REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY CAUSE MISC NO. 033 OF 2018

RAJENDRA RATILAL SANGHANI.....DEBTOR/APPLICANT

VERSUS

SCHOON AHMED NOORANI.....CREDITOR/RESPONDENT

RULING

1. The overall design of The Insolvency Act is to give a distressed Debtor a second chance. Where the Debtor is a natural person, Part 11 of The Insolvency Act provides for Alternatives to Bankruptcy. One such alternative is for a Debtor to seek an Interim Order so as to make a proposal to his/her Creditors for a Composition in satisfaction of the debts or a Scheme of Arrangement of its financial affairs. This remedy is provided in section 305 of The Insolvency Act.

2. In the matter at hand, the attempt by Rajendra Ratilal Sanghani, a Debtor, to benefit from this alternative remedy has met an immediate challenge by one Schoon Ahmed Noorani, a Creditor, who seeks an early termination of these proceedings on the basis of the following preliminary objections;

a) The Application is bad in law, as the debtor has targeted, singled out and effectively discriminated against the Creditor, in so far as it has failed to include all the other creditors of the Debtor as is required by the Applicable law;

b) The Application is invalid as required under the Insolvency Act (2015) to the extent that there is material non-disclosure which goes to the root of the matter;

c) The Application offends the policy objective of Section 306 (2) of the Insolvency Act (2015) in a manner that is detrimental to the interests of the creditor and is wont on promoting discrimination and isolation of the Creditors;

d) The Application is made in bad faith and an abuse of the Court process wherefore the objectives contemplated in the Insolvency Act cannot be achieved.

e) The Application is premature by reason that the creditor has not demanded payment of the entire debt owed by the debtor and further the Debtor has failed to demonstrate and provide evidence that such demand has been made;

f) The Application is speculative, as the Debtor has not in any form or manner, pleaded insolvency and/or disclosed and evidenced an inability to repay the debt by the current installments agreed to by the parties;

g) The Application is grossly defective and ought to be struck out for not complying with the legal requirements for an Interim Order under the Insolvency Act, 2015.

3. These objections invite this Court to consider two related issues. First, at one point in the proceedings can an application for an Interim Order brought under the provisions of Section 304 of The Insolvency Act be questioned and secondly on what grounds can such a challenge be upheld. This discussion will be in context of the facts that inform the tussle herein.

4. Both the Debtor and Creditor are Businessmen who at one time enjoyed a friendship. In the period between 1st August 2012 (although the Creditor thinks it was earlier in 2010) and 26th April 2012, the Creditor advanced to the Debtor substantial sums of unsecured loans amounting to Kshs 477,100,000/-. Although the Debtor says that the Creditor is a shylock, the Creditor is clearly displeased by this characterization. The Creditor prefers to see himself an Investor in the Debtors business by way of Debt Finance with a return on investment in form of interest.

5. For now, however, nothing turns of whether the Creditor is a shylock or Fund Investor because other more critical facets of the case are agreed. The Debtor acknowledges owing the Creditor substantial sums of money and the talks or arrangements to pay the debt by instalments have collapsed. The Debtor is apprehensive that the Creditor will take steps to call up the debt and hence these proceedings.

6. Section 304 of the Act are Provisions on when an Application for an Interim Order can be made:-

> *(1) An application to the Court for an interim order may be made if the debtor intends to make a proposal to the debtor's creditors under this Division for a composition in satisfaction of the debtor's debts or a scheme of arrangement of the debtor's financial affairs.*
>
> *(2) The debtor shall ensure that the proposal provides for a person to act as supervisor of the voluntary arrangement to which the proposal relates.*
>
> *(3) Only an authorised insolvency practitioner is eligible to act as supervisor of a voluntary arrangement.*
>
> *(4) Subject to subsection (2), such an the application may be made—*
>
> > *(a) if the debtor is an undischarged bankrupt-by the debtor, the bankruptcy trustee of the debtor's estate or the Official Receiver; and*
> >
> > *(b) in any other case-by the debtor.*
>
> *(5) An application may be made by a debtor who is an undischarged bankrupt only if the debtor has given notice of the proposal to the Official Receiver and, if there is one, the bankruptcy trustee of the debtor's estate.*
>
> *(6) An application may not be made while a bankruptcy application made by the debtor is pending, if the Court has, under section 33, appointed an authorised insolvency practitioner to inquire into the debtor's financial affairs and to report on those affairs to the Court.*

