In re Tusker Mattresses Limited (Insolvency Cause E018 of 2020)
[2021] KEHC 276 (KLR) (Commercial and Tax) (26 November 2021) (Ruling)

Neutral citation: [2021] KEHC 276 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E018 OF 2020

F TUIYOTT, J

NOVEMBER 26, 2021

N THE MATTER OF TUSKER MATTRESSES LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT (NUMBER 18 OF 2018)

BETWEEN

TUSKER MATTRESSES LIMITED ..... APPLICANT

AND

HOTPOINT APPLIANCES LIMITED ..... RESPONDENT

RULING

1. Tusker Mattresses Limited (the Company) is in financial distress and is facing three petitions seeking its liquidation.

2. The company resists the Petitions and has filed two applications. This ruling is in respect to both applications.

3. The Notice of Motion dated 13th October 2020 seeks the following substantive orders:-

    (5) THAT an order does issue restraining and/or staying any and all legal or analogous process or actions against the Applicant, including legal proceedings pending against the Applicant before this and other Courts tribunals and quasi – judicial bodies for a period of 12 months following the issuance of this order or for such other period as this Court may in its direction deem fit.

    (6) THAT an order does issue staying any and all execution of all judgments, decrees, orders interim or otherwise and execution proceedings against the

Applicant's assets including inter alia proclamation of attachment, seizure, repossession, sequestration, enforcement of security and any other form of execution proceeding or analogous process or action against the Applicant for a period of 12 months following the issuance of this order or for such other period as this Court may in its discretion deem fit.

(7) THAT an injunction be granted against any and all eviction, distress for rent, forfeiture by any landlord or person acting through it through re-entry or closure of, or the interference with the quit possession of the Applicant otherwise at all and any of the premises it occupies pursuant to a lease, tenancy agreement, license and/or controlled tenancy for a period of 12 months following the issuance of this order or for such other period as this Court may in its discretion deem fit.

(8) THAT this Honourable Court be pleased to adjourn the hearing of the liquidation petition dated 21st August 2020 for a period of 12 months or for such other period as this Court may in its discretion deem fit.

4. That of 27th November 2020 prays as follows:-

(2) THAT this Honourable Court be pleased to validate the intended sale and disposition of the Applicant's non-core assets at its Nanyuki Mall, Eldocenter, Shiloa, Mtwapa Mall, Mega Mall, Pioneer, Karen CrossRoads, Lolwe, Ananas, Buru Buru, Juja City Mall, Chigware, Milele, Kitengela, Adams, Malindi, North View, Uthiru and Mirema outlets.

5. The Company explains that it runs a chain of supermarkets in the name and style of Tuskys Supermarkets with 53 branches across Kenya. That it has engaged a Mauritian investment firm for a financial facility of Kshs.2,100,000,000,00. At the heart of the first application is that the company requires time to pursue and finalize the restructuring process. In the earlier application, the company explains that it has made arrangements to engage its creditors,in clusters, on the proposal.

6. Ground 9 to the application recaps why the company requires time:-

"(9) THAT the Applicant's business is and remains commercially viable and the Applicant reiterates its commitment to the settlement of all debts truly owed by it, but only requests that it be granted time within which to:-

a. Finalize negotiations with its investors on the terms of the facility agreement;

b. establish its true level of indebtedness by conducting an evaluation, verification and reconciliation exercise against all claims brought against it;

c. conduct a debt restructuring exercise which will enable the Applicant to continue trading and generate the necessary revenue to settle its debts; and

d. reach out to all its creditors with its restructuring proposals including proposals on the settlement of the debts truly owned to each creditor."

7. In a further affidavit of Chadwick Omondi Okumu on 27th November 2020 he gives more details of the turnaround plan. It is stated that the applicant's strategy is towards rescuing its business, resuming operations as a going concern and settling the debts owed to its creditors. He also produces minutes of 7 meetings held with different clusters of creditors in which they were updated with the implementation of the business plan.

8. There is further information in the 2nd supplementary affidavit of Mr. Okumu sworn on 16th April 2021. He justifies why liquidation of the company in its current financial state would not offer the creditors (a large portion of whom are unsecured creditors) any reprieve whatsoever. He states that as at June 2020, it was estimated that only Kshs.6,678,579,000.00, representing 34% of the total sum owed to unsecured creditors as a class, would be available for distribution.

