I & M Bank Limited v Synergy Industrial Credit Ltd & another (Insolvency Cause E010 of 2024) [2024] KEHC 4190 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4190 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E010 OF 2024

A MABEYA, J

APRIL 19, 2024

BETWEEN

I & M BANK LIMITED ..... APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LTD ..... 1ST RESPONDENT

PONANGIPALLI VENKATA RAMANA RAO AND SWAROOP RAO PONANGIPALLI AS JOINT ADMINISTRATORS OF CAPE HOLDINGS LTD ..... 2ND RESPONDENT

RULING

1. On 12/3/2024, Synergy Industrial Credit Ltd came to Court under a Certificate of Urgency vide a Motion of 11/3/2024. It sought, inter alia, ex-parte orders to stay the appointment of the Administrators from assuming office. The Motion was brought under the relevant provisions of the *Insolvency Act*.

2. The Court certified the Motion as urgent and set it down for directions on 15/3/2024. On the said 15/3/2024, Mr. Gichuhi S.C informed the Court that the Company had filed a preliminary objection to the Motion in addition to a Motion seeking to offer part settlement and stay of proceedings pending delivery of some judgment by the Court of Appeal.

3. Out of nowhere, Counsel for the bank made a submission that this Court, having handled some other matter between the same parties, it should recuse itself from this matter. The Court noting that the bank was only concerned with delaying the matter ordered that a formal Motion for recusal be lodged and in order not to benefit the bank from its delaying tactic, the Court granted prayer Nos. 2 and 3 of the Motion by Synergy.

4. Instead of lodging the Motion for recusal within 7 days as directed, the bank took out a Motion on Notice dated 18/3/2024 under Articles 50 and 159 of *the Constitution* and Section 698 of the *Insolvency Act* seeking to set aside and rescind the orders of 15/3/2024 and fix the pending applications for hearing on priority and maintain the status quo ante.

5. The Motion was supported by the affidavit of Peris Wairimu Chege of even date. The grounds for the Motion were that at the mention of 15/3/2024, the parties extensively submitted on the pendency in the Court of Appeal matters arising from this Court's ruling of 10/12/2021 in Insolvency Cause No. E049 of 2021.

6. That the bank's advocate submitted that in light of the foregoing, this matter be dealt with by another Court to avoid this Court being called upon to determine some of the issues that arise from its aforesaid ruling. That in the premises the Court directed that a formal Motion for recusal be made and status quo ante be maintained.

7. That upon reflection, the bank did not wish to pursue the recusal course and it was confident that the Court would determine the matter dispassionately. That pursuing the recusal Motion would lead to delay in the determination of the matter. That it is important that the outstanding matters be determined before the judgment in the Court of Appeal CA No E 788 of 2021.

8. That the bank believes that the mere fact that this Court dealt with Insolvency Cause No. E 049 of 2021 does not constitute a ground for recusal under the Judicial Service (Code of Conduct and Ethics) Regulations, 2020. That in any event, the same is res-judicata the ruling of 12/10/2023 on recusal.

9. That the order barring the appointment of the administrators was grave and prejudicial to the bank as a debenture holder. That the same should be set aside for the objection and the pending Motions to be heard. That the continued barring of the administrators would hamper their duties as administration has strict timelines. That the Motion was being made in good faith.

10. The Motion was opposed vide a preliminary objection on a point of law dated 25/3/2024. It was contended that the application was a deliberate and calculated move to violate Order No. 4 of the Order of 15/3/2024. The same is incompetent and should be dismissed in limine.

11. The parties filed their respective submissions which I have considered. The bank submitted that it was not barred in law from changing its position. That its intention was to have the matter determined without delay. That pursuing the recusal Motion would lead to unnecessary delay. The Judicial Service (Code of Conduct and Ethics) Regulations, 2020, and Benard Chege Mburu vs Clement Kungu Waibara & 2 Others [2011] eKLR, were cited in support of the submissions that there was no basis for a recusal application.

12. That the preliminary objection was insincere in that it sought to force the bank to pursue a position it had changed. That under section 698 of the *Insolvency Act*, there was jurisdiction to grant the orders sought. That it had not disobeyed the Order of 15/3/2024 as alleged.

13. For Synergy, it was submitted that the bank had failed to explain the nexus between the pending appeal and the instant application. That the orders sought herein are meant to shield the company and the bank in the event the appeal is dismissed. That the objection be upheld.

