REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION COMMERCIAL

CIVIL SUIT NO. E111 OF 2021

EAST AFRICAN TANNERS [K] LIMITED.....1ST PLAINTIFF

ANUJ M PARMAR..... 2ND PLAINTIFF

SARASWATI MADHUSUDAN PARMAR.....3RD PLAINTIFF

VERSUS

ALPHARMA LIMITED.....DEFENDANT

R U L I N G

1. This is a ruling a Motion on Notice dated 26/02/2021 by the plaintiffs. The same was brought under ***sections 1A & 1B, 3A of the Civil Procedure Act, Order 40 Rule 1, 2, 3, 4, 10 & 11 of the Civil Procedure Rules and Rules 10 [4], 16 and 17 of the Insolvency Regulations 2016 as amended in 2018.***

2. In the Motion, the plaintiffs sought an injunction to restrain the defendant from presenting insolvency proceedings against them to the Office of the Official Receiver or to Court, advertising in the press or Kenya Gazette in respect of a claim of Kshs. 19,682,837/15, Kshs. 2,510,000/- and USD 113,808/13 or any other sum arising from any other claim the defendant may have against the plaintiffs. In the alternative, they sought that any insolvency proceedings against them which may have been commenced be stayed.

3. Further, the plaintiffs sought for an order to strike out the Statutory Notices dated 16/11/2020 issued by the defendant's Advocates **Messrs Kale Maina & Bundotich Advocates** which threatened institution of insolvency proceedings over a purported debt of Kshs. 19,682,837/15, Kshs. 2,510,000/- and USD 113,808/13, respectively.

4. The grounds for the application were set out in the body of the Motion and the supporting affidavit of the 3rd plaintiff sworn on the same date. These were that; the 1st plaintiff is solvent and the debt is disputed.

5. It was contended that the parties have done business for over 25 years whereby they entered into agreements dated 27/3/2005 and 1/4/2014, respectively by which, it was agreed that the 1st plaintiff would tan raw skin supplied by the defendant into leather and supply it back to the defendant.

6. That however, the defendant had breached the agreements by, *inter alia*, failing to deliver to the 1st plaintiff the raw materials and associated chemicals required for the tanning for the periods between 2015-2019. That as a result of the exclusivity Clause in the agreements, the 1st plaintiff was unable to mitigate the losses by getting other supplies of raw materials in order to undertake the production and sales.

7. Further, the defendant reduced the contract rate by Kshs. 2 per skin, despite the 1st Plaintiff meeting the quality standards agreed and there was no written agreement amending the contract rate. Finally, the defendant failed to pay the leather technician, leading to the 1st Plaintiff incurring additional expenses for paying the leather technician. In the premises, the 1st plaintiff had suffered loss of over Kshs. 37,552,308/- which it was claiming from the defendant.

8. The plaintiffs contended that by Notices dated 16/11/2020, the defendant's advocates served a 21 day statutory notices purporting to demand a debt of Kshs. 19,682,837/15, Kshs. 2,510,000/- and USD 113,808.13 within 7 days failing which they would institute liquidation and bankruptcy proceedings against the plaintiffs.

9. The plaintiffs disputed the debt on the grounds that they had a claim against the defendant for Kshs. 37,552,308/- which they

particularized in both the statement of claim and affidavit.

10. The plaintiffs contended that the Insolvency Notices against them were a scare tactic stratagem contrived to exert pressure and enforce payment of a disputed debt. That their commercial reputation would suffer immensely if an Insolvency Petition is instituted and would crystallize the floating charges held by various Banks over the assets of the 1st plaintiff.

11. The application was opposed by the defendant through the replying affidavit of **Pamidimukkala Venkata Sambasiva Rao** sworn on 6/03/2021. The defendant contended that the plaintiffs had admitted the advance of financial facilities which was outstanding at Kshs. 19,682,837/15, Kshs. 2,150,000/- and USD 113,808/13, respectively.

12. That the plaintiff's Chief Financial Officer had on 13/01/2021 acknowledged the debt. That the plaintiffs had approached the defendant for an amicable settlement whereby it had been agreed that the plaintiffs be given a rebate on interest.

13. The defendant further contended that the plaintiffs had failed to demonstrate that the intended proceedings by the defendant in respect of the admitted debt was illegal or irregular in any manner or contrary to law. That in any event, the plaintiffs' suit was premature as the Deputy Registrar of the High Court was yet to register and execute a statutory demand pursuant to the requirements of the Insolvency Act 2015.

