



Tusker Mattresses Limited v Equity Bank Kenya Limited & another (Insolvency Petition E018 of 2020) [2022] KEHC 258 (KLR) (Commercial and Tax) (29 March 2022) (Ruling)

Neutral citation: [2022] KEHC 258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E018 OF 2020
DAS MAJANJA, J
MARCH 29, 2022
IN THE MATTER OF THE INSOLVENCY ACT
AND IN THE MATTER OF TUSKER MATTRESSES LIMITED**

BETWEEN

TUSKER MATTRESSES LIMITED APPLICANT

AND

EQUITY BANK KENYA LIMITED 1ST RESPONDENT

ROBERT MAINA WAWERU T/A ANTIQUE AUCTIONS

AGENCIES 2ND RESPONDENT

RULING

1. The Applicant (“the Company”) herein is subject to insolvency proceedings. By the Notice of Motion dated 23rd February 2022 it seeks a temporary injunction pending the hearing and determination of the insolvency cause restraining the 1st Respondent (“the Bank”) from exercising its statutory power of sale over the property known as LR No. 209/11392 (IR No. 54287) located within the Nairobi Central Business District (“the suit property”) scheduled for sale by the 2nd Respondent (“the Auctioneer”).
2. The application is supported by the affidavit and supplementary affidavit of Alan Billz, the Company’s legal officer, sworn on 23rd July 2022 and 4th March 2022 respectively. It is opposed by the Respondents through Ground of Opposition dated 28th February 2022 and the replying affidavit of the Bank’s Director Corporate Banking sworn on 28th February 2022. Both parties filed written submissions in support of their respective positions.
3. The facts upon which the Company’s application is grounded are not in dispute. What is in issue are the legal consequences. Before I deal with the latter, it is important to put the matter in its factual



context. The Company is the registered owner of the suit property which it charged to the Bank to secure certain advances. The Company's complaint arises from the fact that by a ruling dated 26th November 2021 delivered on behalf of Tuiyott J., by Mabeya J., the court put in force a moratorium staying any and all legal proceedings and actions against the Company or executions of any judgment, orders, decrees pending the insolvency proceedings. That despite this ruling, the Bank proceeded to instruct the Auctioneer to schedule the auction of the suit property notwithstanding the orders of the court.

4. The Company founds its case on the principles for the grant of an interlocutory injunction established in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and submits that it has satisfied the threshold for grant of the interlocutory injunction sought. These conditions are that an applicant must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown (Supra)* and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
5. The Company avers that it has established a prima facie case with a probability of success on the ground that the Bank seeks to exercise its statutory power of sale over the suit property in breach of the unequivocal order issued by the court on 26th November 2021 following its application dated 13th October 2021, wherein it sought various moratoria inter alia ring-fencing the company's assets from predatory creditor action. It contends that in order to allow it to recover, court specifically made an order that:
 - 42.4 There shall be a stay of any and all legal proceedings, actions against the company or stay of executions of judgement, orders, decrees against the company pending the hearing and determination of these proceedings.
6. The Company submits that the aforesaid order ought to be read within the context of the application against which it was granted hence it is apparent that as worded, the order cannot be construed to exclude the Bank's intended action of exercising its statutory power of sale or any similar actions by the Company's secured creditors. The Company further submits that if the court's intention was to exclude certain creditors, then court would have so stated as was done for one of the Creditors, Greenspan Mall Limited at Para. 42.5.
7. The Company also impugns the proposed sale on the ground that the Bank has not furnished any proof that the property in question has been valued in breach of its statutory duty of care as set out at section 97(1) and (2) of the *Land Act*. It submits that in the absence of proof of valuation, especially in this instance where the value of the property far outweighs the amount that the Bank purports to be due to it, the Company and its general body of creditors faces the risk of the auction being conducted at an undervalue.
8. The Company submits that in the event the suit property is sold, it shall suffer irreparable loss which cannot be compensated by an award of damages as the suit property forms the cornerstone of its recovery plan. The Company states that it is now operating out of a mere 6 branches including Tuskys Imara which is situate on the suit property. The Company urges that the entirety of its recovery



plan turns on it continuing to trade and generating a sufficient profit margin which would enable it to supplement its investor's funding of the recovery plan and eventually settle the debts owed to its creditors. It therefore states that a further reduction of its branches will result in a corresponding decline in the revenue it can generate.

