. Again you may need to share more details on this proposal, which shall entail a clarification on the expected source of bullet payment.

       Kindly review and confirm. It will be good if supporting information is availed for options 2 and 3 in your response or timelines given when the same would be available to us. This is to enable secure specific approvals that would be necessary.

40. In its submissions, the Petitioner contended that through the said Eustace Nyaga, the 1st Respondent made a counter offer to the effect that it was agreeable to a monthly instalment of USD 20,000 out of the business income and that it accepted the offer and continued to repay the facility by way of monthly instalments of USD 20,000.

41. Notably, in its email of February 17, 2021, the 1st Respondent was only agreeable to the Petitioner paying from its marginal business income USD 20,000 every month until July when enhanced payments would commence as proposed (emphasis court). It was not clear to this court when the commencement date was.

42. However, the Petitioner did not annex and/or produce any letter showing that it actually accepted the said offer to pay monthly instalments of USD 20,000 in settlement of the outstanding sum and/or a letter from the 1st Respondent confirming approval of the same.

43. From the evidence on record, it was common knowledge that the parties had entered into discussions on restructuring the payments but there was no settlement, hence it could not be said that there was an agreement that the Petitioner was to pay monthly instalments of USD 20,000 and if it was, then the Petitioner did not annex any documentation to demonstrated the same.

44. For a court to review its orders, there has to be very good reasons which includes an error on the face of the records, a mistake which was unintended, or that information or evidence was now available which if the court had been seized of at the time of making an order, a different finding could have resulted.

45. In the premises, this court was not convinced that the Petitioner met the threshold for the grant of the orders it had sought.

46. The direction for the Petitioner to pay the 1st Respondent USD 20,000 was an interim measure as this court heard and determined the Petitioner's Notice of Motion application that was dated and filed on 28th November 2022. This court had since determined the said application and consequently, the present application which had sought that the Petitioner pays a sum of USD 20,000 pending the hearing and determination of the said Notice of Motion application dated and filed on 28th November 2022 was now spent.

Disposition

47. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Notice of Motion application dated December 27, 2022 and filed on December 29, 2022 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.

48. For the avoidance of doubt, the order of January 23, 2023 be and is hereby discharged and/or set aside and/or vacated forthwith.

49. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 25TH DAY OF MAY 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF MAY 2023

M.S SHARIFF

JUDGE