9. The company denies shutting down its operations and names 7 outlets as open and operational. The company laments that a majority of the outlets have closed due to ultra vires action of landlords.

10. As to the capital injection of Kshs.2,100,000,000.00, some Kshs.500,000,000.00 had already been released.

11. Touching on the position of its bankers, the company explains that DTB is onboard with the recovery plan and has agreed to restructure the existing Kshs.1,700,000,000.00 short term loan to a term loan and to provide overdraft facilities of Kshs.450,000,000.00.

12. The petitioners in this consolidated petition are Hotpoint Appliances Limited and Syndicate Agencies Limited. They and some creditors namely Greenspan Mall,Chatur Properties Limited oppose the adjournment motion. On the other hand, ten creditors support the application. They are Locum Investments Limited, Jeff Hamilton (K) Limited, Armstrong Young (K) Limited, Finsbury Trading Limited, Artemis Outsourcing Limited, Omega Risk Management Limited, Adix Plastics Limited, L.G Harris (EA) Limited, Smart Brands Limited and Kenstar Plastic Limited.

13. In opposition, the Court is asked to note that the company has neither opposed nor defended the petition and has no locus standi to seek adjournment of the hearing of the petition. Second, that the company is literally on its deathbed and does not have a credible restructure or revival plan. Another issue raised is that the company is guilty of non-disclosure and lacks transparency in reporting.

14. There seems to be consensus that the Court has power to adjourn the hearing of a liquidation application and that power is located in section 427 (1) of the *Insolvency Act*:-

> 1. On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate—
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> (a) an order dismissing the application;
>
> (b) an order adjourning the hearing, conditionally or unconditionally;
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> (c) an interim liquidation order; or
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> (d) any other order that, in its opinion, the circumstances of the case require.

15. That this power can be invoked even before the commencement of the actual hearing of a liquidation petition was alluded to by Majanja J in *Synergy Industrial Credit Limited v Multiple Hauliers (EA) Limited* (2020) eKLR in which the judge observed:-

> "

"53. Although the aforesaid provisions seem to suggest, as counsel for the opposing creditors have submitted, the court can only exercise those powers at a hearing, the inherent power of the court to entertain any interlocutory applications which is incidental and ancillary to the jurisdiction to "supervise liquidation" cannot be gainsaid. The power to entertain applications other than the hearing of the petition is an inherent and necessary power of the court to do justice to the parties and to prevent an abuse of the court process. In Re Ukwala Supermarkets Limited [2019] eKLR, Kasango J., expressed the view that:

In any Petition brought for the purposes of liquidating a Company, the Court has the discretion, once the Petitioner has established a right to bring a Petition and established the grounds alleged, to make or deny the order sought. By the same vein, the Court also has an inherent jurisdiction to strike out any Petition which is bound to fail or is an abuse of the process of the Court.

54. I would even go further and hold that "hearing of a liquidation application" under section 427(1) of the Act encompasses the hearing of interlocutory applications, giving directions and doing all things that go into processing the liquidation application to its conclusion. The fact that the court can entertain an interlocutory application does not deprive the parties to the right to a fair hearing. Even at that stage, the court is obliged to give the parties an opportunity to present their respective positions. In this case, the creditors, both opposing and supporting, have filed depositions and submissions stating the positions in response to the application. I therefore find and hold that the court has jurisdiction to entertain the Company's application."

16. This is a view I endorse. If by dint of sub-paragraph (b), the Court can adjourn the hearing, conditionally or unconditionally, then it should be able to do so even before the actual hearing commences as long as there is sufficient material before the Court upon which it can found and justify the order. That the Court should have this broad power would be in tandem with one of the primary objectives of the current insolvency framework which is encapsulated in section 3(1) (c) of the *Insolvency Act* which reads:-

"(1) The objects of this Act are—

a. .....

b. .....

c. in the case of insolvent companies and other bodies corporate whose financial position is redeemable—

(i) to enable those companies and bodies to continue to operate as going concerns so that ultimately they may be able to meet their financial obligations to their creditors 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."

17. But as is clear from the language of section 3(1) (c) of the *Insolvency Act*, the power to adjourn is only exercisable when the financial position of the insolvency company is redeemable. It is not an order to be made merely to postpone the day of reckoning. The onus is on the party applying, in this event the company, to establish that its financial position is redeemable and revival be given a chance.

