



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

MISC. APPLICATION NO. E239 OF 2021

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT

OF FOREIGN ARBITRAL AWARDS

BETWEEN

MOBILE ACCORD INCORPORATEDAPPLICANT

AND

REELFORGE SYSTEMS LIMITEDRESPONDENT

RULING

1. The Applicant commenced these proceedings by filing the Chamber Summons dated 30th March 2021 seeking recognition and enforcement of an Interim Award dated 30th June 2020 and a Final Award dated 14th August 2020 issued by Jane Michaels, Arbitrator in a reference between the parties.
2. Before that application could be heard, the Respondent filed the Notice of Motion dated 16th June 2021 seeking to stay these proceedings on the basis of pending insolvency proceedings; **Insolvency Petition No. E047 of 2021, In the matter of Reelforge Systems Limited** filed by a creditor, Bonface Ojigo Ong'ijo. The application is supported by the affidavit and supplementary affidavit of Sammy Moses Lusiola, a director of the Respondent, sworn on 16th June 2021 and 29th June 2021 respectively. The application is opposed by the Applicant through the affidavit of its Chief Financial Officer, Mark Schmidt, sworn on 20th July 2021.
3. The matter was canvassed by oral submission made by the respective advocates.
4. It is not in dispute that liquidation proceedings have been commenced against the Respondent. The issue for determination is whether the court should stay these proceedings pending resolution of the insolvency cause. The Respondent has invoked **sections 428 and 430** of the **Insolvency Act** ("the Act") which provide as follows:

428. Power to stay or restrain proceedings against company when liquidation application has been made

(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.

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 of the liquidation is void.

5. Counsel for the Respondent cites the aforesaid provisions to submit that the court has jurisdiction to make an order of stay pending liquidation proceedings and that in the circumstances of this case, it would be proper to make the order in order to protect the principle of equality of creditors which is a matter of public policy. Counsel urged that the Applicant would not suffer any prejudice as it is entitled to make its claim in the liquidation proceedings.

6. Counsel for the Applicant objects to the application on the ground that the nature of the application before the court is only for recognition of the foreign arbitral award and proceedings and the application shall not prejudice the Respondent or any other creditor particularly in view of the fact that no liquidation order has been made. Counsel also discounted the application of **section 430** of the **Act** as the Applicant was not in the process of executing any order or decree hence its application should not be stayed.

7. The purpose of the **sections 428** and **430** of the **Act** cited above is to prevent a run on the company's assets by one or more creditors who fear that the company may be liquidated once insolvency proceedings are commenced. This purpose was expressed by Tuiyott J.,(as he was then) in **Ndane Construction Company Limited v Spencon Kenya Limited ML HCCC NO. 185 OF 2015 [2016] eKLR** as follows;

[22]. 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 permitted. This Court cannot, therefore, make orders that are voided by the provisions of Section 225.

8. Further, in deciding the application, the court must be guided by the objectives of the **Act** set out in **section 3(1)(c)** thereof as follows:

3(1) The objects of this Act are-

(c) In the case of insolvent companies and other bodies corporate whose financial position is redeemable-

i. enable those companies and bodies to continue to operate as going concern so that ultimately they may be able to meet their financial obligations to their creditor in full or at least to the satisfaction of those creditors; and

ii. to achieve a better outcome for the creditors as a whole than would likely to be the case if those companies and bodies were liquidated.

9. Under **section 428** of the **Act**, the court has jurisdiction to stay court proceedings once a liquidation application, in this a case a petition, has been lodged. As **section 428(2)** of the **Act** indicates, the court has discretion whether or not to stay proceedings and may do so on such terms it considers appropriate.

10. Counsel for the Respondent asserted that permitting these proceedings would undermine the general principal in insolvency proceedings that creditors ought to be treated equally. While I agree with this general principal, I do not agree that the prosecution of the application for recognition, would in itself, undermine or affect any other creditors or undermine the objects of the insolvency law. In this case, all the Applicant seeks is an order for recognition of the arbitral award and in the event that it seeks to enforce it, the court would still have the jurisdiction to stay such proceedings.

11. The Respondent has not established any reason why the court should stay these proceedings pending liquidation proceedings against the Company. Consequently, the application dated 16th June 2021 is now dismissed with costs.

DATED and DELIVERED at NAIROBI this 23RD day of AUGUST 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Gethoi instructed by CM Advocates LLP for the Applicant.

Mr Obok instructed by Prof. Albert Mumma & Company Advocates for the Respondent.