9. The Company also states that in resolving the matter, the court should take into account the provisions of section 3(1)(c) of the *Insolvency Act* which requires this Court, in interpreting and applying its provisions, to allow the Company to continue operating as a going concern so that it is ultimately able to meet its financial obligations to its creditors. It maintains that the sale of the suit property would be in diametrical opposition to the provisions of the Act.
10. The Company holds that ultimately the balance of convenience lies in its favour. It submits that owing to the fact that the Bank is the beneficiary of a fixed charge over the suit property, any proceeds from the sale of the property would not be available for distribution to the unsecured creditors. Further, that the value of the suit property far outweighs the value of the debt owed to the Bank. It submits that there is no urgent or immediate risk that the Bank would be unable to recover the money owed to it yet in light of the Company's fragile financial circumstances, sale of the suit property would undoubtedly sound the knell for the Company as well as any chances of its unsecured creditors' debt recovery prospects.
11. The Company relies on the decision in *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* [2021] KEHC 242 (KLR) where the court held that in determining conflicting interests in similar circumstances, the court should protect the claims of various stakeholders such that there is no race to enforce individual claims to the detriment of other creditors. The Company therefore urges the court to respect the statutory allocation of priority while still allowing parties the opportunity to defer their claims in anticipation of generating value for the long term.
12. The Respondents oppose the application. They disagree with the Company's position that the Bank was effectively restrained from exercising its statutory power of sale by the ruling dated 26th November 2021. They point out that when the court ordered a stay of any and all legal proceedings, actions against the Company and stay of execution of judgments, orders and decrees against the Company pending hearing and determination of these proceedings, it only applied to unsecured creditors who ought to be treated equally as opposed to giving priority to those who would have completed proceedings and moved to execution. The Respondents argued that the order was not intended to affect secure creditors as the purpose of the stay order is to prevent unsecured creditors who are in a position to execute from stealing a march on other unsecured creditors.
13. The Respondents further submit that the Bank, is exercising its power of sale as a chargee and is not executing a judgment, order or decree against the Company hence the order of 26th November 2021 does not stop a secured creditor from exercising its statutory power of sale.
14. The Respondents cite *Goode on Principles of Corporate Insolvency Law, 5th edition*, Sweet & Maxwell, paras. 6-40,44 to submit that the assets that are subject to a mortgage or other security interest do not belong to the company and are therefore not subject to the insolvency proceedings and that all the company has is the right of redemption. They also cite *East Africa Cables PLC v Ecobank Kenya Limited* HC COMM Misc. E043 of 2020 [2020] eKLR where the court held that a secured creditor is entitled to exercise its rights under a security document and that power is not subject to insolvency proceedings commenced against the company by another creditor.
15. The Respondents submit that there is no justifiable reason to stop the sale of the suit property by the Bank in exercise of its statutory power of sale. They state that what is available for distribution is the surplus from the sale once the security has been realised. It further submits that section 430 as read with



- 431(3) of the *Insolvency Act* which prohibits attachment, sequestration, distress or execution instigated against the assets of the company does not prevent a chargee from exercising its statutory power of sale. They therefore urge that the Company has failed to demonstrate that it has a prima facie case with a probability of success.
16. The Respondents submit that the Company cannot suffer irreparable loss if the sale is allowed to proceed as the suit property, once charged, became a commodity of sale. Further, that there is no suggestion that if the suit property is sold, that the Bank, being a tier 1 bank, will be unable to settle any damages that may be awarded to the Company.
 17. The Respondents rebuff the argument that the balance of convenience tilts in favour Company. It contends that the outstanding sums continue to accrue interest and if the Bank is not allowed to realise its security soon, the interest will continue to grow and exceed the value of the suit property. It urges that this will eliminate the possibility of there being a surplus that can be shared among the unsecured creditors hence it is in the best interests of all parties involved for the Bank to be allowed to proceed with the exercise of its statutory power of sale.
 18. As I stated earlier, the facts upon which the Company's application is grounds are not disputed. The suit property is charged to the Bank which wishes to exercise its statutory power of sale on account on the Company's indebtedness. The Company does not dispute the fact that it is indebted to the Bank. What the court is required to resolve is whether the sale of the suit property is subject to the pending insolvency proceeding and in particular to the order made on 26th November 2021, staying any and all legal proceedings, actions against the company or stay of executions of judgement, orders, decrees against the company pending the hearing and determination of these proceedings.
 19. I have read the decision of Tuiyott J., relied on by the Company and I agree with the Respondents' submissions that the order does not apply to the Bank's exercise of its power of sale in respect of secured property. First, the order on its face refers to legal proceedings and the consequences of legal proceedings against the Company. It cannot be argued that the exercise of statutory power conferred by security documents constituted a legal proceeding as opposed to legal proceedings which by their nature connote invocation of the court processes to enforce a right. Second, the learned Judge emphasised and explained that the intention of granting the order was to ensure equality among the unsecured creditors, as a class, in line with the objects of insolvency law that creditors of a class ought to be treated equally.
 20. More fundamentally though is the undisputed fact that the Bank is a secured creditor. As a secured creditor, the Bank is entitled to exercise its statutory power of sale without recourse to the court exercising insolvency jurisdiction. I therefore reiterate the holding in *East Africa Cables PLC v Ecobank Kenya Limited* HC COMM Misc. E043 of 2020 [2020] eKLR that it is settled law that a secured creditor is entitled to exercise its rights under the security document or statute in the event of default by the company and that the power is not subject to insolvency proceedings commenced against the company by any other creditor.
 21. Since the Company only seeks an injunction pending the determination of the application, the orders cannot be granted. This would mean that the Bank would be prevented from exercising its legal right for no reason other than pending insolvency proceedings to which it is not subject. Further, the Company has raised other issues concerning the propriety of the Bank's actions. Since the Bank, qua secured creditor, is not subject to these proceedings, the Company's claims can only be litigated elsewhere.
 22. For the reasons I have set out above, the Notice of Motion dated 23rd February 2022 is dismissed with costs to the Respondents. The interim orders in force are now discharged.



SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2022

A. MABEYA

JUDGE

Mr Ogola with him Ms Kimani instructed by O & M Law LLP Advocates for the Applicant.

Mr Kimani, SC with him Mr Ondieki instructed by Hamilton, Harrison and Mathews Advocates for the Respondents.