18. As observed by Harris J in *Re Founder Information (Hong Kong) Ltd* (01/02/2021, HCCW 350/2020) [2021] HKCFI 311, (a decision cited by the company), the true nature of an application such as the one before court is more commercial than legal. The Court is asked and has to determine, on the material before it, whether the company is redeemable. The Court may in fact reach the decision that a company is salvageable but later events prove otherwise. That should not worry the Court too much because it is duty-bound, on the basis of the material before it, to make orders that could breathe life into an ailing company.

19. I think that on the material placed by the parties I can reach a decision as to whether adjourning the hearing of the Petition gives the company a realistic opportunity to return back to life.

20. I start by noting that what the company sought was an adjournment for a period of 12 months or for such period as the Court may its discretion deem fit. The Court takes it that, the company needed 12 months of the date of the application, being 13th October 2020, to put in place a viable restructuring plan. If there was doubt then hear what Mr. Okumu, in his affidavit of 16th April 2021 says:-

> (33) THAT in any event, the Applicant has only sought a stay of the application, and the Petition can always be revisited once the 12 months are over should the Applicant be unable to show evidence of the rehabilitation of its business and operations or efforts towards settlement of the debts owed to its creditors."

21. By fate presented by the delay in Court proceedings the twelve (12) months sought by the company has now run its full course. All this while the company has enjoyed interim orders and had opportunity to implement its restructuring plan. The Court is aware that by the time of the hearing of the application there had been no further movement in the implementation plan and there may therefore be some justification in the skepticism expressed by the petitioners and opposing creditors.

22. That said it has been over 6 months (21.05.2021) since the hearing and there may have been progress in the intervening period. The Court will grant parties an opportunity to report back on whether there has been any forward movement, failing any positive report on restructuring then it will not adjourn the hearing any further.

23. In reaching this decision I do not downplay the fact that a substantial number of creditors support the adjournment. In this regard the company had urged the Court to take into account the observation in Harris J on this aspect of creditor support when in Re Founder Information *(Hong Kong)* (Supra) he stated:-

> "
>
> " 51. I summarise how this balancing exercise is to be approached when, as in the present case, creditors take differing views about what is in their best interests in Re Chase On Development Ltd [9]:
>
> > "In cases in which a company is clearly insolvent and a petitioner's debt is not in dispute an important consideration, when a court it being asked to adjourn a petition by a Company in order to allow

it to attempt to restructure its debt, are the views of its unsecured creditors.

If the creditors are taking different views the Court will normally take into account all the circumstances including the following considerations:

(a) A qualitative assessment of the number of creditors for and against a winding-up order. It is not just a matter of counting the number of creditors in favour and those against or the proportion of the value of the debt they hold.

(b) The reasons proferred by the supporting and opposing creditors.

(c) The feasibility of the proposed restructuring."

In practice the court is making a decision which commonly will be more commercial than legal. In most situations the court takes the view that a party is best placed to assess what is in its best financial interests, but the nature of the insolvency process involving, as it frequently does, multiple creditors inevitably throws up situations where there are genuine differing views. This may be explained by varying degrees of knowledge amongst the body of creditors about a company, its commercial prospects or the insolvency process. In these circumstances the court has to decide, which view it considers preferable at the time the decision has to be made. Snowden J provides an example in his judgment in Re Maud (No 2) [10] of how the court approaches this task in the analogous situation of personal bankruptcy:

"Taking all these factors into account, I am not currently satisfied that the interests of Mr. Maud's creditors would be served by making him bankrupt immediately. Whilst there is no certainty, there does now seem to be some prospect of an imminent end-game to the Spanish insolvency which might bring a benefit to Mr. Maud and his creditors if he continues to be able to play a role in Spain. In contrast, there seems to be no real likelihood of any obvious, still less immediate, benefit to his creditors if a bankruptcy order is made now, and I have not been given any specific reason why a formal investigation of Mr. Maud's past dealings needs to be undertaken immediately.

The majority in number and value of Mr. Maud's creditors are also in favour of a further adjournment, and whilst I recognise that the creditors who have advocated or supported an adjournment may have other interests to serve, I cannot say that I find their approach unreasonable or irrational. I also have in mind that the only voice that I actually heard in favour of the making of such an order, that of Edgeworth, also comes from a party that is vigorously pursuing its own commercial agenda outside the bankruptcy proceedings" (emphasis added).'

