In re Paleah Stores Limited (Insolvency Cause 3 of 2020)
[2022] KEHC 12204 (KLR) (20 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12204 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

INSOLVENCY CAUSE 3 OF 2020

OA SEWE, J

JUNE 20, 2022

IN THE MATTER OF: THE INSOLVENCY ACT NO 18 OF 2015

AND

IN THE MATTER OF: THE INSOLVENCY REGULATIONS, 2016

AND

IN THE MATTER OF: THE INSOLVENCY (AMENDMENT) REGULATIONS, 2018

AND

IN THE MATTER OF: PALEAH STORES LIMITED

AND

IN THE MATTER OF: AN APPLICATION TO SET ASIDE STATUTORY DEMAND RULING

BETWEEN

PALEAH STORES LIMITED ..... APPLICANT

AND

MITCHELL COTTS FREIGHT KENYA LIMITED ..... RESPONDENT

RULING

1. Before the court for determination is the notice of motion dated August 25, 2021. It was filed under article 159(2) (d) of the *Constitution*, sections 384(1) and 699 of the *Insolvency Act*, 2015, sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of the laws of Kenya for orders that:

   (a) Spent

   (b) Spent

(c) There be stay of further insolvency proceedings herein pending the hearing and determination of the intended appeal by the applicant against the court's ruling dated July 30, 2021;

(d) Costs of the application be provided for.

2. The application was premised on the grounds that the proceedings herein are insolvency proceedings intended to liquidate the applicant company, Paleah Stores Limited; and that on the July 30, 2021, the court (Hon D Chepkwony, J) made a ruling dismissing the applicant's application dated August 4, 2021; which had sought to set aside the respondent's statutory demand dated June 18, 2020. It was further stated that the applicant, being aggrieved with that ruling, commenced an appeal by filing a notice of appeal; and that it is apprehensive that the appeal will be rendered nugatory unless the orders sought are granted.

3. The application is supported by the affidavit of Patrick Kuria Njiru, sworn on August 25, 2021 in which he averred that the applicant is sufficiently solvent and truly a going concern; and that if the liquidation proceeds as proposed, the applicant will suffer more than substantial loss since it would have been unfairly liquidated and practically extinguished to its detriment and to the detriment of its shareholders. Mr Njiru also mentioned that the applicant is able and willing to furnish sufficient security, including but not limited to land title documents. He annexed to his affidavit a copy of the notice of appeal, among other documents, to demonstrate that the appeal process has already been initiated.

4. The application was opposed by the respondent, Mitchell Cotts Freight Kenya Limited, and grounds of opposition filed on September 15, 2021 thus:

(a) That the application seeks to stay a negative order;

(b) That the application has been made in bad faith and in an attempt to frustrate the respondent's effort to recover its debt;

(c) That the issues raised in the application can well be determined by the court in this petition;

(d) That the application is bad in law, misconceived, frivolous and vexatious, lacks merit and is an abuse of the court process.

5. Accordingly, the respondent prayed that the application be dismissed with costs.

6. The application was canvassed by way of written submissions, pursuant to the directions given herein on September 16, 2021. Those submissions were thereafter highlighted on February 14, 2022. Thus, in the applicant's written submissions dated September 24, 2021, the following two issues were proposed for determination by its counsel, Mr Khaemba:

(a) Whether an order of stay of further insolvency proceedings herein should be granted pending the hearing and determination of the intended appeal; and

(b) Who should bear the costs of the application?

7. While acknowledging that stay of proceedings is a serious, grave and fundamental interruption of the right of a party to conduct his litigation, Mr Khaemba nevertheless urged the court to take into account that no irremediable prejudice will befall the respondent. He also relied on *Re African Safari Club Ltd* [2006] eKLR to buttress his argument that winding up a company is a draconian step which should be treated with the seriousness it deserves; and that before proceeding to liquidation, the court ought to be satisfied that all the prerequisite procedural steps have been taken.

8. Mr Khaemba further submitted that it is in the discretion of the court to grant stay of proceedings. He made reference to the principles discussed in *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR, namely, whether the applicant has established a *prima facie* case; whether the application was filed expeditiously and whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought. He urged the court to find that all those prerequisites have been met by the applicant herein.

