



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO.96 OF 2019

KAHINDI MUMBA CHOME & 23 OTHERS.....APPLICANTS

VERSUS

ARM CEMENT PLC LIMITED (Under Administration).....RESPONDENT

RULING

1. By a **Notice of Motion** application dated 23rd **January, 2019** brought under the provision of **Article 159(2)** of the **Constitution of Kenya**, **Section 3A** of the **Civil Procedure Act**, **Order 1 Rule 10(2)** of the **Civil Procedure Rules** and **Section 560 1(d)** of the **Insolvency Act** and all other enabling provisions of the law, the Applicants seek for the following orders:

- a. That leave be granted to the Applicants to proceed and continue with the suits against the Respondent;*
- b. That PWC's Muniu Thoithi and George Weru the Administrators of ARM Cement Plc be enjoined as Co- Defendants;*
- c. That the orders sought do apply to the following suits involving ARM Cement Plc Limited (formerly, Athi River Mining):- ELRC 443 of 2018, ELRC 336 of 2018, ELRC 248 of 2018, SRMCC 230 of 2018, SPMCC 71 of 2016 and RMCC 45 of 2017;*
- d. Costs be in the cause.*

2. The grounds upon which the application is brought are that the Respondent; ARM Cement PLC (formerly Athi River Mining) was placed under administration following an application by its secured lenders and **PWC's Muniu Thoithi** and **George Weru** appointed as its administrators. As such, the Applicants are unable to proceed with any legal proceedings unless leave is granted by this court.

3. Further, that under **Section 560 1(d)** of the **Insolvency Act**, this court is clothed with Jurisdiction to grant such leave which if so granted will not prejudice the Respondent in this suit.

4. It is also averred that in exercise of its discretion in this suit, the court will be furthering its Constitutional mandate to foresee justice being administered without undue regard to procedural technicalities and that justice is not delayed. For those reasons, it is pleaded that the court grants leave and that the two administrators be enjoined as Defendants in the suits.

5. Those facts were repeated and reiterated in the affidavit of support sworn by **Laura Mbithe Mwadime**, the Applicants' advocates, which exhibited the pleadings for all those suits with respect to which leave is being sought.

6. The application is opposed by the Respondent through the **Replying Affidavit** of its Human Resource Manager, **Ephraim Gaitho** who has termed the application as misconceived, an abuse of the court process and maliciously drawn to mislead the court to interrupt the moratorium that has been placed over all legal proceedings against the Respondent who is under administration and its affairs placed under the hands of the two administrators as mentioned by the Applicants.

7. The Deponent has gone on to outline the objectives administration as provided for under **Section 522** of the **Insolvency Act** so as to maintain the Company as a going concern and achieve better outcome of the company but added that the administration should not always be disrupted unless there are clear and special circumstances.

8. Nonetheless, it has been conceded that the court has jurisdiction to grant leave under **Section 560** of the **Insolvency Act** to a party seeking to commence or continue with proceedings against a company under administration but only if such party shows exceptional circumstances. In the present case, it is averred that the Applicants have not shown exceptional circumstances.

9. With respect to the prayer seeking to enjoin the administrators as Co-Defendants, it is averred that the administrators can only be joined to a suit for actions arising from their duties and capacity as administrators. Since such is not the case herein, the respondent is of the view that such prayer is aimed to disrupt and frustrate the administrators from exercising their statutory duties and should therefore be dismissed.

10. The parties were then directed to canvass the application by way of written submissions with the applicants filing their submissions on **12th February, 2021** while the Respondent filed its submissions on **6th April, 2021**.

Applicants' Submissions

11. In their submissions, the Applicants reiterated their earlier position as articulated in the grounds of the application but added that they have met the threshold under **Section 560** of the **Insolvency Act** for the reason that they are former employees of the Respondent and are likely to suffer significant loss and loss of their income if the application is disallowed. In support of their submissions, they have cited the cases of **Vehicle and Equipment Leasing Limited –vs- Athi River Mining Limited & another [2020]eKLR, Kenya Power & Lighting Company Limited –vs- Esther Wanjiru Wokabi[2014]eKLR** and **Bakery Confectionery Food Manufacturers & Allied Workers Union (K) –vs- Tahir Sheikh Grain Millers Limited [2020]eKLR**.

Respondent's Submissions

12. On the other hand, the Respondent has pointed out three issues for determination which are; *whether the Applicants have met the threshold to warrant the grant of leave to continue with the proceedings as sought, whether the Respondent's Administrators should be enjoined as Co-Defendants in the subject suits and lastly on who should bear the costs of the suit.*

13. On the first issue, the Respondent has reiterated the contents of its Replying Affidavit and maintained that since there is a moratorium in place, insulating the Respondent from all legal proceedings, the grant of leave as sought would defeat the essence of the administration and distract the administrators' attention from their statutory duties to defending the Applicants' suits and the end result would be that the Respondent together with all its creditors, will suffer substantial loss.

14. It has been submitted that the fact that the Applicants had instituted the subject suits before the Respondent was placed on administration, cannot be the basis of interfering with the moratorium in place in terms of **Section 560** of the **Insolvency Act**. Further, that the Applicants will suffer no prejudice if the moratorium remains in place since they (the Applicants) shall be at liberty to pursue their suits once the Respondent is discharged from administration. Still on **Section 560 (supra)**, the Respondent has argued that it fully complied with the said Section by notifying the Applicants of the administration at the earliest opportune despite publishing the same in the Kenya Gazette and the Daily Newspapers.