24. The view of the supporting creditors must however be weighed on scale with the reality as to whether a proposed restructuring is viable. Here, we are told, that the company needed 12 months to implement a viable restructuring plan. The 12 months have passed and unless the Court receives evidence of meaningful steps towards the restructuring then the Court will have to find that the optimism of the supporting creditors is perhaps an unrealistic optimism. In making this observation I have considered neither those creditors nor the company allege that the petitions presented are motivated by ill faith or malice.

25. Attention now turns to the application for an order for stay of legal proceedings brought under section 428 of the *Insolvency Act*:-

> " 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 —
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> (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."

26. The general rule is that once a liquidation Petition has been presented, absent very exceptional circumstances, legal proceedings against the company should be barred or stayed as a way of preserving the assets of the company. As explained in *Bowkett v Fuller's United Electric Works Ltd* [1922] All ER 281 this secures an equality among all creditors of the same class.

27. It is common ground that there are ongoing litigation or threats of such proceedings against the company and unless stay is granted there shall, all likelihood, be a run for the company assets. Those unsecured creditors who will have been able to complete the proceedings and execute against the assets of the company will have gained an unfair advantage over other unsecured creditors. This will go against a core objective of the insolvency law, that creditors of like class should be treated equally.

28. No exceptional circumstances, save in respect to one creditor, has it been demonstrated that the Court should not grant this order. That creditor who stands in unique circumstances is Greenspan Mall Limited (Greenspan). Greenspan owns a shopping mall known as Greenspan Mall in which one of the company's supermarket was housed. Having failed to pay rent on time, the creditor issued a warrant for distress of rent against the property of the Company. Sale under distress consequently happened on 4th November 2020. Greenspan states that following the distress the company abandoned the premises.

29. A grievance by Greenspan is that notwithstanding the abandonment, the Company has failed or refused to execute a surrender of lease and it is therefore unable to lease the premises to a potential tenant. I am urged by Greenspan to allow them to commence Court proceedings against the company to compel execution of the surrender. And I see no reason not to do so.

30. That the company, as previous tenant, has abandoned Greenspan Mall is not controverted. Similarly, there is no dispute that in respect to the property taken under distress, the same has been sold. In these circumstances, there can be no advantage given to Greenspan if it were to be permitted to press, by way of litigation, that the company executes the surrender. Only to that extent will the bar on legal

proceedings against the company be allowed. Greenspan will, however, not be permitted to use that window to sue for rent still outstanding, said to be Kshs.25,908,625.25 as at 23rd December 2020.

31. The company tells Court that other than the expected Kshs.2,100,000,000.00 working capital injection, it intends to generate additional capital of Kshs.911,500,000.00 from the intended sale of some non-core assets set out in its motion of 27th November 2020. The Court is also told that the company has already executed letters of offer in respect of the assets at its Mtwapa Mall, Mega Mall and Nanyuki Mall.

32. The Court is asked to sanction the intended sale so that the intended buyers take up the sales and benefit from the spikes in the sales of an upcoming holiday season, a season that may well have now past. Second, that the sales would allow the company to surrender the premises without incurring further rental income. Last, that the sales frees the company to concentrate its resources on the outlets it intends to retain. The company argues that all this ultimately benefit the creditors.

33. The creditors who oppose the sales argue that by virtue of section 429 of the *Insolvency Act*, the sale of assets is void ab initio and that the company, by entering into the arrangement for sale disregarded the provisions of statute.

34. The Petitioner then raises the following concerns:-The company has neither disclosed all its assets nor given a clear picture of its current financial position to the Court, therefore the Court has no way of establishing whether the assets proposed to be sold are core or non-core to the business of the company.The proposed sale would in any event amount to a partial liquidation, which involves sale of assets to pay off the debts. Allowing such a sale to go on unsupervised by the Court is not in the best interests of the creditors.The proposed sale appears to have been already arranged by the company and four (4) agreements duly signed and they have provided for no way of supervision of the same by the court or the creditors.There is no evidence of the list and valuation of the said assets, only an estimate of their total value of Kshs 911 Million as stated by the company. There is therefore no way of ascertaining that a sale would obtain the best price possible.The company has not disclosed how it intends to apply the proceeds of the sale, and what measures have been put in place to ensure that the proceeds do not end up in the same mismanagement woes as the capital injection of the short term loan's first tranche of Kshs 500 Million already received.

