



REPUBLIC OF KENYA



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**Athi River Steel Plant Limited & another v Rao & 4 others (Civil Case E325 of 2022)
[2023] KEHC 24297 (KLR) (Commercial and Tax) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E325 OF 2022
A MABEYA, J
OCTOBER 24, 2023**

BETWEEN

ATHI RIVER STEEL PLANT LIMITED 1ST PLAINTIFF

GREAT KENFAST WORKS LIMITED 2ND PLAINTIFF

AND

PONANGIPALLI VENKATARAMANA RAO 1ST DEFENDANT

COMMERCIAL BANK OF AFRICA LIMITED 2ND DEFENDANT

KCB BANK OF KENYA LIMITED 3RD DEFENDANT

BANK OF AFRICA LIMITED 4TH DEFENDANT

I&M BANK LIMITED 5TH DEFENDANT

RULING

1. This ruling determines the application dated 25/8/2022 which was brought under Order 40 rules (1), (3) and (4), Order 50 rule 1 of the [Civil Procedure Rules](#) 2010, section 63(c) of the [Civil Procedure Act](#) 2010.
2. The application sought injunctive orders to restrain the defendants from selling the plaintiffs land reference numbers 17849, 17851,17852,17853,17854 and 17855 Mavoko Township and the machineries contained in the said properties. The plaintiffs also sought access to their premises for purposes of inspection and audit and orders for accounts concerning the management of the 1st plaintiff by the 1st defendant.
3. In support of the application, the plaintiffs relied on the grounds on the face of it and the supporting affidavit sworn by RAvinder Kumar Gupta on 25/8/2022.



4. The application was premised on the grounds that the 1st defendant had by an advertisement dated 20/7/2020 advertised for the sale the plaintiffs' properties known as LR numbers 17849, 17851,17852,17853,17854 and 17855 situate in Mavoko Township ("the suit properties"). That in addition to that, the 1st defendant had also invited bidders for the sale of the 1st plaintiff's plant machinery in the suit properties.
5. The plaintiffs stated that the 1st defendant was in breach of section 522 of the *Insolvency Act* as he had not made attempts to keep the company as a going concern. Further, to prove that the 1st plaintiff's business was viable, it was contended that the 1st defendant had applied for the extension of his term.
6. With respect to the 2nd plaintiff company, it was contended that no extension had been sought despite there being four properties which had the machinery
7. The plaintiffs contended that the 1st defendant had substantially understated the capacity of the plant and the machinery in order to suppress the real value. They stated that the under sale would be detrimental to them because the outstanding facilities would not be cleared.
8. According to the plaintiffs, the value of the buildings and machinery amounted to KShs. 12,197,710,000/- as at 30/6/2017 which value was enough to cover the outstanding facilities owed by the plaintiffs to the 2nd to 5th defendant. That the 1st defendant insured some assets for KShs. 5,069,239,784/- at a reduction of 60% without giving any explanation. The plaintiffs maintained that the debt of KShs. 460,000,000/- was still recoverable despite the 1st defendant's contrary views.
9. It was the plaintiffs' contention that the debt would be recoverable within 7 years if the defendants agreed to provide additional working capital of KShs. 2,400,000,000/-. Further that, the 1st defendant was advanced a facility of KShs. 1,250,000,000/- which he used to operate 6 plants instead of 24. The plaintiffs contended that an inspection of the factory showed that there was deliberate damage of the 1st plaintiffs' plant and machinery in a bid to undervalue it.
10. The application was opposed by a replying affidavit sworn by the 1st defendant Ponangipalli Venkata Ramana RAO on 29/9/2022. It was his contention that the 2nd to 5th defendant appointed him as the receiver manager of the 1st plaintiff. That at the time of appointment, the Companies collectively owed the lenders over KShs. 6.445 billion.
11. That the issue of whether the lenders were holding a floating charge that predates that *Insolvency Act* was an issue live before the Court of Appeal. That the plaintiffs had previously tried to obtain injunctive orders concerning his appointment and sale of the assets but the same was not allowed. That the director's powers were suspended once he was appointed Receiver/Manager and the plaintiffs needed leave to litigate on behalf of the company in receivership.
12. It was the defendant's contention that the debt was more than the securities held by the lenders and therefore, the operations of the company could not pay the loans in full. Mr. Ponangipali averred that he continued to run the operations of the company until a successful sale was concluded. That he would conduct a valuation of the plaintiff's assets in order to create a reserve price.
13. With respect to the insurance, it was stated that it was based on the valuation undertaken by the lenders in 2012 by which the assets were valued at KShs 5.50 billion. That the 1st defendant could only run selected units since the rest of the companies' facilities needed substantial amounts to maintain the machinery.



