



Njuguna v Cytonn High Yield Solutions LLP (In Administration) (Miscellaneous Civil Application E089 of 2022) [2022] KEHC 466 (KLR) (Commercial and Tax) (31 May 2022) (Ruling)

Neutral citation: [2022] KEHC 466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E089 OF 2022**

DO CHEPKWONY, J

MAY 31, 2022

BETWEEN

MARY MARGARET NJUGUNA APPLICANT

AND

**CYTONN HIGH YIELD SOLUTIONS LLP (IN
ADMINISTRATION) RESPONDENT**

RULING

1. Cytonn High Yield Solution (for purposes of discussion of this Ruling to be referred as the “Applicant”) moved this court vide a Notice of Motion dated 17th February, 2022 under the inherent jurisdiction of this court seeking for the following orders:
 - a. Spent;
 - b. Spent;
 - c. That the ex-parte orders made on 5th February 2022, “that leave is hereby granted to the Applicant to commence and continue with the Arbitration proceedings against the Respondent herein” be stayed;
 - d. That the Notice of Motion dated 31st January 2022 be served upon the Respondent for filing of any Responses and hearing and determination in the normal way;
 - e. That the costs of and occasioned by this Application be provided for.
2. The grounds upon which the application is premised are inter alia that; this Honourable Court on 5th February, 2022 granted Margaret Mary Njuguna (hereinafter referred as “the Respondent” for purposes of discussion of this Ruling) leave to commence and continue with Arbitration proceedings



against the Applicant. That on the basis of those orders, the Respondent has invited the Chartered Institute of Arbitrators Kenya to appoint an arbitrator to hear the dispute. The Applicant challenges the propriety of the orders granted on 5th February, 2022 for breaching the rules of natural justice and avers that the court had no jurisdiction to issue ex-parte orders without the subject application being served on the Applicant. In any event, the Applicant persuades the court to make a finding that the Respondent had not established the factors stipulated under Section 560A of the Insolvency Act, 2015 to warrant the granting of the leave.

3. Further, that given that the Applicant has more than 3,500 investors, the orders granted are likely to trigger an avalanche of similar applications and consequently undermine the object of the administration by shifting the Administrator's attention to defending the claims. The Applicant further expresses the view that the application seeking leave to commence the arbitration proceedings ought to have been made in HCCCOMMP/E063 of 2021, Cytonn High Yield Solutions LLP -vs- The Office of the Official Receiver.
4. The Application was further supported by the Affidavit sworn by the Applicant's Administrator, one Mr. Kereto Mrima wherein he averred that on 6th October, 2021 the Applicant was placed under Administration, and he was as well appointed as the Administrator. According to him, the administration order had the effect of stalling all legal proceedings against the Applicant as stipulated under Section 560(1) of the Insolvency Act and the Respondent herein is not excused. That even though the Respondent obtained leave to commence the arbitral proceedings, the Respondent had not shown any special conditions under Section 560A of the Insolvency Act and such leave ought not to have been granted.
5. The deponent further averred that there are similar applications pending under the Insolvency proceedings for leave to commence arbitral proceedings. And to ensure uniformity, this Application in this case should be slated for hearing and similar determination.
6. The Respondent opposed the application vide her Replying Affidavit sworn on 23rd February, 2022. She deponed that she had invested her life savings with the Applicant, but the latter failed to pay to her the investments on the maturity date. That prompted a dispute and even before the Applicant was placed under administration, they had agreed for appointment of an arbitrator by the chairman of the Chartered Institute of Arbitrators (K) to determine the dispute. Thus, she views the present application as malicious device to defeat her right to have the dispute resolved under law as guaranteed under Article 50 of the Constitution. She added that the Insolvency proceedings placing the Applicant under administration were conducted ex-parte and she was never served with any pleadings.
7. In any case, the order granted sets no bad precedent or otherwise discriminates the other creditors because she has a contract with the Applicant which is separate from the contracts between the Appellant and the other 3,500 creditors.
8. Respondent further averred that the administrator had not placed any material evidence before the court to show how the orders granted have affected the discharge of his duties. In any event, the arbitration proceedings could either be determined in favour of the either party after they are accorded a chance to be heard.
9. The Application was canvassed by way of written submissions and as the record reflects, the Applicant filed two sets of submissions dated 15th March, 2022 and 16th May, 2022 respectively while the Respondent filed only one set of submissions dated 10th May, 2022. I have read through the said submissions, and they do reproduce the grounds advanced in the respective affidavits as summarized above that I wish not to repeat the same here.