35. Section 429 of the *Insolvency Act* reads:-

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

36. The rationale behind section 429 of the *Insolvency Act*, as correctly submitted by Hotpoint, is that once a liquidation Petition has been presented in Court then the company assets ought to be protected. This

is to guard against the directors of the company disposing of the company assets to the detriment of creditor (See *J in Coutts & Co v Stock* [2000] 1 WLR 906.)

37. That said there will be occasion when it would be to the benefit of creditors if assets were to be sold after the presentation of the liquidation petition but before the liquidation order is made. The company cites to this Court the decision of Buckley L.J in *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 which discusses such instance:-

> " It is a basic concept of our law governing the liquidation of insolvent estates..... that the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's unsecured creditors as at that date.....There may be occasions, however, when it would be beneficial, not only for the company but also for its unsecured creditors, that the company should be enabled to dispose of some of its property during the period after the petition has been presented but before a winding up order has been made. An obvious example is if the company has an opportunity by acting speedily to dispose of some piece of property at an exceptionally good price. Many applications for validation under the section relate to specific transactions of this kind or analogous kinds. It may sometimes be beneficial to the company and its creditors that the company should be enabled to complete a particular contract or project, or to continue to carry on its business generally in its ordinary course with a view to a sale of the business as a going concern.....
>
> In considering whether to make a validating order the court must always, in my opinion, do its best to ensure that the interests of the unsecured creditors will not be prejudiced. Where the application relates to a specific transaction this may be susceptible of positive proof. In a case of completion of a contract or project the proof may perhaps be less positive but nevertheless be cogent enough to satisfy the court that in the interests of the creditors the company should be enabled to proceed.....
>
> Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claims, it is, in my opinion, clear that the court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interests of the unsecured creditors as a body."

38. As is revealed by that decision, the overarching consideration for a Court in validating a pre-liquidation order sale is that it will achieve an outcome beneficial to the interests of the unsecured creditors.

39. In this instance, the creditors of the company began the process of the sale of the intended assets before seeking the consent of the Court. This has led to mistrust and suspicion on the part of some creditors who have raised certain questions. These include whether the assets intended to be sold are indeed non-core assets and how valuation was reached.

40. The Court takes the view that if the sale of certain non-core assets now and not later can achieve a benefit to the creditors then the same should be allowed to proceed but only after the concerns raised by the creditors have been addressed. Further the process should under the supervision of Court so that any concerns of the creditors can be quickly resolved.

41. The Court will be willing to allow the sale but only after the company files a report satisfactorily explaining or demonstrating the following:-

    i. How the assets proposed to be sold are indeed non-core assets.

ii. A full inventory of the assets to be sold.

iii. A current valuation of those assets.

iv. Details of how the proceeds are intended to be applied.

42. In the end, the Court makes the following orders as regards the two applications:-

1. The Court shall adjourn the hearing of the liquidation Petition filed herein for a period of 30 days to enable the Court receive a report on the progress of the restructuring plan.

2. The Court shall at the end of that period make an order as to whether there shall be further adjournment to the hearing of the liquidation Petition.

3. Parties shall at the time of delivering of this Ruling appoint a mention date for the Court to make further orders envisaged in 42.2 above.

4. There shall be a stay of any and all legal proceedings, actions against the company or stay of executions of judgment, orders, decrees against the company pending the hearing and determination of these proceedings.

5. Order 42.4 above does not apply to Greenspan who are at liberty to commence legal proceedings against the company but only limited to compelling the company to execute a surrender of lease over Nairobi/Block 82/8759.

6. The Court shall consider and give further orders in regard to the sale of assets set out in the Notice of Motion dated 27th November 2020 after receipt of the report required in paragraph 41 of this decision.

7. Parties shall bear their own costs in respect to the Notice of Motion of 13th October 2020 and 27th November 2020.

43. Last I must apologise to the parties for the late delivery of this Ruling. It was ready by 29th September 2021 and I was always under the impression that I had passed on for delivery. Had it not been a reminder by the indefatigable Nixon (my former court assistant), this delay would have been worse.

DATED AND SIGNED THIS 12TH DAY OF NOVEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT: