REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 13 OF 2018

T.S.S. GRAIN MILLERS LTD (UNDER ADMNISTRATION).....PLAINTIFF

VERSUS

NIC BANK KENYA PLC.....DEFENDANT

R U L I N G

Introduction

1. The defendant has attacked and sought that the plaintiff suit be struck out on account of the fact that it is not competent for being in violation of Sections 560 (d), 576 and 581 of the Insolvency Act and secondly for being an abuse of the court process on account of the fact that it was filed subsequent to and while HCCC No. 65 of 2017 between the same parties was pending before court. The Application was brought pursuant to the provisions of Section 1A, 1B, 3A, 6, 63 and Order 2 Rule 51 Civil Procedure Act. Those grounds are contained on the face of the Application and on the Affidavit file in support thereof.

2. The Application was opposed by the Replying Affidavit sworn by one Fatma Tahir Sheikh Said whose gist and thrust was that all the provisions of the law cited do not support the position taken in the application and orders sought therein. To the plaintiff, the application is promised upon the misconception and misconstruction of sections 560, 576 and 581, Insolvency Act, as well as Section 6 Civil Procedure Act.

3. Having considered the record of the Application the Response by the Plaintiff, I do consider that only two issue arise for the determination by the court: -

i) Is this suit liable for dismissal pursuant to Section C, Cap 21, on account of the existence of a previous suit?

ii) Is the suit incompetent on account off the cited provisions of the Insolvency Act to warrant being struck out?

Striking out on account of Section

6 Civil Procedure Act

4. The plain and unambiguous wording of Section 6, Civil Procedure Act, is that a suit filed subsequent to another ought not to be heard but need to be stayed. There is no interpretation that can lead to the provision demanding or calling for striking out such a suit. The logic and rationale is however to achieve the overriding objective of the court towards timely, fair and proportionate determination of legal dispute at affordable legal costs. That is best achieved by asking parties to consolidate all their disputes into a single cause and before a single forum so that both judicial resources and parties own resources in both time and financials are utilized fully and kept at minimum.

5. That objective of the rule was aptly captured by the High Court of Uganda in ***Nyanza Garage Ltd vs Attorney General HCCC No. 450 of 1993***. The court said:-

> ***"In the interests of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interests of the parties because the parties are kept at minimum both in terms of time and money spent, on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clog the wheels of justice, holding up resources that would be available to fresh matters and creating and or adding to the backlog of cases courts line to deal with. Parties could be well advised to avoid a multiplicity of suits"***.

6. In this matter, it is obvious that there existed before this suit was filed, Mombasa HCCC No. 65 of 2017 in which the matter in dispute, is the question of whether or not the defendant should be restrained from exercising its statutory power of sale. The parties in both suits are the

same and litigate under the same title before this same court and registry, which no doubt has the requisite jurisdiction to determine the dispute in these two suits. The suits therefore cannot escape the character of those the law term *sub judice*. When a suit is *sub judice*, it presents itself for being stayed rather than being struck out. That is the meaning of the words, *'no court shall proceed with the trial…..'*

7. Of course, with the inherent powers of the court and the overriding objectives of the court, the court has powers to make orders deemed just. That is a latitude and discretion the court exercises only for the reasons:-

i) To avoid its processes being abused and

ii) To meets the ends of justice.

8. In considering what benefilting orders need be made in the circumstances of each case, the fact of each must be taken into account. In this matter the plaintiff has explained that while there is an administrator in place and in charge of the affairs and assets of the plaintiff, who had moved the court as expected and obtained orders of injunction stopping sale of the plaintiffs assets, the same administrator, for unexplained reasons nolonger exhibit eagerness to pursue that matter and seem to care the least that a statutory prohibition enacted under Section 561, insolvency Act 2015, under which the same administrator was appointed, was about to be affronted and violated by the acts the plaintiff came to court to stop. I see the conduct of the plaintiff as solely geared towards the need to observe the law that once an administrator is appointed, no creditor including a chargee can purport to alienate the property of the company without concurrence of the administrator or the court.