7. The Statute does not set out the procedure for making the application and this should not be surprising because the provisions are substantive in nature. Matters of procedure belong elsewhere and hence section 697 of the Act contemplates the making of Insolvency Procedure Rules to provide, inter alia, the procedure of the Court under the Act. Under Section 697 (2) matters that may be dealt with by the contemplated rules include:-

> *a) ……..…..*
>
> *i) The right of creditors and other persons to appear in proceedings and the procedure to be followed in the absence of creditors or other persons;*
>
> *j) The notice requires to be given in connection with proceedings, and who may give them and to whom;*

Whether or not a Creditor has a Right of audience at the application for an Interim Order is perhaps one such Rule to be provided. Unfortunately, the Rules Committee on which the responsibility to make the Rules is bestowed is yet to carry out its mandate.

8. In its very nature a section 304 Application is for an interim relief which, ordinarily, ought to last for a very short period. Indeed section 306 (5) provides as follows in respect to its ideal duration:-

> *"Except as otherwise provided by this provision, an interim order made on an application made under section 304 ceases to have effect at the end of fourteen (14) days from the date on which the order was made"*

Because the objective of the relief is to grant the Debtor some brief breathing space to present a viable proposal to his/her Creditors, there should be no reason to make it an involved process and it should, in my view, typically be exparte proceedings.

9. But there is a flipside. Not only the grant of an Interim Order but the mere presentation of the application for the order has ramifications on the rights of Creditors and Landlords to commence and or continue with certain proceedings. Section 305 which is on the effect of an application for an Interim Order reads:-

> *(1) While an application under section 304 for an interim order is pending, the following provisions apply:*
>
> > *a) a landlord or other person to whom rent is payable by the debtor may exercise a right of forfeiture in relation to premises let to the debtor for a failure of the debtor to comply with a term of the tenancy—*
> >
> > > *i) only with the approval of the Court; and*
> > >
> > > *ii) if in giving approval the Court has imposed conditions-only if those conditions are complied with;*
> >
> > *b) the Court—*

i) may prohibit distress from being levied on the debtor's property or its subsequent sale, or both; and

ii) may stay any action, execution or other legal process against the property or person of the debtor.

(2) A court in which proceedings are pending against the debtor may, on proof that an application has been made under section 304 in respect of the debtor, either stay the proceedings or allow them to continue on such terms as it considers appropriate.

10. While section 306 (7) is on some implications on the making of the Order;

"*While an interim order has effect in respect of a debtor—*

a) bankruptcy application relating to the debtor may not be made or proceeded with;

b) a landlord or other person to whom rent is payable may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with a term or condition of the debtor's tenancy of the premises only with the approval of the Court; and

c) any other proceedings (including execution or other legal process) may be begun or continued, and distress may be levied, against the debtor or the debtor's property only with the approval of the Court

11. The presentation of the Application for and the making of the Interim Order guarantees a measure of protection to the debtor and will necessarily impede a creditor from taking adverse steps against him/her. Now, while in a perfect world the order ought to last for 14 days only, the period can be extended by order of Court (see for example under the provisions of section 307 (6) to enable an appointed supervisor more time to prepare his or her report). Because of the possible delay that may occur in prosecuting an application for an Interim Order and the possibility of extension of the order for long periods, considerable prejudice and hardship may be occasioned on a landlord or creditor. In addition, because of the immunity that the Debtor will enjoy upon presentation of the Application and the grant of the Interim Orders, there may be real temptation by a debtor, acting in bad faith, to abuse the process.

12. These considerations present a strong argument that there are instances when a landlord or creditor should be allowed to participate during the hearing of the Application for Interim orders. The conclusion I must reach is that while the application will typically be exparte, there will be occasion when the participation of a creditor is justified. Proverbially, each matter must be considered in its own circumstances.