14. The application was further opposed by the lenders vide a replying affidavit sworn by Stella Mogere on 20/9/2022. She stated that the lenders had separately advanced funds to the two plaintiffs and the same was secured by fixed and floating debentures over the assets of the companies.
15. That the plaintiffs defaulted in their loan obligations and both the lenders and the plaintiffs engaged the services of professionals to establish the status of the companies and whether the debt could be salvaged. That Mr. Kieran Day who acted for the plaintiffs proposed an injection of KShs. 1.8 billion as working capital and the lenders expert proposed a sum of KShs. 2.4 billion and a two-year moratorium. The lenders clarified that they had no obligation to accept the proposals
16. That the parties entered into another agreement on 14/12/2017 whereby the lenders agreed to finance the insurance premium and in return be paid a sum of USD 45,000,000 on or before 31/1/2018. That the plaintiffs and their investor failed to honour the new agreement and as a result the lenders appointed a receiver for the 1st plaintiff.
17. The application was canvassed by way of written submissions which I have considered.
18. The plaintiff submitted that the 2nd to 5th defendant should only appoint an administrator under the Companies Act and not a Receiver. Counsel submitted that the directors of the company had residuary powers to protect the interests of the company and should therefore be allowed to institute a suit against the Receiver and debenture holders. That the defendant would not be prejudiced if the Court granted leave to the directors to institute the suit.
19. Counsel submitted that in order to establish whether there was deliberate suppression of the assets, the issue of valuation was *prima facie* as the plaintiffs would at the main suit adduce evidence to support their claim. It was the plaintiffs' submission that the correct valuation to use was the 2017 valuation which demonstrated that the assets were enough to cover the plaintiffs' indebtedness. It was further submitted that the books of accounts provided by the defendants were not accurate as it was a clear indication that the defendants were manipulating the records.
20. On their part, the defendants submitted that the application was defective for want of leave to file and institute the proceedings. That the plaintiffs could only commence the proceedings if they didn't affect the Receiver's ability to perform his duties.
21. It was submitted that the plaintiffs had raised issues in the application which were pending before the Court of Appeal for determination. That the plaintiffs had failed to prove the Receiver's mismanagement or breach of his duties.
22. With respect to the valuation report relied upon by the plaintiffs, the defendants submitted that the forced sale valuation was KShs. 7.9 billion and could not be of evidentiary value since it was 6 years old. The defendants submitted that the plaintiffs had failed to establish a *prima facie* case and on irreparable harm, the lenders were reputable banks who were capable of paying damages.
23. I have considered the pleadings, the rival submissions and the authorities relied on. The main issue for determination is whether the plaintiffs have met the threshold for grant of injunctive orders sought. The conditions for the grant of an interlocutory injunction are well known as set out in *Giella –versus- Cassman Brown and Company Limited (1973) E.A 385*. These are *prima facie* case with a probability of success, irreparable damage and balance of convenience.
24. *Prima facie* case is a case where on the material presented before court, a tribunal properly directing itself will be satisfied that a right belonging to one party has been infringed so as to call for a rebuttal by the latter. See *Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125*.



