



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**INSOLVENCY PETITION NO. 25 OF 2018**

**IN THE MATTER OF UCHUMI SUPERMARKETS PLC**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT**

**RULING**

1. Uchumi Supermarket Limited (herein after the company) is in the business of operating supermarkets throughout Kenya. It was incorporated in 1975.

2. A petition was filed in this matter by Githunguri Dairy Farmers co-operative society seeking the liquidation of the company for non payment of debt. On 20<sup>th</sup> March, 2019 the company appointed Owen Njenga Koimburi to supervise the implementation of the Company's Voluntary Arrangement (CVA). On **13<sup>th</sup> May 2019** the said supervisor convened a first meeting of the company and its creditors. The meeting was convened for the purpose of the company's members and its creditors to decide whether to approve the CVA with or without modification.

3. The said supervisor submitted a report to this court of the outcome of the meeting. It is clear from the report that the CVA was rejected by the company's secured creditors. It is as a consequence of that rejection of CVA that an application dated 29<sup>th</sup> May 2019 was filed by Securitas Kenya Limited (the applicant) one of the Company's Creditor. By that application the applicant seeks the prayers:

(1) ***THAT*** the secured creditors vote in the company's creditors meeting held on 13<sup>th</sup> May 2019 be disregarded due to material irregularity.

(2) ***THAT*** this honourable Court be pleased to make an order approving the company's voluntary arrangement ("the company's proposal") put to the meeting of the company and its creditors on the following terms:

a. All debt incurred as at the date of the approval of the Company Proposal ("Old debt") be paid in accordance with the Company Proposal presented at the creditors meeting on 13<sup>th</sup> May 2019.

b. The Company's Proposal be subject to review after every six (6) months through a meeting of the company and a meeting of creditors from the date of approval of the company's proposal;

c. After approval of the company's proposal, the company to engage its secured class of creditors in a debt restructuring and repayment plan to be filed with this honourable court, if any, and be annexed as part of the company's proposal;

d. A person may take steps to enforce a security over the company's property only with the consent of the supervisor or with the approval of this Honourable court;

e. A person may take steps to repossess goods in the Company's possession under a credit purchase transaction only with the consent of the supervisor or with the approval of this Honourable Court.

f. A person may begin or continue legal proceedings (including execution, distress, liquidation or administration) against the company or the Company's property only with the consent of the Supervisor or with the approval of this Honourable Court; and

g. The Company's landlords may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the

*Company only with consent of the Supervisor or with the approval of this Honourable court.*

4. The affidavit in support of that application is sworn by Martin Kirimi Mwenda, a director of the applicant. He deponed that he learnt that the CVA had been rejected by a majority (in number and value) of the company's secured class of creditors present at the meeting. He further deponed that the inclusion of the secured class of creditor's vote (in value) present at the meeting in determining whether the company's proposal was approved was unprocedural and constituted a material irregularity.

5. The applicant, as far as I can discern from its affidavits and submissions, relies on the provisions of the Third Schedule of the Insolvency Regulations, Rule 25 (8) and (9) is the Rule the applicant relies upon in submitting that the secured creditors vote was restricted in determining the final tally of the CVA.

6. Rule 25 is the Rule which is applicable in calculating the voting rights. Rule 25 (8) and (9) provide:

***“(8) If a debt is wholly secured, its value for voting purpose is nil.”***

***“(9) If a debt is partly secured its value for voting purpose is the value of the unsecured part.”***

7. The applicant submitted that by the aforesaid Rule for the purpose of determining requisite majority needed to approve the company's proposal the secured creditor's vote should not have been considered.

### **ANALYSIS AND DETERMINATION**

8. I have read and considered affidavit evidence and the parties written submissions. Having done so I begin my analysis by wholly concurring with the submissions made on behalf of UBA Bank, one of the creditors hereof. The submissions of UBA Bank were that sections 628 and 629 of the Insolvency Act completely disposes the application before me. Section 628 provides for the procedure to be adhered to during the meeting of the company and its creditors. Section 628 (6) is pertinent to this matter. It provides

“(6) If the proposal or a modification to it affects the right of a secured creditor of the company to enforce the creditor's security, it may not be approved unless—

(a) the creditor consents to it; or

(b) if the creditor does not consent to it, the creditor—

(i) would be in a position no worse than if the company was in liquidation;

(ii) would receive no less from the assets to which the creditor's security relates, or from their proceeds of sale, than any other secured creditor having a security interest in those assets that has the same priority as the creditor's; and

(iii) would be paid in full from those assets, or their proceeds of sale, before any payment from them or their proceeds is made to any other creditor whose security interest in them is ranked below that of the creditor, or who has no security interest in them.”

9. It is clear from the above provision that the secured creditor holds the sway on whether or not the CVA is approved or not. Although the CVA can be approved if the conditions set out in Section 628(6)(b) exist there was no submissions made, by any party, if those conditions enumerated in that subsection were present in this matter.