13. Having looked at the objection taken up by the Creditor and the Replying Affidavit filed on his behalf, this Court formed the view that he deserved a hearing even at this early stage of the proceedings. The reason becomes apparent as i now consider the challenge. But before i do so i attempt to lay out the applicable law. I draw from the arguments and submissions made by Counsel and the provisions of the Law.

14. An application for an Interim Order can only be stopped on its tracks if it is demonstrated that it is an abuse of Court process or that it is so hopeless that it cannot possibly succeed. But this must be in the clearest of Cases and the Court must be slow to grant the draconian Order of striking out.

15. As pointed out earlier, proceedings of this nature afford the debtor a certain amount of freedom. Just by example, upon grant of an Interim Order any proceedings (including execution or other legal process) may only be began or continued against the debtor or the debtor's property with the sanction of the Court. An undeserved application should be disallowed at once if its clear motive is to attain a collateral objective of granting protection to an undeserving debtor. So ,for instance, a debtor who is neither an undischarged bankrupt or is able to make an application for his own bankruptcy should not be allowed to use the process to avoid his/her obligations or as a stalling device.

16. The conditions to be satisfied before a Court grants an interim order are explicitly set out in section 306 (1) as follows:-

(a) that the debtor intends to make a proposal under this Division;

(b) that on the day of the making of the application the debtor was an undischarged bankrupt or was able to make an application for the debtor's own bankruptcy;

(c) that no previous application has been made by the debtor for an interim order during the twelve months immediately preceding that day; and

(d) that the supervisor designated under the debtor's proposal is willing to act in relation to the proposal.

These may be straightforward and require no elaboration. But two observations need to be made. Where the applicant is not an undischarged Bankrupt, he/she needs to satisfy the Court he or she is insolvent,that is unable to pay his /her debts. This is discussed further in the Decision. Second, the Court must always remember that an Interim order is not an end to itself and before granting it, the Court must be satisfied that it will facilitate the consideration and implementation of the Debtors' proposal(Section306(2).The Court must never loss sight of this overarching objective.

17. An argument made by the Creditor is that the application lacks bonafides because the Debtor is neither an undischarged bankrupt nor Insolvent. The Debtor is criticized for singling out only one creditor and for failing to set out his assets and liabilities. Now, it is common ground that the Debtor is not an adjudged bankrupt and so as to meet the one threshold of the application he must demonstrate that he is a person able to make an application for his own bankruptcy. The provisions of section 32 provide an answer as when a Debtor may apply for

his own bankruptcy order. Section 32 (1) reads;

"A debtor may make an Application to the Court for an order adjudging the debtor only on grounds that the Debtor is unable to pay the Debtors' debts"

Crucial are the provisions of section 32 (2) which read:-

> ***"The Court may decline to deal with such an application if it is not accompanied by a statement of the debtor's financial position containing-***
>
> ***a) such particulars of the debtor's creditors and of the debtor's debts and other liabilities and assets as may be prescribed by the insolvency regulations; and***
>
> ***b) such other information as may be so prescribed.***

18. When dealing with an Applicant who is not yet adjudged Bankrupt, like the Debtor herein , the Court must be satisfied that the debtor is unable to pay his/her debts. While the Court is not expected to carry out a detailed examination as to the fortunes(perhaps misfortunes) of the debtor ,the evidence presented must be such as to make out a prima facie case that the debtor is insolvent and is unable to pay his/her debts. It seems fairly elementary that such an assessment cannot be undertaken unless the debtor gives a true and full inventory of his creditors and debtors and other liabilities and assets.

19. This Court has familiarized itself with the entire application herein and the affidavit in support and quickly notices that the Debtor has failed to give particulars of his other creditors and debtors and other liabilities and assets and if he has none, then he has not said so. This silence is loud. What is even more curious is that the silence persists even when the Creditor contests the application as being brought in bad faith and on the basis of material non-disclosure.

