



Blue Nile East Africa Limited v Prime Steel Mills Limited & 3 others (Miscellaneous Application E786 of 2020) [2023] KEHC 22626 (KLR) (Commercial and Tax) (27 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E786 OF 2020**

EC MWITA, J

SEPTEMBER 27, 2023

BETWEEN

BLUE NILE EAST AFRICA LIMITED APPLICANT

AND

PRIME STEEL MILLS LIMITED 1ST RESPONDENT

WESTERN STEEL MILLS LIMITED 2ND RESPONDENT

ABYSSINIA IRON & STEEL LIMITED 3RD RESPONDENT

APEX STEEL LIMITED 4TH RESPONDENT

RULING

Application

1. Blue Nile East Africa Limited (the company) took out a motion on notice dated May 4, 2020, under sections 922, 923 and 924 of the *Companies Act*, sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*, seeking stay of execution of all judgments in various courts against it and its directors Ms Lidia Yussuf Gode and Mohamed Said Chute.
2. The company further sought an order allowing it to hold a meeting of all its creditors to be convened on a date to be stated for purposes of discussing and agreeing on arrangements and compromises related to money the company and directors owes the creditors.

The company also sought an order that the notice convening the creditors' meeting be published in two daily newspapers with nationwide circulation; that a report of the meeting be filed in court for further directions on the way forward and that upon deliberations in that meeting, a moratorium be issued stopping the creditors from executing any judgment obtained against the company or its directors for



- a period of 12 months to allow the company and directors collect money from the company's debtors and pay the creditors in an organized manner.
3. The company again sought a further order that upon resolutions being made in the intended meeting, the creditors be restrained from demanding, instituting suits, continuing suits or executing judgments against the company or its directors for a period of 12 months to allow the company and directors collect money the company debtors owe and pay the creditors in an organized manner.
 4. The application is premised on the supporting affidavit and written submissions. From these, the company asserted that it was incorporated in 1997 to carry on hardware business. In 2013, the company supplied construction materials to contractors who had been awarded tenders by various county governments and other agencies who, however, defaulted in payments.
 5. The default caused cash flow problems to the company and prevented the company from meeting its own obligations to its suppliers and creditors. To facilitate continuation of its business, the company's directors agreed to offer their personal guarantees to the company's creditors.
 6. As at February 6, 2020, the company's debtors owed it Kshs 551,976,883.58 while the company owed its creditors Kshs 290,516,457.85, which showed that the accompany was solvent. That notwithstanding, a number of the company's creditors have obtained judgements which they are executing against the company and its directors. Some creditors are seeking to commit the directors to civil jail.
 7. The company urged that the court should order the creditors to meet for compromise and arrangement on the outstanding debts, and allow the company a second chance to be revived. The company relied on the decision in [*Equity Bank Kenya Limited v Kenya Airways PLC & 11 others \(Civil Appeal No 278 of 2017\) \[2017\] eKLR*](#), for the position that the provisions on which the application is brought do not allow arbitrary deprivation or expropriation of property, but a mechanism for saving a deserving enterprise under financial stress and guaranteeing vulnerable creditors ultimate payment.
 8. The company again relied on [*Midland Energy Limited v George Muiruri t/a Leakey's Auctioneers & another \(Insolvency Notice No E014 of 2018\), \[2019\] eKLR*](#) for the argument that administration provided under Part VIII of the [*Companies Act*](#), is one of the alternatives to liquidation aligned with our current insolvency regime intended to give financially struggling companies a second chance.
 9. The company argued that it is fair, just and reasonable that the application be allowed so that its directors may make deliberate efforts to clear outstanding debts and collect monies owed to it by its debtors.

Response

10. Prime Steel Mills Limited, Western Steel Mills Limited and Abyssinia Iron & Steel Limited, (creditors), opposed the application through grounds of opposition and written submissions. They collectively argued that the application is grossly misconceived, mischievous, misplaced, frivolous, scandalous and vexatious, and constitutes an abuse of the process of the Court.
11. The creditors asserted that the application is unmeritorious in view of the fact that the company seeks the Court's refuge for having failed to discharge its obligations. It is the creditors' case that the application is contrary to the interest of justice and their interests since they had been forced to wait for long before they could recover debts owed to them by the company. In the circumstances, the creditors argued, they are likely to suffer more financial loss if the debts are not satisfied.



12. In the view of the creditors, the company failed to adduce any or any substantial, concrete or tangible evidence of how it intended to collect its debts. In the circumstances, there is no guarantee that the company will meet its financial obligations to the creditors. The creditors also maintained that there is no evidence to demonstrate that the company had indeed commenced legal proceedings against its debtors to recover the money allegedly owed. In other words, the company had not shown any adequate effort it had made to push for recovery of the money owed to it.
13. The creditors urged the Court to dismiss the application with costs since it was filed with sole the intention of protecting an undeserving debtor. The application was also intended to delay their right to execute or proceed with insolvency proceedings against the company, given that the company had failed to meet its obligations to pay debts, thus can no longer sustain its business.
14. The creditors took the view, that the company should have sought the arrangements and compromises much earlier, since it was aware of its financial difficulties, rather than wait until this late stage when the creditors seek to rightfully recover their money. The creditors argued that the company should not be allowed to evade its obligations or stall settlement of its debts to the detriment of the creditors who continue to suffer great financial loss.
15. The creditors relied on Scott VC in *Hook v Jewson Ltd [1997] 1 BCLC 664* for the argument that courts must be careful not to allow applications for interim orders merely as a means of postponing the making of bankruptcy orders in circumstances where there is no apparent likelihood of benefit to the creditors from such postponement.
16. The creditors asserted that sections 922, 923, 925 and 926 of the Act do not grant the Court powers to stay execution of judgments or grant a moratorium. They cited the decision in *Christian Pilkington, Schemes of Arrangement in Corporate Restructuring*, Sweet & Maxwell, 2nd edition, (paragraph 3-036), that the promulgation of a scheme does not in itself amount to a moratorium against creditors' action against the company or its assets becoming available or being automatically imposed.
17. The creditors took the position that the application is fatally defective since the company had failed to produce the scheme of arrangement or compromise that it intends to propose to them for consideration. Reliance was placed on *Kempe v Ambassador Insurance Co (In Liquidation) [1998] 1 WLR 271*, to the effect that it is for the company to propose the scheme for the creditors consideration by the necessary majority to agree to it and for the court to sanction it.
18. The creditors argued therefore, that the decision in *Midland Energy Limited v George Muiruri t/a Leakey's Auctioneers & another [supra]* is distinguishable as it dealt with proceedings instituted under the *Insolvency Act* to stop the repossession of assets of a company under administration. For that reason, the company is not entitled to the same protection as that of a company under administration given that this application was brought under the *Companies Act*.