9. That to me is a conduct aimed at securing the observance of the law and cannot be deemed a conduct that perverts or abuses the court process but must be viewed to be one intended to meet the ends of justice. In those circumstances even though the side note to the provision seem to circumscribe that the matter be stayed, I do consider that the interests of justice, looked at from the prism of the overriding objective of the court would dictate that orders other than stay be made. I do consider that to meet the other bastion and goal of every court system, to do justice, the order that recommends itself to me is that this suit and HCCC No. 65 of 2017 be consolidated and heard together. Such an Order will serve to obviate the prospects of multiplicity of suits while seeking to hasten the resolution of the dispute between the parties. That is what I consider just, proportionate and cost effective.

10. The defendant applicant did not cite to court any provision of the law in an enactment or *stare decises* to persuade me that section 6 invite striking out and I know of none. On account of Section 6 Civil Procedure Act, I do find that the suit cannot be struck out and therefore that limb of the application fails.

Is the suit barred and incompetent pursuant to Sections 560(d), 576 and 581 of the Insolvency Act

11. For ease of appreciation of this line of attack mounted against the suit, one needs to reproduce what the three sections of the statute relied. They provide:-

Section 560(1): Moratorium on other legal process while administration order has effect

(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.

571: Specific functions of administrator

The administrator of a company has the functions and powers specified in the Fourth Schedule.

581: Company under administration not to perform management functions without administrator's consent

(1) A company under administration, or an officer of a company under administration, shall not perform or exercise a management function without the consent of the administrator.

(2) For the purpose of subsection (1)—

(a) "management function" means a function or power that could be performed or exercised so as to interfere with the exercise of the administrator's functions; and

(b) consent may be general or specific.

(3) A company that contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding one million shillings.

(4) An officer of a company who contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.

12. I read the three provisions to be intended and purposed to achieve:-

i) The protection of the company asset once an administrator is appointed. The protection is against all secured creditors, hire purchase sellers, landlords from reentry and distress for rent and for any suits being instituted against the company unless with the concurrence of the administrator or leave of the court.

ii) Secure and facilitate the functions of the administrator as defined under the forth schedule.

iii) **Restriction of the company and its officers, from performing actions and powers as to be able to interfere with the functions of the administration as defined.**

13. Broadly put, the sections cited seek to protect the property of the company under administration from wastage while entrenching the position of the administrator so as to achieve the object of administration. Of the two broad subject, I hold the opinion that the paramount one is the protection of the company assets.

14. I have said hereto before that the appointment of an administrator injuncts alienation of the company's Assets unless with the consent of the administrator or the leave of the court. I have equally held that my view of the purpose of this suit was to stop an intended sale of an asset of the company, an immovable property, in a manner viewable as being contrary to section 561 of the Act. That to me cannot amount to interference with the functions of the administrator but a bolster to such functions. If I be right then a person acting for the observance of the law cannot be castigated but need be commended. To strike out this suit would be to castigate the commendable acts. That may not pass as being just.

15. In coming to this conclusion, I have found guidance in the decisions of the Court of Appeal cited to me by the plaintiff being; ***Odera Obar vs Charter House Bank Ltd[2018] eKLR*** as well as ***S K Macharia vs Kenya Commercial Bank Ltd [2012] eKLR*** for the proposition that the directors of a company reserve the liberty to bring a suit on behalf of the Company provided the initiation of the suit does not interfere with the administrators' functions.

16. Having so said and held, it follows that the application by the defendant lacks merit and the same is hereby dismissed in its entirety.

17. However for the benefit of active case management, and noting that I have ordered the consolidation of this suit and the earlier suit, it is now directed that the DR puts the files together for further directions of the court on the 15th October 2018.

18. I direct that the interim orders last extended on the 4/7/2018 be extended till that date or further orders of the court.

19. Costs are ordered to be in the cause.

Dated and delivered at Mombasa this 26th day of July 2018.

P.J.O. OTIENO

JUDGE