



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. APPLICATION NO. E725 OF 2019**

**IN THE MATTER OF THE**

**HP GAUFF INGENIURE GMBH & CO. KG –JBG**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015**

**AND IN THE MATTER OF**

**ONGOING CROSS-BORDER INSOLVENCY PROCEEDINGS**

**RULING NO. 3**

1. The application before the court is the Notice of Motion dated 16<sup>th</sup> August 2021 brought by the Foreign Representative, Dr Georg Bernsau, seeking orders in respect of certain assets of HP Gauff Ingeniure GmbH & Co., KG-JBG (“the Company”) as follows:

(a) Transfer of motor vehicles registration nos. KAW 151G, KAQ 632Z, KAY 395X, KAY 396X, KBG 892K, KAZ 117U, KBM 660V, KBY 438F, KCD 450L, KCB 652M, KCB 653M, KCD 513Z, KCE 463L, KCF 239Z, KCF 434C and a DYNATEST TRAILOR BLUE, 1994 0002-140.ZC0591 (FWD Machine) and USD 10,891.56 being payment received in respect of Project 3521-7663- A design support Naivasha Treatment Plant to GAUFF CONSULTANTS AFRICA LIMITED.

(b) Receive and pay into the insolvency estate accounts in Germany, EUR 50,000.00 being payment by GAUFF CONSULTANTS AFRICA LIMITED in respect of transfer of motor vehicles.

(c) Receive pending payments being KES. 5,700,000.00 on account of payment in respect of Project 35226712A Supervision of Kisumu-Kakamega Road from KENYA NATIONAL HIGHWAY AUTHORITY in respect of services it provided and to transfer the same to GAUFF CONSULTANTS AFRICA LIMITED.

(d) Leave be granted to the Applicant to transfer to the insolvency estate all assets traced in Kenya in the course of the insolvency.

2. The application is supported by the affidavit of Dr Goerg Bernsau sworn on 16<sup>th</sup> August 2021. The employees oppose the application through the affidavit of Patrick Njeru Kariuki sworn on 19<sup>th</sup> August 2021 while Kenya Revenue Authority opposed the application through oral submissions.

3. It is not in dispute that the insolvency proceedings against the Company were commenced in Germany in the Nuremberg Local Court in accordance with the German Insolvency Statute. This court recognised those proceedings by the ruling and order dated 18<sup>th</sup> January 2021 on the following terms:

*(a) The applications dated 13<sup>th</sup> August 2020 by Kenya Revenue Authority, applications dated 21<sup>st</sup> August 2020 and 23<sup>rd</sup> August 2020 by employees of HP Gauff Ingenieure GmbH & Co. KG – JBG in Kenya and the application dated 23<sup>rd</sup> November 2020 by Zamconsult Consulting Engineers Ltd are hereby dismissed. Each party shall bear their own costs.*

*(b) The proceedings and the decree of the Nuremberg Local Court issued on the 23<sup>rd</sup> of April, 2020 granting the application by*

**the Applicant, HP Gauff Ingenieure GmbH & Co. KG – JBG, protecting the Applicant’s assets against adverse changes pursuant to Section 21 (1) of the German Insolvency Statute and ordering provisional debtor-in-possession management be and are hereby recognised by this court.**

(a) An order of stay be and is hereby issued staying commencement and/or continuation of any and all adverse civil actions, barring any and all adverse Civil actions, operations of any orders and decrees issued against the Company pending the finalization of the provisional insolvency proceedings in Germany under the direction of the proceedings in the Nuremberg Local Court, in Germany or until they are lifted, varied or discharged by a further order of this Court.

(b) An order be and is hereby issued that no assets of whatever kind belonging to the Company in Kenya shall be permitted to leave, be transferred out or encumbered or otherwise disposed of without the leave of this Court.

(c) The Local Court in Nuremberg, Germany shall adopt such process that shall give the Kenyan creditors meaningful and affordable access (including but limited to virtual access) and participation in the insolvency proceedings.