15. Be that as it may, the Respondent has submitted that the Applicants' subject suits are merely seeking terminal and collateral dues arising from redundancy and alleged negligence which has no proprietary interests over it so as to take priority over the legitimate interests of the creditors.

16. As to whether the Respondent's Administrators should be enjoined as Co-defendants in the subject suit, besides reiterating the position stated under the Replying Affidavit, the Respondent submitted that administrators can only be joined to an action only in instances stipulated under **Sections 591 and Section 592** both of the **Insolvency Act**. The Respondent has also added that the administrators only act as agents of the company under administration and under common law, an agent cannot be sued where the agent is disclosed unless there are factors vitiating the liability of the disclosed principal.

17. Lastly, on the question of costs, the Respondent has submitted on **Section 27** of the **Civil Procedure Act**, which essentially provides that costs of a suit shall follow the event unless otherwise directed by the court on good cause.

Analysis and Determination

18. I have considered the application, the affidavit in support and in rebuttal thereof, the submissions by both parties as well as the authorities and the law cited in support thereof, and find that the main issues for determination are:-

a. Whether leave should be granted to the Applicants to continue with the subject suits against the Respondent; and if so,

b. Whether the Respondent's Administrators should be enjoined to those suits as co-defendants;

c. Who should bear costs of the suit.

a. Whether leave should be granted to the Applicants to continue with the subject suits.

19. It is a common ground in this case as conceded by all parties that once the Respondent Company was placed under administration, no proceedings could be validly undertaken against the Respondent prior to obtaining the leave of the Court or with consent of the administrator. The position is buttressed under **Section 560(1)** of the **Insolvency Act**, which provides as follows;

a. A person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;

b. A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the

consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;

c. A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and

d. A person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court."

20. Similarly, the court in the case of **Owiti, Otieno and Ragot Advocates –vs- Mumias Sugar Co. Limited (Under Administration) [2020] eKLR**, in circumstances akin to the issues at hand expressed itself as follows;

“When considering whether to grant approval under section 560, the court may in particular take into consideration – (a) the statutory purpose of the administration; (b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;(c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and (d) the conduct of the parties.”

21. In the instant case, there is no doubt that the Applicants are former employees of the Respondent and had initiated proceedings prior to the Respondent being placed into administration specifically in **ELRC 443 of 2018, ELRC 336 of 2018, ELRC 248 of 2018, SRMCC 230 of 2018, SPMCC 71 of 2016 and RMCC 45 of 2017** claiming their terminal dues. In my view, former employees claiming their terminal dues are preferential creditors and do therefore have a legitimate interest which should not be overlooked once a company is placed under administration.

22. I am also persuaded that the dispute between the Applicants and the Respondent can only be resolved through a legal process and if approval as sought is not given, the Applicants stand to suffer a greater harm. Therefore, granting leave as sought will enable the Plaintiff to progress with the suits which will aid in ascertaining whether the claim on terminal dues and/or alleged negligence is merited or not. In the end it is this court's finding that the prayer for leave to be granted to the Applicants to continue with the proceedings against the Respondent is merited and is hereby allowed.

b. Whether the Respondent's Administrators should be enjoined to those suits as Co-defendants

23. The Applicants have sought in their application that the Respondent's Administrators be joined in the subject proceedings as co-defendants for purposes of continuing with the suits. On the other hand, the Respondent has vehemently opposed the prayer on grounds that the administrators are merely its agents and once the principal is disclosed or known to the Claimants, the Agent cannot be sued.

24. Be that as it may, as a general rule, a person qualifies to be joined as a Co-defendant only when it is shown that the order to be made is to bind that person. In the instant case, it is to be noted that the Applicants seek to be awarded terminal dues owing from their contracts of employment with the Respondent as well as damages accruing from alleged acts of negligence by the Respondent. Therefore whatever award the court will make the Administrators will not be liable in their personal capacity to settle any claim by the Applicants. It would therefore be unnecessary to join the administrators as Co-defendants and in my view, the best way would be joining them as Interested Parties.

25. In the end, and for the reasons stated above, the application dated 23rd January, 2019 is allowed in the following terms;

a. The Applicants are granted leave/consent of the court to continue with proceedings in suits No. Mombasa ELRC Cause No. 443 of 2018, Mombasa ELRC No.336 of 2018, MOMBASA ELRC No.248 of 2018, KALOLENI R.M.C.C No. 230 of 2018, Mariakani P.M.C.C No. 71 of 2016 and Kaloleni P.M.C.C No. 45 of 2017 against the respondent which is under administration.

b. The Respondent's Administrators PwC's Muniu Thoithi and George Weru be enjoined in the suits mentioned in (a) above as interested parties for purposes of continuation of the said suits.

c. There will be no orders as to costs.

It is hereby so ordered

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASA this 11TH day of AUGUST 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for the Applicants

M/S Mwaniki counsel holding brief for Mr. Kimathi counsel for Respondent

Court Assistant - Winny