14. That there was no error in the order of 15/3/2024 to warrant a review. That the same should be retained pending inter-partes hearing of the Motion of 11/3/2024. That the administration sought to be permitted was based on a debenture for which statutory declaration does not refer to. That the debt under the Debenture had been fully paid.

15. It was further submitted that since the preliminary meeting was scheduled for 30/3/2024 by the administrator, the same had been stopped by the order of 15/3/2024. That there was no basis for exercising the discretionary powers under section 698 of the *Insolvency Act*. The case of National Bank of Kenya vs Ndungu Njau [1997] eKLR was cited in support of the proposition that there were no review grounds disclosed in the present motion to warrant its grant.

16. This is an application to set aside or rescind or review the order of this Court made on 15/3/2024. There being a preliminary objection raised by Synergy, I propose to deal with it as a preliminary issue.

17. The objection was that the Motion was incompetent in law as it was a deliberate and calculated violation of order No. 4 of the Order of 15/3/2024.

18. A preliminary Objection was defined in the case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors [1969] EA 696, to be a pure point of law that is raised in the pleadings. It is not to be raised if facts are to be ascertained. It is raised on the basis that the facts pleaded by the other side are correct.

19. What are the facts here? These are that; on 15/3/2024 the bank orally sought the recusal of the Court, that the Court directed the bank to file a formal Motion for recusal within 7 days and made orders of status quo ante; that the bank has since abandoned the route of recusal and would like the Court to determine the pending matter in limine.

20. The foregoing being the case, can the bank be said to be in violation of order No. 4 of the Order of 15/3/2024. In para 9 of her supporting affidavit; Peris Wairimu Chege has stated:-

> " 9. That the Applicant upon review of the matter does not wish to pursue the Judge's recusal and is confident that the Honourable Judge will hear and determine the pending applications dispassionately and on merit."

21. To this Court's mind, that is a sounding statement of abandoning the route of recusal. Order No. 4 of the Order of 15/3/2024 directed the bank to make real its threat to the Court by lodging a recusal application. To give grounds upon which it thought the Court will not be dispassionate in this matter.

22. To my mind, since the bank has finally realized that, both in law and fact, there were no grounds to seek the Court's recusal, such route would be a shear waste of time. That there is no need to insist on it to pursue the same. A party cannot be forced to pursue a remedy he does not wish to obtain.

23. In this regard therefore, the preliminary objection has no basis and is hereby dismissed.

24. On the prayers to vary the order of 15/3/2024, the bank's position is that there was discretion to do so. That the administration would suffer if the prayers sought are not granted. On its part, Synergy submitted powerfully on the need not to retain the administration. Most of the contentions and submissions hinged on the merits of the Motion dated 11/3/2024. That Motion is yet to be argued I cannot therefore consider them at this stage.

25. In matters insolvency, the Insolvency Court has wide discretion and may make any appropriate order at any stage of the proceedings. However, such discretion and order should always have the objective of the Act in mind. That it should be for the benefit of the whole body of the creditors, both secured and unsecured.

26. It is on that basis that on 15/3/2024, when the Court noted that the bank wanted to delay the proceedings by engaging on side shows (recusal), the Court handed down the order of status quo ante in order not to benefit the bank from its intention of delaying the proceedings. That order was made for the benefit of the creditors. That the bank do get an opportunity to impeach the Court (recusal) but in

the meantime, it be denied any benefit enuring from the attendant delay. Not to enjoy the appurtenant Moratorium then existing.

27. Section 698 of the *Insolvency Act*, provides:-
"The Court may review, rescind, or vary any order of the Court under this Act."

28. As correctly submitted by Counsel for Synergy, the power under section 698 aforesaid is discretionary. However, like in all discretions, the same must be exercised judiciously and not capriciously. It must be exercised with the view of doing justice to all the parties; the company and all the creditors.

29. As I have already stated, the route sought to be taken by the bank on 15/3/2024 was meant to delay the determination of the two pending Motions and preliminary objection for no basis at all. The Court could not allow the bank to benefit from that delay. Now the bank has seen the light and would want to have the pending matters dealt with expeditiously as it should be in law.

30. It should be noted that the order of 15/3/2024 was made to tame the mischief that one of the parties had created. That party has now rescinded its position. The mischief no longer exists. The orders were not made on merit. The Court was very careful at both the ex parte stage as well as on 15/3/2024 not to condemn any party before examining the merits of the application before it.

31. In order to place all the parties in the position they were as on 15/3/2024, I will allow the application as prayed save that the bank will bear the costs of Synergy for the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb, EBS

JUDGE