14. In addition to the replying affidavit, the defendant raised a Preliminary Objection to the suit on the grounds that the 1st plaintiff had not filed any Board Resolution under seal authorizing the 3rd plaintiff to swear any Verifying Affidavit or pleadings on its behalf. It was urged that the application be dismissed.

15. The Court has considered the depositions of the parties and the submissions on record. This is an injunction application. The principles applicable in such an application were settled in the case of **Giella vs Casman Brown [1973] EA.** These are that; firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant shows that he will suffer irreparable injury which would not adequately be compensated by an award of damages and finally, if the court is in doubt, the application will be decided on a balance of convenience.

16. On prima facie case, the Court of Appeal held in **Mrao Ltd –v- First American Bank of Kenya Ltd (2003) Eklr,** that: -

> "***A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial. ...it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter….".***

17. The first issue to deal with is the defendant's preliminary objection. It sought the striking out of the plaintiffs' suit for failure to file an authority under seal authorizing the 3rd plaintiff to swear any pleadings on its behalf in contravention of ***Order 4 Rule 1(4) of the Civil Procedure Rules.***

18. The plaintiffs contended that they had since filed the Authority on 2/03/2021 and that the objection was therefore unsustainable. I agree with the plaintiffs who, on the authority of **Leo Investments Limited vs Trident Insurance Company Limited [2014] Eklr,** submitted that resolutions of authority may be filed at any time before the suit is fixed for hearing.

19. In the above case, **Odunga J.** held: -

> ***"Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as he suit. Its absence, is therefore, not fatal to the suit."***

20. That being the case, the preliminary objection has no merit and is hereby dismissed.

21. The next issue is whether the defendant is entitled to bring insolvency proceedings against the plaintiffs. It is clear that there exists a debt between the parties. The plaintiffs contended that they had brought the suit to counter the defendant's claim of the existing debt by claiming breach of contract. That as a result of the breach, the plaintiffs had suffered losses which they are entitled to claim from the defendants.

22. The question therefore lies as to whether the defendant is entitled to institute insolvency proceedings against the plaintiffs in the circumstances.

23. In their submissions, the plaintiffs relied on ***section 384 of the Insolvency Act, 2015.***

24. That provision provides: -

> ***"(1) For the purposes of this Part, a company is unable to pay its debts –***

a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;

b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities)".

25. There was no evidence to show that the plaintiffs were unable to pay their debts. The lending agreements were not produced. It was not shown how much was lent, what the terms of the lending were, when and how the monies were repayable.

26. Further, there were no statements of accounts or otherwise to show that the debt was due or that there was arrears on the plaintiffs' account which had not been settled.

27. Courts have often held that insolvency proceedings are usually detrimental and harsh to corporate bodies and should therefore be carefully examined before being allowed. Courts must therefore not be hasty in such matters especially where other avenues may be an option.

28. In **Joginder singh Dhanjal vs Dhanjal Brothers Ltd [2016] Eklr,** the court observed: -

"Noting that the Presentation of Winding up cause effectively paralyses the company, (see QUEENWAY TRUSTEES LTD. -VS- OFFICIAL RECEIVER AND LIQUIDATROS, TANNERIS OF KENYA LTD) it is not difficult to imagine the possible run in on the company by its creditors and the customers alike. It is not far-fetched that bank creditors would be entitled under charges to recall loans purely on the basis that a Winding up cause has been presented. In that event, the effect on the company which would reflect on contributories, including the petitioners is not difficult to fathom. I am minded to say that a Winding up court is bound to strive to obviate such eventualities occurring to the detriment of all concerned. It can only do that by looking at what I would call the best interest of the company".

29. In **Sawand Care Products Ltd v Nestle Kenya Limited [2019] Eklr**, the Court held: -

"It is now well settled that a disputed debt, unless the dispute be frivolous, makes a winding up remedy unavailable and that to invite insolvency court to undertake debt collection is improper and may amount to abuse of the process of the company court."

30. I have examined the evidence on record, the plaintiffs allege that there was breach of the agreement between the parties. That the breach had caused the plaintiffs to suffer losses which they have quantified and are claiming the same from the defendant in this suit. That claim cannot be said to be far-fetched nor to be vexatious.

31. Since insolvency proceedings are not supposed to be pressure points through which debts are to be collected, the same should not be allowed to be used as a short cut to collecting debts, more so, those that are disputed.

32. In this regard, I am satisfied that the application is well merited and I allow the same as prayed in prayer nos. 4 and 5 of the Motion dated 26/2/2021.

It is so ordered.

DATED and DELIVERED at Nairobi this 15th day of April, 2021.

A. MABEYA, FCI Arb

JUDGE