



Booth Extrusions Limited (Under Receivership) v Matogo (Insolvency Petition E041 of 2021) [2023] KEHC 24949 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

INSOLVENCY PETITION E041 OF 2021

MN MWANGI, J

JULY 28, 2023

IN THE MATTER OF BOOTH EXTRUSIONS LIMITED

-AND-

**IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015, LAWS
OF KENYA**

-AND-

**IN THE MATTER OF SECTIONS 424, 425, 427 & 432 OF THE
INSOLVENCY ACT, NO. 17 OF 2015, LAWS OF KENYA**

-AND-

**IN THE MATTER OF REGULATION 77B OF THE INSOLVENCY
REGULATIONS, 2016**

BETWEEN

BOOTH EXTRUSIONS LIMITED (UNDER RECEIVERSHIP) DEBTOR

AND

JEREMIAH ONDIEKI MATOGO CREDITOR

RULING

1. The debtor/applicant filed a Notice of Motion application dated 9th February, 2022, brought under the provisions of Sections 427(1)(a), (b) and (d), 428, 534, 546, 560 & 561 of the *Insolvency Act*, 2015 and Sections 103 & 35 of the *Companies Act*, Cap 486 (now repealed). The applicant seeks the following orders-



- i. That this Honourable Court be pleased to grant a stay of proceedings in this suit pending the completion of the ongoing receivership process;
 - ii. That this Honourable Court be pleased to stay the enforcement of the statutory demand notices issued against the applicant dated 8th December, 2020 and all consequential orders pending the completion of the ongoing receivership process; and
 - iii. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and is supported by an affidavit sworn on 9th February, 2022, by Prashant Sumantlal Shah, the director of the applicant company. In opposition thereto, the respondent filed grounds of opposition dated 15th March, 2022.
 3. On 16th March, 2022, the Court gave directions for the instant application to be canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Rachier & Amollo LLP on 15th September, 2022, whereas the respondent's submissions were filed on 19th September, 2022 by the law firm of Mohammed Muigai LLP.
 4. Ms. Adunga, learned Counsel for the applicant relied on the provisions of Section 3 & 522 of the Insolvency Act, 2015 and submitted that the instant application is grounded in law. She further relied on the case of Re Nakumatt Holding [2017] eKLR and Section 561 of the Insolvency Act and indicated that a Receiver was appointed in September, 2021 and the said Receiver who for all intents and purposes is the Administrator under the Insolvency Act, 2015 had effectively invoked Section 561(2) of the said Act.
 5. She stated that in light of the above and pursuant to the provisions of Section 588 of the Insolvency Act, the instant liquidation proceedings stand suspended until the administration is concluded, since the applicant company was under administration as of 27th September, 2021.
 6. She cited the case of Nakumatt Holdings Limited & another v Ideal Locations Limited [2019] eKLR and stated that pursuant to Section 559 of the Insolvency Act, this Court is barred from making a liquidation order while a company is under administration. In submitting that this Court can exercise its discretion and stay the liquidation proceedings herein so as to give the applicant a second chance to pursue administration as per the Insolvency Act, she referred to the case of Cook v Mortgage Debenture Ltd [2016] EWCA Civ 103, where the Court outlined the purpose and effect of a moratorium under the Insolvency Act.
 7. Ms. Wanjiru Ngige, learned Counsel for the respondent stated that the respondent applied for an order of liquidation against the applicant on 16th April, 2021 following the applicant's failure to honour his statutory demand dated 7th December, 2020, for the sum of Kshs. 15,464,570.85. She submitted that on 27th September, 2021, the Bank of Baroda Kenya Limited appointed a Receiver further to a debenture dated 18th August, 2011, a supplemental debenture dated 3rd February, 2012 and a supplemental/variation debenture dated 3rd February, 2023, and stated that it is on this basis that the applicant is seeking a stay of the proceedings herein pending the completion of the receivership.
 8. She cited the decisions in Mandev Limited v M.K & Sons Limited (Under Receivership) & another [2010] eKLR and Cyperr Enterprises Limited v Metipso Services Limited & 2 others [2011] eKLR and submitted that a company that has been placed under receivership lacks the legal competence to institute any proceedings in its name. She stated that such a company can only sue or be sued through the Receiver and as such, as at 27th September, 2021, only the Receiver had the capacity to institute



or pursue any proceedings on behalf of the company. She submitted that for this reason the instant application is incompetent and ought to be dismissed with costs.

9. She referred to Section 734(2) of the *Insolvency Act*, 2015 and the case of *I & M bank Limited v ABC Bank Limited & another* [2021] eKLR and stated that the debentures held by the Bank of Baroda Kenya are not qualifying debentures under Section 534 of the *Act*. She stated additionally, the bank did not apply to Court prior to the appointment, thus the Receiver Manager is not an Administrator. She contended that the applicant is not under administration so as to effectively cause a moratorium on all other proceedings.
10. In submitting that the appointment of the Receiver Manager does not affect the petition herein in anyway, Ms. Wanjiru Ngige relied on the case of *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* [2021] KEHC 242 (KLR). She stated that the proceedings herein ought not to be stayed in order to allow the petitioner, as well as unsecured creditors who have expressed their intention to appear in these proceedings to safe-guard their interests since it is only within these proceedings that the Receiver can operate under the supervision of the Insolvency Court, to enable transparency and to give effect to the objects of administration under the *Insolvency Act*, 2015.