Determination

19. The company, said to be in financial distress, approached this court for orders to prevent creditors from executing judgments and decrees obtained against it, or instituting new against it and or its directors. The company also sought an order allowing it to convene a creditors' meeting for purposes of coming up with arrangements and a compromise scheme for settling the debts owed to the creditors.
20. In a nutshell, the company sought the court's protection from harassment by the creditors and an opportunity to come up with a suitable compromise and arrangement to pay the debts, thus give the company a new beginning.



21. The creditors opposed the application, primarily arguing, that the company had not come up with any proposed scheme for their consideration and, therefore, the application was meant to forestall and frustrate their quest for payment. The creditors took the view, that the application was not only filed late but was also made in good faith given the timing and the nature of the orders sought.
22. I have considered the application, submissions and the decisions relied on. The provisions under which the application was brought fall under Part XXXIV of the Act, headed: Compromises, arrangements, reconstructions and amalgamations. Section 922 states that this Part applies when a compromise or arrangement is 'proposed' between a company and its creditors, or any class of its creditors; or between the company and its members, or any class of its members.
23. Section 923, empowers the court to order a meeting of the creditors or class of creditors; or members of the company or a class of members, to be convened in such manner as the Court directs. An application under this section may be made by the company; any creditor or member of the company; or if the company is in liquidation or under administration, the liquidator or administrator.
24. The section confers on the court, discretionary power to order a meeting for purposes of getting into a compromise in the case of a depressed company. It is on this basis that the company sought the court's exercise of discretion. This being an exercise of discretion, the discretion, like all other discretions, must be exercised judiciously and for good cause.
25. Where a company approaches the court for protection, it must show that it is acting in good faith and satisfy the court that the proposed compromise or arrangement is a viable plan for resolving the distress and allow the company pay the debts owed to its creditors.
26. In *Equity Bank Kenya Limited v Kenya Airways PLC & 11 others* (supra), the Court of Appeal observed that the provisions under Part XXXIV of the Act on compromises, arrangements, reconstructions and amalgamations, provide a mechanism for saving a 'deserving enterprise' under financial stress to guarantee vulnerable creditors ultimate payment.
27. A company that approaches the court for protection under this part, must be a deserving enterprise under financial distress: And it is for the enterprise to demonstrate to the satisfaction of the court that it deserves the protection sought. Whether or not a company is deserving, is a question of fact to be determined by circumstances of each case.
28. The creditors argued that the application was intended to deprive them of the opportunity to execute judgments and decrees already obtained against the company. They asserted that the company had come to court late and only after they moved to execute those decrees. The creditors further argued that the company had not put forward a scheme of arrangement or compromise for their consideration and, therefore, the application should not be allowed.
29. I have perused the application and the attachments visa vis the orders sought. There is no draft scheme of arrangement that has been attached to the application to show the court what the company proposes to present to its creditors for consideration and voting were the application be allowed. The company simply sought orders without demonstrating that it had a viable proposed scheme of arrangement or something similar to present to the creditors for discussion and voting, to persuade this court to allow the company to go ahead and call for a creditors' meeting.
30. The company has not for, instance, shown the steps it has taken, or is taking to collect debts owed to it by debtors to demonstrate to the court that it is one plans intended to presented to the creditors on the improving its financial position if allowed to call a creditors' meeting.



31. It is not enough for the company to invoke the provisions in Part XXXIV of the Act regarding compromises, arrangements, reconstructions and amalgamations, without laying bare the mechanism put in place for saving the company to guarantee vulnerable creditors of ultimate payment.
32. The company relied on the decision in Equity Bank Kenya Limited v Kenya Airways PLC & 11 others (supra) where the court allowed the respondent company to call a creditors' meeting. In that case, unlike this application, the company had attached a scheme/plan the was to be presented to the creditors for purposes of the meeting and it was that plan that the court considered in allowing the company to go ahead and hold the meeting. That is not the case here.
33. In the premise, it is not clear to the court what the meeting, if allowed, will be discussing in the absence of a scheme that creditors are made aware of at the time of allowing the application and sanctioning holding of the creditors' meeting.
34. I agree with the creditors that the application was meant to forestall and frustrate their quest for payment given its timing and the fact that the application was not only filed late but was also not made in good faith when one looks at the nature of the orders sought.
35. In the circumstances, I am not satisfied that this application calls for exercise of the court's discretion in favour of the company. Consequently, the application is declined and dismissed. Each party will bear their own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023

E C MWITA

JUDGE

