



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 27 OF 2020

CO-OPERATIVE BANK OF KENYA.....APPLICANT/APPELLANT

-VERSUS-

EUNICE MWIKALI MAINGI.....1ST RESPONDENT

GEDION NYAMAI KILONZO (*Suing as legal Representatives and Administrators of estate of*

STANLEY MWANIKI NYAMAI (DECEASED).....2ND RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED.....3RD RESPONDENT

RULING

1. Before me is an application dated 21/09/2020 brought under section 428, 429 and 430 of the Insolvency Act, and Order 51 Rule 1 Civil Procedure Rules as well as sections 1A, 1B and 3A of the Civil Procedure Act (cap.21), seeking for orders, one of which has been spent as follows –

1) (spent)

2) That this honourable court be pleased to stay these proceedings pending the hearing and determination of the Nairobi Commercial and Admiralty division, Insolvency Cause No. E155 of 2019.

3) That this court be pleased to order that any attachment, sequestration, distress of execution against the appellant/applicant herein is void.

4) That costs of this application be provided for.

2. The application has grounds on the face of the Notice of Motion that the 1st respondent filed garnishee proceedings against the appellant herein for release of Kshs.3,538,558/=, and that during the pendency of the garnishee proceedings and prior to the issuance of a decree absolute, there was filed a Creditors Insolvency Petition at Nairobi Commercial and Admiralty Division being Insolvency cause E155 of 2019 and that by virtue of section 428 of the Insolvency Act, if there are legal proceedings pending before a court of law, the company or creditor or contributory may apply to the court to restrain any further proceedings in respect of that matter before the court.

3. The application was filed with a supporting affidavit sworn on 21/09/2020 by Philip Muasya advocate for the applicant which amplifies the grounds of the application, and emphasizes that this court should take judicial notice of the fact that once a company is being liquidated as in the case herein with respect to the 2nd respondent, any attachment or distress or execution instigated against the company after the commencement of liquidation is void and that this court has jurisdiction to issue the restraining orders sought.

4. It is also urged in the supporting affidavit that the proceedings herein be stayed pending determination of the Nairobi Insolvency Petition No. E155 of 2019.

5. The application was opposed through a replying affidavit sworn on 23rd December 2020 (*I think it should be 2019*) by Bernard M. Kitindio advocate for the respondent, in which it was deponed that the application is frivolous, vexatious and an abuse of court process. It is further deponed that the application is fatally defective and that though garnishee orders had already been issued in 18/2/2019 and made absolute on 4/12/2019, the appellant has however refused to release money leading to filing of contempt proceedings against directors of the appellant.

6. It was also deponed that the appellant/applicant does not fall within the categories of parties contemplated under the provisions of section 428 of the Insolvency Act, as it is neither a creditor nor contributory to the 2nd respondent. The replying affidavit annexes copies of orders issued by this court.

7. The appellant/applicant filed a further affidavit sworn by Philip Mwasya advocate in which it was deponed that under section 2 of the Insolvency Act a creditor includes a person entitled to enforce a judgment, or final order and that the 1st respondent can only seek to be enjoined in **Insolvency Petition No. E155 of 2019 – Kinyanjui Njuguna & company advocates –vs- Invesco Assurance Ltd**, if they want to obtain any orders from the court.

8. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by B.M Mungata & company for the appellants/applicants and Kitindio & company for the respondent.

9. Having considered the application, documents filed and submissions on both sides, in my view, the main issue herein turns on the applicability of section 428 of the Insolvency Act in this matter; as it is not in dispute that there are pending insolvency proceedings in Nairobi Insolvency Cause No. E155 of 2019.

10. In my view this application is not merited. The first reason is that the parties herein are different from the parties in Nairobi Insolvency Petition No. E155 of 2019 and the party who is now bringing the present application is not Invesco Assurance Company Ltd or anybody acting on its behalf, but a different entity Cooperative Bank of Kenya Ltd. In my view, for such an application to be sustainable, it should either have been brought by Invesco Assurance Co. Ltd, or somebody coming to this court on its behalf.

11. The second reason why this application will not succeed are the provisions of section 428 (1) and (2) which, in my view, would require that such request for moratorium or stay as sought herein, should have been applied for and issued in Insolvency Cause No. E155 of 2019 not in another cause. The said section provides as follows –

428(1) At any time after the making of a liquidation application and before a liquidation order has been made the company or any creditor or any contributory may –

(a) If legal proceedings against the company are pending in court – apply to the court for the proceedings to be stayed, and

(b) If proceedings relating to a matter are pending in another court, apply to the court to restrain further proceedings in respect of the matter in that court.

(2) On the hearing of an application under sub-section 1(a) or (b) the court may make an order staying or restraining the proceedings on such terms as it considers appropriate”

12. My understanding of the above provisions of the law under section 248(1) and (2) is that the application for restraining orders or moratorium has to be made in the Insolvency Cause, not in another cause. Once restraining orders are granted in the Insolvency cause, they will apply to the targeted other proceedings. The application for moratorium cannot be made in a multiplicity of other proceedings, thus this application was filed in the wrong cause.

13. The argument by the appellant that the respondent herein should apply to join the Insolvency Cause in Nairobi as an interested party in order to be heard, does not hold water, and is not sustainable or feasible, as the court may or may refuse to enjoin it as a party, and in any case, it is an unnecessary expense on an innocent party.

14. Consequently and for the above reasons, I find no merits in the application. I dismiss the application with costs to the respondents.

Delivered, signed & dated this 4th day of April, 2022, in open court at Makueni.

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GEORGE DULU

JUDGE