9. Ms Abwao, learned counsel for the respondent relied on her written submissions filed on November 15, 2021. She adopted the two issues proposed by Mr Khaemba and urged the court to find that the application is not only devoid of merit but is simply a tactic to further delay and/or frustrate the respondent in its efforts to recover the debt that is rightfully owed to it by the applicant; and which has been owing since 2017. Ms Abwao also faulted the applicant for the delay of about 26 days after the impugned ruling; which she says was not explained at all by the applicant. She likewise urged the court to note that, so far, no appeal has been filed; and therefore that it is the respondent that stands to suffer immense prejudice should these proceedings be stayed as proposed by the applicant. She relied on the maxims "equity does not aid the indolent" and "he who comes to equity must come with clean hands" and prayed for the dismissal of the application.

10. In the light of the foregoing, it is plain that the only issue for determination is whether, in the circumstances outlined, the applicant is deserving of an order of stay of proceedings pending appeal. As was correctly pointed out by learned counsel, stay of proceedings constitutes an interruption of a party's right to prosecute his/her case to its logical conclusion. Hence, such an order ought not to be granted unless sufficient reason be shown to warrant such interference. Accordingly, in *Halsbury's Law of England*, 4th Edition Vol 37 page 330 and 332, the opinion is given that:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.
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> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

11. Hence, it is imperative to ascertain whether, in this case, the principles governing the exercise of discretion in such applications have been met. Those principles are now well settled. For instance, in *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR it was held thus: -

> " ...the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;
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> a) Whether the applicant has established that he/she has a *prima facie* arguable case.
>
> b) Whether the application was filed expeditiously and
>
> c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought..."

12. Likewise, in case of *Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri* [2015] eKLR it was held: -

> The court is aware the defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in article 159 of the *Constitution* which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...
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> ...As a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The mere fact that an appeal is arguable alone does not fit the constitutional yardstick used to gauge whether a stay of proceedings should or not be imposed. That is only one of the factors which the court should consider. There are other equally important factors to consider namely;
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> i. The need for expeditious disposal of cases and the impediment the stay would place on the right of the Respondent to have the case determined expeditiously;
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> ii. The interest of justice in the case; the pros and cons of granting or not granting the order;
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> iii. The *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one,
>
> iv. The scarcity and optimum utilization of judicial time, and
>
> v. Whether the application has been brought expeditiously..."

13. The applicant in this case has indicated that he has an arguable appeal with high chances of success and that it will suffer irreparable loss if stay is not granted, as the consequence of the impugned order is that it is at a risk of suffering liquidation, yet it is a solvent, going concern capable of settling its debts. However, this being a court of concurrent jurisdiction to the court that made the impugned orders, my view is that the arguability of the appeal is a matter best left for the Court of Appeal to determine.

14. On the second requirement that the application be made timeously, there is no dispute that there was a delay of about 26 days in bringing the instant application; which delay has not been explained. It is noteworthy however that the notice of appeal was filed on August 6, 2021, within 7 days of the impugned order. I therefore do not, in the circumstances consider the 26 days delay to be inordinate, for purposes of seeking stay of proceedings; granted that the next hearing date is yet to be taken. In fact, no step had been taken by the respondent towards prosecuting the petition by the time the instant application was filed.

15. On whether sufficient cause has been shown to warrant stay of proceedings, there is no gainsaying that the order given herein on July 30, 2021, is a negative order; nevertheless, its implication is that the respondent is at liberty henceforth to proceed with the prosecution of this petition to conclusion; with one of the possible outcomes being liquidation of the applicant company. Needless to say that liquidation of a company is a drastic step and therefore it is only fair and just that the applicant be afforded the opportunity to test the validity of the demand notice on appeal before such a step can be taken. In this regard, I agree entirely with the view expressed in *Re African Safari Club Ltd* (*supra*) by Hon Maraga, J (as he then was) that:

> " ...winding up a company is a draconian step. It is a most drastic step which the retired Justice Kwach, in Matic General Contractors Limited v Kenya Power and Lighting Company Limited, Civil Appeal No 26 of 2001 (CA) said amounts to "corporate execution". In Kenya Cashewnuts Limited v National Cereals & Produce Board [2002] 1 KLR 652 Ringera, J (as he then was) likened it to "passing a death sentence on an individual". I agree with those views and add that winding up a company is a serious matter which should be treated with the seriousness it deserves. Before a court makes a winding up order therefore, nay, even deals with a winding up petition it must be satisfied that all the prerequisite procedural steps have been taken."

16. In the premises, I take the view that it is in the interest of justice that these proceedings be stayed pending the hearing and determination of the applicant's appeal on terms to be settled after hearing the parties in that regard. It is further ordered that costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JUNE 2022.

OLGA SEWE

JUDGE