Analysis and Determination.

11. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are-
 - i. Whether the applicant has the requisite locus standi to prosecute the instant application; and
 - ii. Whether the proceedings herein should be stayed pending completion of the administration process.
12. In the affidavit filed by the applicant, it deposed that it entered into an agreement with the Bank of Baroda Kenya Limited (hereinafter referred to as the bank) for the advancement of sums for which it executed various debentures and a guarantee over its property but due to various financial difficulties, it defaulted in remitting the sums owed to the bank, which had accumulated to Kshs. 247,507,730.92 and USD 349,061.40 as at 27th September, 2021.
13. The applicant averred that consequently, the bank exercised its rights under the debentures registered on 15th September, 2011 and a supplemental debenture and supplemental variation dated 21st February, 2012 and on 27th September, 2021. That the bank appointed Ponangipalli Venkata Ramana Rao of Tact Consultancy Services as the applicant's Receiver - Manager, in view of the fact that the said debentures were executed before the coming into force of the *Insolvency Act*, 2015.
14. It was stated by the applicant that the said Receiver-Manager is for all intents and purposes the Administrator of the applicant under Sections 534 and 546 of the *Insolvency Act*, 2015, as read together with Sections 103 and 351 of the repealed *Companies Act*, Cap 486 Laws of Kenya. It contended and that there ought to be a moratorium on all legal processes pending completion of the administration process as provided for under Sections 560(1), 561(3), (4) and (f) of the *Insolvency Act*, 2015.
15. In opposition to the application herein, the respondent filed grounds of opposition dated 15th March, 2022 raising the following grounds-
 - i. By a further affidavit dated 1st February, 2022, the applicant informed this Honourable Court that on 25th September, 2021, Bank of Baroda Kenya Limited, a holder of fixed and floating charges had appointed an Administrator over the company;



- ii. The applicant therefore has no capacity to prosecute any proceedings or applications before this Honourable Court and the present application is unmerited; and
- iii. The application is frivolous, vexatious and is an abuse of Court process. It should therefore be dismissed with costs.

Whether the applicant has the requisite locus standi to prosecute the instant application.

16. The applicant in its affidavit in support of the application herein stated that it entered into an agreement with the Bank of Baroda Kenya Limited, for the advancement of sums from which it executed debentures registered on 15th September, 2011, and a supplemental debenture and supplemental variation both dated 21st February, 2012, but due to various financial difficulties, it defaulted in remitting the sums owed to the bank, and on 27th September, 2021, the bank exercised its rights under the said debentures by appointing Ponangipalli Venkata Ramana Rao of Tact Consultancy Services, as the applicant's Receiver and Manager.
17. Noting that the instant application is dated 9th February, 2022, it is evident that it was filed after the appointment of Ponangipalli Venkata Ramana Rao as the applicant's Receiver - Manager, which took effect on 27th September, 2021. The legal position is that directors of a company under receivership can only institute proceedings in the name of the company with the authority of its Official Receiver. This was the position taken by the Court in *Mandev Limited v M. K. & Sons Limited (Under Receivership) & another* [2010] eKLR where it was held that-

“The general principle is that once a company has been placed under Receivership it lacks the legal competence to institute a suit or be sued in its company name. It can only sue or be sued through the Receiver.”
18. Similarly, in the case of *Cyperr Enterprises Ltd vs Metipso Services Ltd & 2 others* [2011] eKLR cited by Counsel for the respondent, the Court held as follows-

“Therefore, prima facie the position appears to be that the Plaintiff Company is still under Receivership. If that be the case, then the suit ought to have been instituted through the authority of the Receiver manager and not the Directors of the company. This is because the Directors of the company have been temporarily put on the back seat so far as the management of the company is concerned. There being no evidence of any authority from the Receiver manager to file the suit, the suit is incompetent as Shakalaga Kwa Jirongo had no authority to authorize the filing of the suit. ”
19. The Court of Appeal in *Tudor Grange Holdings Ltd v Citi Bank N.A.* [1991] 4 ALL ER 1, when faced with a similar issue held that company directors have no power to sue on behalf of the company after appointment of the Receiver especially where the proceedings could directly infringe on the property subject of the Receiver's powers or where the Receiver's position would be prejudiced by their decision to bring such proceedings.
20. In this instance, there is no evidence that the applicant sought and received the authority from the Receiver – Manager prior to the filing of the instant application. There is also no evidence of service of the instant application upon the Receiver - Manager. There is therefore no way for this Court to ascertain whether or not the applicant's Receiver – Manager is aware of the existence of these proceedings, and whether he intends to participate in them. Having been placed under receivership, the applicant ought to have brought the instant application with the authority of its official Receiver



Manager since the outcome of the liquidation proceedings herein have the potential of directly affecting the property which is the subject of the Receiver – Manger’s powers.

21. In view of the above, it is this Court’s finding that the application herein is a non-starter for want of authority from the Receiver-Manager. It is struck out with costs to the respondent.

It is so ordered.

AMENDED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the applicant

No appearance for the respondent

Mr. Sahil Javer - creditor

