



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 65 OF 2017

TAHIR SHEIKH SAID

GRAIN MILLERS LIMITED (Under Administration).....PLAINTIFF

VERSUS

1. NIC BANK LIMITED

2. GARAM INVESTMENTS AUCTIONEERS LIMITED.....DEFENDANTS

J U D G M E N T

1. These two suits were on the 26/7/2018, by a ruling of even date, consolidated and ordered to be heard together. Pursuant to that order the two files were put together and placed before the court on the 15/10/2018. The two suits concern the same subject matter but are filed by two different parties. The first suit was filed by the administrator while the second one was by the directors of the company while under administration.

2. When the matter came up before court as ordered, and after address by counsel, the court gave the following directions:-

“As pleaded, the dispute in both cases is one straight one:- Whether or not the defendants actions in exercise of statutory power of sale was in conformity with the provisions of insolvency Act.

That to this court is a dispute that can be resolved without production of oral evidence and within the same time that would be necessary to urge the application, if not shorter. However as Mr. Mugambi says he has not firm instructions, I stand over the matter to the 1/1/2018 to enable Ms. Mburu attend court and give her views.

On that day let parties address the court on why the application for injunction cannot be abandoned and the main suit heard by way of case stated”

3. On 1/1/2018, after the counsel had addressed the court, it was directed that the matter proceeds by way of “*case stated*” and canvassed by way of written submissions.

4. The question for determination is as framed above and depends on whether or not there had been compliance with Section 560 of the insolvency Act by the time the suits were filed. However prior to filing of the submissions Ms. Mburu for the defendant in both suits sought and obtained leave to file an Affidavit and did file same on the 14/11/2018.

5. The purpose of that affidavit was to demonstrate that a request for consent was made to the administrator on the 12/10/2017 and the said consent was granted on the 27/11/2017. That date shall become focal and reference point on the issue for determination. On directions that parties file submissions, none filed any submissions and therefore on the 25/1/2018 the court ordered that the isolated issue be argued and determined on the basis of the Affidavits on record and oral submissions.

6. Parties therefore offered oral submissions to the court largely relying on the provisions of the insolvency Act without much reliance on any decided cases. For the plaintiff in HCC No. 13 of 2018, Mr. Kigandi offered submissions and urged the court to find that his client was forced to come to court on the basis that there had been obvious violation of the law as deposed to in the Affidavits of **Fatuma Tahir Sheikh Said** at paragraph 13 of the Affidavit filed on 26/4/2018 in which it is said that the administrator having come to court and obtained an injunction, totally failed to provide information to the directors of the company and had failed in his duty to protect the assets of the company by doing nothing when the property was advertised for sale for the second time.

7. The Affidavit did exhibit a letter by the plaintiff's advocate protesting an intended sale for the 12/3/2018 and proceedings in HCC No. 65/2017 in which interim orders were granted and shown to have been extended for the last time on the 10/10/2017.

8. Mr. Gikandi however laid much premium that the consent given was conditional and that without evidence that the conditions had been met and fulfilled the court should draw the adverse references that this were never fulfilled. That to this court was fact that a consent had been granted for sale of the suit property.

9. For the plaintiff in No. 65 of 2017, Mr. Ngoya submitted that since the appointment, the administrator had discharge his overriding duty to maintain the company as a going concern and achieve the best results for the creditors and the company at large. He said that the fact of appointment inhibited all dealings with the property of the company unless with the consent of the administrator or sanction by the court. He pointed out that suit No. HCC 65/2017 was filed to ensure that no sale took place contrary to the law requiring consent of the administrator and that after the orders were granted, that suit was compromised by the consent being sought and granted. On the charge that the consent was conditional, Mr. Ngoya submitted that all the conditions were only due for fulfilment after sale and not before.

10. According to counsel the subsequent sale sought to be forestalled by HCC No. 13 of 2018 was indeed sanctioned by the administrator and the sanction subsists todate.

11. Ms. Mburu for the defendant in both case wholly relied on the Affidavit of Stephen Atanya for the assertion that the consent of the administrator was indeed requested and obtained and that the law did not require the administrator to consult the directors before giving the consent and that, in any event, that was not an issue for determination.

12. In his closing submissions Mr. Gikandi submitted that condition No. C regarding settlement of all outstanding and incidental taxes including but not limited to capital gains tax had not been met.

Analysis and determination

13. All agree, and have no justification from disagreeing with the law that once an administrator is appointed the company assets and property are secured from alienation or other dealings except with the consent oof administrator or sanction of the court.

14. The dispute here having been narrowed down to the existence of a consent, the dates the suits were filed when juxtaposed against the date the consent is said to have been given is the only formula available to resolve the dispute.

15. The consent is disclosed and demonstrate to have been given on the 27/11/2017 and its terms accepted on the 13/2/2018. By that date suit number 65 of 2017 had long been filed and orders given. It thus follows that when suit No. 65 of 2017 was filed there was no consent in place. It however must be noted that, that suit was by the administrator himself and asserting that the intended sale by the defendant without his consent was contrary to and in violation of the law. That state of facts lead me to find that when the suit No. 65/2017 was filed there was no consent by the administrator and the intended actions by the defendant were wrongful and unlawful. That suit cannot be faulted for want of consent by the administrator but is obviously merited in its pursuit to enforce compliance with and observance of the law.

16. However when the suit No. 13 of 2018 was filed, the parties in HCC No. 65/2017 had negotiated and agreed that the suit property be sold and a consent duly granted. The foundation of the suit is pleaded at paragraph 9 of the plaint as follows:-

“The Plaintiff avers that the intended sale is unlawful because it is expressly prohibited by section 560(1)(a) of the Insolvency Act No. 18 of 2015 since the Plaintiff is under Administration”.

17. For the purposes of this suit and the issue for determination, that ground of the suit is misconceived if not wholly false. I do find that the suit when filed on 5/3/2018 there was in existence a valid consent by the administrator. Accordingly the claim cannot be sustained as framed. It lacks merits and it is therefore dismissed with costs to the defendant.

Dated and delivered at Mombasa this 25th day of October 2019.

P.J.O. OTIENO

JUDGE