10. It is important also to take particular note of section 629 (8) which provides:

“(8) The Court may make an order under subsection (7)(a) even if the proposal (or a modification to it)—

(a) was not approved at the company meeting; or

(b) was not approved at the creditors' meeting by a majority of the preferential creditors' group or the unsecured creditors' group, but do so only if the proposal (or the modification)—

(i) has been approved by a majority of the secured creditors' group;

(ii) does not discriminate among the members of the dissenting group or groups of creditors and ensures that they will be no worse off than they would have been if the company had been liquidated; and

(iii) respects the priorities of preferential creditors over unsecured creditors.”

11. It is further clear from the above provision that the court can approve a company's proposal or a modification of it only if the proposal was approved by the majority of the secured creditors or if the company's proposal or modification of it does not discriminate the members of the dissenting group.

12. The applicant erred to rely on that Rule in the Third Schedule of the Insolvency Regulation. The applicant erred in relying on Rule 25 of the schedule because that Rule 25 applies to voting in case of bankruptcy. The Rule that relates to voting in case of companies is Rule 26 of the Third Schedule. That Rule 26 does not value the secured creditor's vote at nil as does Rule 25.

13. The applicant further erred to have sought to rely on the provision of a Rule to contradict the clear provisions of an Act of parliament. To have sought to do so was contrary to section 31 (b) of the Interpretation and General Provisions Act Cap 2. That section provides:

**“(b) no subsidiary legislation shall be inconsistent with the provisions of an Act:”**

14. This was the holding in the case **SAFE PARK LIMITED V FINE INDUSTRIES LIMITED (2018) eKLR** where it was held:

In the case of **Wavinya Ndeti vs Independent Electoral & Boundaries Commission (IEBC) & 4 Others [2014] eKLR** the court of appeal had this to say:

*“It is an established principle of construction of statutes that no subsidiary legislation shall be inconsistent with the provisions of an Act (see section 31(b) of the Interpretation and General Provisions Act – Cap 2 Laws of Kenya). A subsidiary legislation cannot repeal or contradict express provisions of an Act from which they derive their authority.”*

15. It follows that even if Rule 25 of the Third Schedule, that the applicant relied upon, contradicted the Insolvency Act the Provisions of the Act would prevail.

16. From the above it follows that the application is unmeritorious and undeserving. It therefore fails.

17. On cost the respondents to the application were correct in submitting that the application was vexatious and without merit. That also being the finding of the court, I will order the applicant to bear the costs of the application. The order of costs will enable the respondents to recoup their expenses in opposing the application. See **JASBIR SINGH RAI & 3 OTHERS V TARLOCHAN SINGH RAI & 4 OTHERS [2014] eKLR**

#### **DIRECTIONS**

18. I have, in past, in this matter raised a concern that far too many applications have been filed leading to delayed determination of the petition. In the interest of justice I will permit the company and the supervisor, Owen Njenga Koimburi, to further engage the secured creditors with a view to presenting another CVA which, in accordance with section 626 (2) of the Insolvency Act will be submitted before court. In presenting the report to court a date will be set for the meeting of the company and the company's creditors.

#### **CONCLUSION**

- a. The application dated 29<sup>th</sup> May 2019 is dismissed with costs to the Uchumi Supermarket and UBA Bank.
- b. The supervisor, Mr. Owen Njenga Koimburi, shall within 30 days from today's date present a report of the company's voluntary arrangement, after further engaging the secured creditor.
- c. Until further orders of the court, in the interest of justice the following orders are granted:
  1. **THAT** a stay be and is hereby granted on all legal proceedings pending before other courts, tribunals and quasi-judicial bodies against Uchumi Supermarkets Plc pending the hearing and determination of this petition or further orders of the court.
  2. **THAT** a stay be and is hereby granted of all judgments, decrees, orders, execution proceedings inter alia proclamations of attachment, sequestrations, distress for rent, and any other form of execution proceedings against Uchumi Supermarkets PLC pending the hearing and determination of this petition or further orders of the court.
  3. **THAT** an injunction be and is hereby granted against any eviction or the interference of the quiet enjoyment of Uchumi Supermarkets Plc at all and any of the premises it occupies pursuant to a lease, tenancy agreement, license and/or controlled tenancy pending hearing and determination of this petition or further orders of the court.
  4. **THAT** a temporary injunction be and is hereby issued against UBA Bank, its assignees, agents or servants from exercising its statutory power of sale over L.R No. 209/12593 Langata Area Nairobi belonging to Uchumi Supermarkets PLC and held as a charge pending the hearing and determination of this petition or further orders of the court.
  5. Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 26<sup>th</sup> day of September, 2019.**

**M. KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

Sophie.....Court clerk.

..... FOR THE COMPANY

.....FOR THE APPLICANT