



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E155 OF 2019

KINYANJUI NJUGUNA & CO ADVOCATES.....PLAINTIFF

VERSUS

INVESCO ASSURANCE LIMITED.....DEFENDANT

RULING

1. Through the application dated 27th July 2020, the Debtor seeks the stay of all the proceedings in this matter and the stay of execution of all the warrants of attachment taken out against it by the petitioner until the application is heard and determined. The application is premised on the grounds set out in its face and the supporting affidavit.
2. The Debtor's case is that the petitioner is engaging in an exercise that is contrary to the provisions of Section 428,429 and 430 of the Insolvency Act.
3. At the hearing of the application **Mr. Nderitu**, learned counsel for the Debtor submitted that the reliance, by the petitioner on the consent issued on 19th August 2020 is contrary to the provisions of the Insolvency Act.
4. The petitioner opposed the application through the Replying Affidavit of **Mr. Seth Khisa**, counsel for the petitioner, who at the hearing thereof submitted that the court should proceed to hear and determine the main petition in furtherance of the overriding objective pursuant to Article 159(2) of the Constitution which frowns upon delaying justice. Counsel observed that the multiplicity of the applications in the matter was delaying the conclusion of the petition.
5. It was submitted that the expeditious determination of the petition would resolve all the issues between the parties. For this argument, the petitioner cited this court's decision in *Dankar Rambhai Patel v United Engineering Supplies Ltd & Another* [2020] eKLR. It was submitted that the main issue that should concern the court is whether or not the Debtor is able to settle its debts when they fall due. It was submitted that the parties had recorded a consent before the court which had not been set aside, reviewed or varied.
6. Counsel observed that since the Debtor had not complied with the terms of their consent, it was guilty of contempt of court as the decree had not been satisfied.

Analysis application and Determination

7. I have carefully considered the application by the Debtor and the response from counsel for the Petitioner. The issue for determination is whether the debtor has made out a case for stay of the proceedings in the Petition and the warrants of attachment taken out against the debtor.
8. The Debtor pleaded that the rationale of the provisions of Sections 429 and 430 of the Insolvency Act was that once a liquidation petition has been presented it follows that the company's assets ought to be protected. According to the Debtor, this would mean that there should be no action that destabilizes equity among Creditors. The Debtor argued that all the warrants of attachment taken out against the company/applicant and dispositions of assets of the Company pursuant to those warrants from 21st June 2019 were illegal and void.
9. Counsel for the Debtor submitted that the Petitioner was mandated by law to stop executing the winding up petition in the interest of preserving the interest of any other creditor in event that the Company wound up and in support of this position counsel referred the court to the case of *Re Ukwala Supermarket* 2019 eKLR.

10. Counsel observed that if the petitioners were allowed to continue taking out warrants of attachment against the Debtor the whole purpose of sections 428,429, 430 and 431 would be defeated as the Petitioner would have gained from the assets by the time the Petition is concluded.

11. In opposing the application, the Petitioner's counsel submitted that section 428(2) of the Insolvency Act empowers the court to grant orders of stay on such terms it considers appropriate. Counsel noted that the gist of the application is with regard to the consent order dated 19th August 2020 wherein the Creditor and the Debtor agreed on the mode of payment and, in turn, the Creditor agreed to halt the hearing of the petition and the advertisement. He added that upon default of payment on the part of the Debtor the Creditor executed warrants of attachment thus provoking the application before the court.

12. The Debtor invoked Sections 428,429,430 and 431 of the Insolvency Act which provides that: -

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 contributory, may-

(a) if legal proceedings against the company are pending in the Court— apply to the Court for the proceedings to be stayed; and

(b) if proceedings relating to a matter are pending against the company in another court—apply to the Court to restrain further proceedings in respect of that matter in the other court.

(2) On the hearing of an application under subsection (1)(a) or (b), the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.

(3) If, in relation to a company registered (but not formed) under the Companies Act, 2015, the application is made by a creditor; this section extends to any contributory of the company.

Sections 429 and 430 provides as follows;

429. Dispositions of property by company after commencement of liquidation to be void unless the Court otherwise orders

(1) In a liquidation ordered by the Court—

(a) any disposition of the company's property; and

(b) any transfer of shares, or alteration in the status of the company's members, made after the commencement of the liquidation is void, unless the Court otherwise orders.

(2) Subsection (1) does not apply to action taken by an administrator of a company while a liquidation application is suspended under section 558(1)(b) (effect of administration order on pending liquidation application).

430. Attachments and other forms of execution against company in liquidation to be void

If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void.

431. When liquidation of company by the Court commences

(1) If, before the making of an application for the liquidation of a company by the Court, a resolution has been passed by the company for liquidating the company voluntarily—

(a) the liquidation commences at the time of the passing of the resolution; and

(b) unless the Court, on proof of fraud or mistake, directs otherwise, all proceedings taken in the voluntary liquidation are to be regarded as having have been validly taken.

(2) If the Court makes a liquidation order under section 534, the liquidation commences on the making of the order.

(3) In any other case, the liquidation of a company by the Court commences when the application for liquidation order is made.

13. In view of the foregoing, Section 431 of the Insolvency Act provides that liquidation of the company commences when the application for the liquidation order has commenced and, in this case, the day the Petition was presented before court. This means that the proceedings leading up to the execution against the Company by virtue of the above section should be put on hold. The consent order dated 19th August 2020 stayed the hearing of the petition and the terms were that in the event of a default, the petitioner would within two weeks list the petition before court for hearing.

14. In **Ndane Construction Company Limited v Spencon Kenya Limited** [2016] eKLR the court observed that; -

“A rationale of the provisions of Section 225 of The Companies Act (and Section 430 of The Insolvency Act) is that once a Winding Up Petition is presented, the assets of the Company need to be protected as they are now subject to the Winding Up Cause and secondly no action that destabilizes the equality among Creditors of the same class is to be permitted. This Court cannot therefore, not make Orders that are voided by the provisions of Section 225.”

15. My take is that where a Creditor elects to pursue insolvency as a way of realizing its funds, then it is imperative that it continues on the same course and not to be seen seeking recourse from all avenues available. I therefore find the warrants of attachment of the Creditor's property are, by virtue of Sections 229 and 230 of the Insolvency Act, void as to allow the execution would conflict with the said sections. I find that the Creditor's recourse was to proceed with the Insolvency petition. With regard to stay of proceedings in all other courts, I find and hold that this court can only pronounce itself in matters pending before it for determination.

16. I however note that the orders sought in this application may have been overtaken by events considering that this court has at the time of the delivering this ruling also rendered itself on the main Petition.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nderitu for Awele for the Company Invesco Assurance.

Mr. Lesaigor for Khisa for petitioner.

Mr. Kimutai also for the company.

Court Assistant: Sylvia.