25. In the present case, it is not in dispute that the plaintiffs were granted facilities by the defendants in which they defaulted. The lenders appointed the 1st defendant as a receiver/manager under the securities. The receiver/manager sought to dispose off the assets of the 1st plaintiff to make recoveries. The plaintiffs brought the current application to stop the sale or transfer of the parcels of land as well as the assets contained therein.
26. On the first issue, the plaintiffs had faulted the lenders for appointing the Receiver pursuant to the repealed *Companies Act* instead of appointing an administrator under the *Insolvency Act*.
27. In *Re Winding Up of Karuturi Limited (2016)* eKLR, the court held: -
“The appointment of the Receiver/Managers is a step following or a step relating to the past event: therefore, even though it is a step which was taken after the commencement of the *Insolvency Act*, the applicable law is the *Companies Act*, to the exclusion of the *Insolvency Act*.”
28. Further, in *Suraya Holdings Limited & 4 others Vs. ICICI Bank & another (2018)* eKLR, the court held: -
“It follows, on the reading of subsection 2, that the provisions of the *Companies Act* part V or parts VI to IX of that Act, and any other provisions of the repealed Act necessary for their operation will continue to apply (to the exclusion of the *Insolvency Act*) to any step or proceeding following the past event, even if it is a step or proceedings that is taken after the commencement.”
29. The above provisions clearly demonstrate the action to be taken with respect to an action that had been taken prior to the commencement of the *Insolvency Act*. This Court is therefore of the view that it need not pronounce itself on the matter since that is an issue pending before the Court of Appeal.
30. The plaintiffs have raised the issue that the assets of the plaintiffs were enough to cover the plaintiffs’ indebtedness to the 2nd to 5th defendant. In doing so, the Court was urged to rely on the valuation report done in 2017 and not the report done in 2021.
31. In their rebuttal, the defendants’ submissions were that the 2017 report forced sale valuation was KShs. 7.9 billion and not KShs. 12 billion as contended by the plaintiffs.
32. The Court’s view is that, a valuation report has the effect of giving both the lenders, the plaintiffs and any prospective buyer the worth of the asset. In the present case, the parties had conducted one valuation in 2017 whereas the second one was conducted in 2021. The plaintiffs had not challenged the veracity of the second valuation report but only stated that the value therein for the assets was low. There was no recent current valuation report to counter the one provided by the defendants.
33. The Court is alive to the fact that the assets could depreciate in value in the 5-year difference in time within which the report was conducted. The Court finds that the plaintiffs did not lay down the basis for disregarding the valuation report relied on by the defendants. In any event, the 1st defendant offered to conduct a fresh valuation to ascertain the status of the assets before undertaking any sale.
34. On whether the 1st defendant had mismanaged the affairs of the 1st plaintiff, no evidence was provided to buttress the allegation. The 1st defendant as a receiver has the power to sell off charged assets upon it being ascertained that the company in receivership was not making any profit. In the premises, the Court finds that the plaintiffs did not establish a prima facie case with a probability of success.



35. On the second limb, the plaintiffs must demonstrate that they would suffer irreparable loss that cannot be compensated by an award of damages. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014]* eKLR, the Court of Appeal held that: -

“If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

...

““On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prim facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

36. In the present case, default is not denied. It stands in billions of Shillings. It is unlikely that the plaintiffs would stand to suffer loss that cannot be compensated in damages since the properties had been given as security. There was no evidence that the lenders would not be in a position to compensate any loss that might be suffered by the plaintiffs.
37. The balance of convenience lies in favour of the defendants recouping their outlay. The continued delay will stripe the assets of any significance value leading to huge losses whereby the securities would be incapable of satisfying the debt owed.
38. Accordingly, the Court finds that the plaintiffs have not met the threshold for an injunction.
39. The plaintiffs also sought that the 1st defendant supply them with complete and accurate accounts of his management of the of the 1st plaintiff company.
40. In *Gomba Holdings UK Ltd and Others v Homan and Another*, [1986] 3 All ER 94, at page 99, noted with approval in the case *Suraya Holdings Limited & 2 others v Cfc Stanbic Bank Limited [2015]* eKLR, the court observed: -

“... the fact that the board may need information in order to exercise the company’s right to redeem. It seems to me at least arguable that the right to redeem gives rise to a right on the part of the company to ask for sufficient information to make it effective. If the company



has no way of finding out which assets have been sold and which remain to be redeemed, the right may in practice be incapable of exercise.”

41. In view of the above, the Court finds that it would be in the interest of justice to avail the information relating to the accounts of the Company in order to give the plaintiffs an overview of the status of the companies. The Court also finds that there would be no prejudice in giving the plaintiffs access to the business premises provided that the Receiver is given 7 days’ notice of the intended visit.
42. From the foregoing, the Court finds that, the continued running of the companies at losses is prejudicial to both the plaintiffs and the lenders. The plaintiffs should be given an opportunity of redeeming the securities if they so wish.
43. Accordingly, the application dated 25/8/2022 is partly successful as follows: -
 - a. The 1st defendant does avail to the plaintiffs the information sought on the accounts of the companies with a view to redeeming the securities within 14 days of the date of this ruling.
 - b. The plaintiffs be given access to the company premises on giving the 1st defendant a 7 days’ notice.
 - c. The 1st defendant does carry out a current and independent valuation of the assets of the companies and does offer the plaintiffs the first opportunity of redeeming the securities, within 14 days giving such offer, in default of which the 1st defendant may proceed to find other buyers for the assets as shall be appropriate.
 - d. The prayer for injunction is declined.
 - e. The costs of the application to be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

