



Grain Industries Limited v Orlando Mario Da Costa-Luis (IP. No. 014) (Sued as the Liquidator of Royal Swiss Bakery Ltd) (Insolvency Petition E046 of 2022) [2025] KEHC 1898 (KLR) (Commercial and Tax) (11 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E046 OF 2022**

AA VISRAM, J

FEBRUARY 11, 2025

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

AND

**IN THE MATTER OF SECTIONS 474(1) & (2) AND
560(1)(D) OF THE INSOLVENCY ACT NO. 18 OF 2015**

AND

IN THE MATTER OF REGULATION 96(1) OF THE INSOLVENCY REGULATIONS, 2016

AND

IN THE MATTER OF ROYAL SWISS BAKERY LIMITED (UNDER LIQUIDATION)

BETWEEN

GRAIN INDUSTRIES LIMITED APPLICANT

AND

**ORLANDO MARIO DA COSTA-LUIS (IP. NO. 014) (SUED AS THE
LIQUIDATOR OF ROYAL SWISS BAKERY LTD) RESPONDENT**

RULING

Introduction

1. I have considered the Application dated 10th November, 2023, together with the supporting affidavit of even date, the reply sworn on 22nd March, 2024, the submissions of the parties, and the applicable law.



2. The Application seeks to restrain the Respondent, being the liquidator of the company, from releasing any funds acquired in the liquidation process without allocating 20% of the proceeds to the Applicant, who is an unsecured creditor.
3. The Applicant relied on Section 474 of the *Insolvency Act*, and submitted that the liquidation was subject to a floating charge. He submitted that Regulation 96 further applies to the present situation, and prescribes that the amount to be set aside for unsecured creditors is the amount of 20%, which he contended ought to be paid to the Applicant in priority.
4. The Application is opposed primarily on the basis that the property disposed of by the liquidator is the subject of a fixed charge, and not a floating charge, as evidenced by the security documents on behalf of a secured creditor, KCB Bank Kenya Limited.
5. The Respondent submitted that the debt due to the Applicant herein is not contested, save that the Applicant is an unsecured creditor and ought to be paid in accordance with the priorities set out under the *Insolvency Act* and regulations, and not in priority.
6. The company was placed in liquidation on 22nd December, 2022, by order of the court, and the Respondent took control of the company pursuant to this order as provided for under Section 444 of the *Insolvency Act*.
7. Since then, the Respondent submitted that he has conducted his role as the liquidator in line with the Third Schedule of the *Insolvency Act*, which includes inter alia the power to take all action as may be necessary for the beneficial liquidation of the company.
8. The Respondent pointed out that Section 474 of the *Insolvency Act*, as relied on by the Applicant, makes provision for share of assets to be made available for unsecured creditors where floating charge relates to company's property.
9. Counsel submitted that the above section is not applicable because a share of assets under the above section can only be made to an unsecured creditor with reference to a floating charge and not a fixed charge.
10. The Respondent submitted that in this case, the debenture, and further debenture made in favor of KCB bank securing the sums of Kshs. 3,000,000/- and Kshs. 16,000,000/- constitute a fixed charge as opposed to a floating charge, therefore making the bank a secured creditor with a priority claim. As such, the secured assets are not subject to the provisions of Section 474 of the *Insolvency Act*.
11. I have looked at the agreement dated 23rd November, 2020. The charging clause is found at clause 4 of the agreement at page 6. The same states as follows:-
 - (b) by way of first fixed charge of future freehold and leasehold property of the company...
 - (d) by way of first fixed charge all present and future fixed assets, plant, machinery, vehicles, computers and office and other equipment of the Company... (Emphasis mine)
12. The schedule of the said assets is found at page 29 and include motor vehicles Registration No. KCU 935S, KCY 244F, KCY 388F and a property known as Title Number Lamu/Witu/779.
13. Additionally, the assets secured in the further debenture of 28th July, 2022, are also motor vehicles registration number KCJ 736X, KCD 452U, KCU 935S, KCY 244F, KCY 388W and machinery/equipment stocks. The schedule is found at page 59-60 of replying affidavit. Pursuant to clause 4(b) and (d) above, the assets fall within the category of land and vehicles, which are subject to a first fixed charge.



14. I have taken note of the Applicant's submission that clause 4(j) of the debenture is applicable, giving rise to a floating charge rather than a fixed charge. The same, however, clearly states that the bank charges a continuing security to be secured by a floating charge on the company's stock in trade and floriculture or horticultural produce.
15. Further, the Respondent submitted that these assets were not the subject of realization by the Official Receiver and there is no evidence before this court that any such assets have been realized, and distribution made, in relation to the same.
16. To the contrary, the Respondent clarified that the company is not seized of any such stock in trade as provided for in the debenture and therefore, the said clause, 4(j), does not apply.
17. The Respondent further pointed out that pursuant to the further debenture, at clause 4, page 39 of replying affidavit, there exists a first fixed charge on freehold and leasehold property under clause (b), and a first fixed charge on all present and future fixed assets, plant machinery, vehicles etc.
18. Having considered the evidence as set out above, I note that the applicable law is found in the decision of *East Africa Plc vs Ecobank Kenya Limited; SBM Bank (K) Limited (interested party)* 2020 eKLR, the court stated as follows:-

“A secured creditor like Ecobank occupies a special position in Insolvency proceedings as it has rights over the property protected by the security agreement and statutory provisions where applicable. These rights take precedence over the administration and liquidation process in the sense that the holder of those rights is entitled to exercise them at any time.”
19. Further, in *Re-high - Plast Limited* ML HC IP No. E001 of 2019 (2019) eKLR Kasango J held:-

“in liquidation whose purpose is realization of debtor's assets to settle liabilities and dissolution of the company, the secured creditor is protected as the said creditor will rank in priority and exercise first the lien over the charged property before other creditors.”
20. Guided by the above, I am of the opinion that in insolvency proceedings, the Act sets out which parties will be paid in order of priority, and in accordance with the rules and regulations applicable. I do not see any good reason to depart from the same in the present matter.
21. Further, I take note of Section 432 of the *Insolvency Act* which reads as follows:-

Consequences of liquidation order

(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.
22. I take further note that Applicant did not pray for leave to commence proceedings against the company in liquidation, and did not lay out the basis upon which leave ought to be granted. This ought to have been done from the outset given the provision of Section 432 above. However, given that the action is against the liquidator, and not the company, my decision does not turn on that factor above.
23. In any event, based on my reading of the relevant agreements before the court, it is evident that the Applicant has filed the present Application under a misapprehension of the nature of the charge over the assets in question. Looking at the documentation in question, I am persuaded that distributions made thus far by the Respondent relate to assets that are the subject of a fixed charge rather than a



floating charge, and that the Respondent's actions were accordingly lawful, and in accordance with the provisions of the *Insolvency Act*.

24. Based on the reasons set out above, I find and hold that the Application is without merit. The same is dismissed with costs.

25. The file is marked as closed.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF FEBRUARY, 2025

ALEEM VISRAM, FCIARB

JUDGE

In the presence of;

Court Assistant

For the Applicant

For the Respondent