20. The Debtor makes no effort to debunk the following allegations made by the Creditor about his supposed fortunes:-

> "The Debtor owns prime properties within Nairobi County; L.R. No. 209/363/7 situated in Riverside Drive with an estimated value of Kshs.450,000,000/- L.R. No. 209/2559, commonly known as Twiga Towers off Murana Road with estimated worth of Kshs.180,000,000/- L.R No. 209/363/7 along Lenana Road with an estimated value of Kshs 300,000,000/- and two properties in Mombasa County worth Kshs 500,000,000/- whereof disguise his wealth, he has formed companies and put proxies as directors in some of them, to wit;
>
> i) Shivali Holdings Limited;
>
> ii) Granada Trading Company Limited;
>
> iii) Real Management Services 2002 Limited;
>
> iv) Twiga Properties Limited;
>
> v) Moto Ventures Limited;
>
> vi) Naval Holdings Limited;
>
> vii) Kettery Investment Limited;
>
> viii) Saaf Holdings Limited".

21. The reluctance by the debtor to disclose other creditors and debtors and to set out his assets and liabilities even in the face of express challenge says something about the bona fides of the application. This Court reaches a conclusion that the Application may not only be an abuse of Court process but is so hopelessly wanting as it fails one crucial test. That the Debtor is either an undischarged Bankrupt or person able to make an application for his own bankruptcy! Given that finding, the Application is a cropper and would have to be declined. But let me add this.

22. An important theme of the Insolvency Act is that the door should not be shut too quickly on an insolvent person and in as much as is possible he/she/it should be given a second chance. However some heed needs to be paid to the following remarks by **Scott VC in** *Hook – vs- Jewson Ltd [1997]* 1 BCLC 664, when considering similar provisions to our law on Interim orders;

> *"Judges must, I think, be careful not to allow applications for interim orders simply to become a means of postponing the making of bankruptcy orders in circumstances where there is no apparent likelihood of benefit to the creditors from such postponement."*

These remarks are in consonance with the policy objective set out in section 306 (2) that one purpose of an interim order is to facilitate the consideration and implementation of the debtors' proposal.

23. Now it had been argued by Counsel for the Creditor that his client is the only named creditor and has unequivocally stated that he will not accept the proposal. Counsel then posed the question, why waste time?

24. Upon the grant of an interim order, the appointed Provisional Supervisor makes a Report to Court on the debtors proposal stating:-

> *(a) whether, in that supervisor's opinion, the proposal has a reasonable prospect of being approved and implemented;*
>
> *(b) whether, in that supervisor's opinion, a meeting of the debtor's creditors should be convened to consider the proposal; and*
>
> *(c) if in that supervisor's opinion is that such a meeting should be convened-the date on which, and the time and place at which, it is proposed to hold the meeting.(* Section 307 (1))

25. Where it is reported that a creditors meeting should be convened, the Court directs for such a meeting to be convened. The creditors meeting consider the report and may reject or approve it. Should the report be rejected then the Court discharges any subsisting Interim Order.

26. The argument made by the Creditor herein is why wait until the meeting is convened when he (the only named creditor) will refuse to approve the proposal anyway. This is propounded to support the position that there should be rejection of the Application for an Interim order at this stage.

27. On the part of this Court, it would be reluctant to allow such a proposition to be the basis of summary rejection of the Application because it seems inimical to the spirit of giving an insolvent person a chance vide the alternative remedies. As long as the Court considers the proposal by the debtor to be put to his Creditors to be serious and viable, then the process should be allowed to run its complete course and for the creditors to have their say at the appropriate time. It may well be that there will be a change of circumstances or the less hardening of positions between the time the interim order is made and when creditors meet!

28. Otherwise for reasons earlier given, this Court upholds the objection taken by the debtor and dismisses the Notice of Motion dated 28th May 2018 with costs.

Dated, Signed and Delivered in Court at Nairobi this 26th day of October, 2018.

F. TUIYOTT

JUDGE

In the presence of:-

Kibera for Applicant

Maingi for Respondent

Kibera h/b for Osicho for Official Receiver

Nixon Court Assistant