(d) The Provisional Insolvency Monitor and or foreign representative shall file in this court and serve on the Creditors and or their representatives in Kenya periodical reports of the proceedings in Germany and status of the insolvency every 90 days from the date of the first report being filed and served within 30 days from the date hereof.

(e) Any Creditor in Kenya who shall be dissatisfied with the any aspect of the process shall be at liberty to apply to this Court for modification or termination of the relief.

4. According to the Foreign Representative, the Creditors Committee appointed to protect the interests of the creditors owed by the Company allowed the sale of the Company’s assets to enable collection of all revenues for the benefit of creditors. By a Project and Receivables Agreement dated 7<sup>th</sup> July 2020 and the First Amendment to the Project and Receivables Agreement dated 7<sup>th</sup> August 2020, the Company sold its Kenyan business to *Gauff Consultants Africa* Limited in order to ensure that pending projects were completed in order to avoid claims of breach against it and ensure payments due to the Company were collected. The Foreign Representative avers that the proposed transfer of assets in the application is necessary to ensure that all assets are collected for the benefit of the body of creditors.

5. Although the employees oppose the application, their counsel, Mr Mugisha, informed the court that since these proceedings commenced, only 6 claims by employees out of 38 lodged have been resolved. Whether the claims are valid or not is a matter of dispute which this court cannot delve into. It is however agreed that both sides have engaged in settlement negotiations.

6. KRA expressed its opposition to the proposed transfer by the letter dated 9<sup>th</sup> July 2021 in which it stated that any transfer of assets would put at risk outstanding tax liabilities. Mr Lemiso, counsel for KRA, submitted that the Company owes KRA KES. 1.9 billion in taxes which it is apprehensive that if the said amount is not properly secured, it is unlikely to be collected. It urged the court to reject the application and if it is minded to allow it, order the Company to provide security in line with **section 36** of the **Tax Procedures Act, 2015**. In response, to this submissions, counsel for the Company informed the court that the amount claimed by KRA was disputed and was the subject of ongoing judicial proceedings.

7. In the ruling dated 10<sup>th</sup> January 2021, I stated that who should be paid and under what circumstances are matters that are normally dealt with by the Insolvency Court and the manner of dealing with the assets of the Company are within the power and authority of the Insolvency Court in this case the Local Court in Nuremberg, Germany subject to the conditions imposed on the recognition order. The issues raised by the Creditors are the same issues raised in opposition to the application for recognition and which I took into account in line with the provisions of the **Fifth Schedule** to the **Insolvency Act**. It is for this reason I granted the relief on the terms set out in the recognition order. In that regard, I reiterate what I stated in the ruling in relation to the creditors:

*The application by KRA was made after these proceedings were commenced and the order staying any further proceedings issued by this court on 2<sup>nd</sup> June 2020. Allowing the orders would in effect paralyse the insolvency proceedings in Kenya contrary to the provisions of the **Fifth Schedule**. Further, if the orders sought by the Employees, Zamconsult and KRA are granted, all the other creditors will be disadvantaged. Granting those orders, would mean that the creditors in Kenya would be given priority or preference over all the other creditors of the Company elsewhere. This would undermine the basic principle underlying insolvency, that is, all creditors of the same class must be treated fairly and equally. It would also amount to this court taking over the insolvency proceedings contrary to the **Fifth Schedule**.*

8. I do not think any circumstances have been brought to the court’s attention to warrant the taking any steps that would give the Kenyan creditors any preferential treatment. Consequently, I allow the Notice of Motion dated 16<sup>th</sup> August 2021 in terms of prayers 1, 2 and 3 only. The Foreign Representative shall continue to adhere to the terms of the recognition orders made on 18<sup>th</sup> January 2021.

**DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Wachira instructed by Munyaka Advocates LLP for the applicants.

Mr Mugisha instructed by Nyaanga and Mugisha Advocates for the Creditors (Employees of HP Gauff Ingenieure GMBH & Co)

Mr Lemiso, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.