Analysis and Determination

10. I have carefully considered the application, the response thereof as well as the submissions filed on behalf of the parties by their respective counsels, the law and the authorities relied on. In my view, the only issue for determination is whether the orders made by the court on 5th February, 2022 for leave to commence proceedings against the Applicant can be stayed and in its place an order be made for the Application dated 31st January, 2021 to be served upon the Applicant for hearing and determination.
11. However, before delving into the substance of the question for determination as highlighted, I wish to first deal with a controversial issue between the parties as to whether the application at hand seeks for orders for setting aside the ex-parte orders issued on 5th February, 2021. Whereas the Applicant seeks to convince the court that the application at hand seeks is a “setting aside” order and even goes further to submit on grounds under which the orders of 5th February, 2021 can be set aside, the Respondent submits that such orders are not sought on the face of an application and the court cannot grant such orders.
12. My view on the issue is that, since parties in any proceedings are adversaries, it is left to each one of them to formulate his/her case in his/her own way, subject to the basic rules of pleadings. Therefore, for the sake of certainty and finality, each party is bound by his/her own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly being sought. Even the court itself is bound by the pleadings of the parties as they are and the court has no duty to enter into an inquiry of the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or orders not sought for by the parties in the pleadings. To do so would be to enter into the realm of speculation.
13. In view of the above findings, a quick perusal of the prayers on the face of the application dated 17th February, 2022 shows that none of the prayers seeks to set aside the orders granted on 5th February, 2022. In an adversarial system of litigation like ours, it was upon the Applicant to seek the prayer for setting aside the orders and cannot complain now if this court strictly adheres to the prayers specified on the face of the application. Therefore, this court shall not delve into whether the Applicant has made a case for setting aside the orders granted on 5th February, 2022 or not.
14. As for whether those orders should be stayed and the application dated 31st January, 2021 be served for hearing and determination inter-parties, the Applicants supports its case by submitting that the ex-parte orders were contrary to the rules of natural justice and discriminatory against the other creditors who have had similar applications listed for hearing. The Respondent on the other hand submits that even before the Applicant was placed in administration, disputes had already arisen between the parties and by consent they had agreed to appoint a sole administrator to determine the dispute. She added that the Applicant had refused to pay her savings which she intended to use for upkeep upon her retirement.
15. Section 560(1) (d) of the *Insolvency Act* provides that a person may begin and continue legal proceedings against a Company or the Company’s property notwithstanding that the application is under administration but subject to the consent of the administrator or approval of the court. In this case, it is not denied that the Respondent sought for the administrator’s consent, but the administrator withheld the consent without any reasons being advanced. The Respondent then sought the court’s approval and the court upon considering the Notice of Motion dated 31st January, 2021 granted the leave to proceed under Section 560(1) (d) of the *Insolvency Act*. In addition, Section 560A of the same



Act comes into place to help the court in considering an application for stay approval for action to be taken against a company under administration. It reads as follows: -

“560A when considering whether to grant approval under Section 560, the court may in particular take into consideration-

- a) The statutory purpose of administration;
- b) The impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;
- c) The legitimate interest of the applicant and the legitimate interest of the creditor of the company, giving the right of priority to the proprietary interest of the applicant; and
- d) The conduct of the parties.”

16. Section 560(1)(d) above also connotes that the leave as may be sought lies at the discretion of the court and as all with other discretions, it should be exercised judiciously and specifically in accordance with Section 560A of the same Act. Therefore, if the court is persuaded that a party has shown sufficient cause within Section 560A, then the leave sought may at the discretion of the court be granted even at an ex-parte stage.
17. In the present case, the court indicated in its order dated 5th February, 2022 that it had considered the grounds on the Respondent’s affidavit in granting the leave to proceed for arbitration. In that affidavit, the Respondent disclosed that she is an elderly retiree and had invested in the Application with intend of using the investments for her upkeep in her retirement. She added that her savings had matured but the Applicant had refused to pay her, and yet she can hardly sustain herself.
18. I am of the considered view that from the explanation advanced in the Respondent’s affidavit, the Respondent stands to suffer greater harm than the Applicant if the approval sought had not been granted. I am of further view that given that the Applicant had agreed to the appointment of an arbitrator to determine the dispute with the Respondent, the Applicant cannot afford to say that the leave to proceed with arbitration contravened its right to be heard.
19. In the end, I am not persuaded that the Applicant has advanced a plausible explanation as to why the orders should be stayed or otherwise interfered with. The Applicant has also not shown any error on face of those orders to warrant their setting aside and/or review. As such, this court finds the Notice of Motion dated 17th February, 2022 without merit and the same is hereby dismissed with costs.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY , 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ndoigo counsel holding brief for Mr. Amoko counsel for Respondent/Applicant

Court Assistant - Kimoine

