



**Pine Care Limited & 2 others v Rao & 2 others (Commercial Case E536 of 2023)
[2024] KEHC 8192 (KLR) (Commercial and Tax) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E536 OF 2023**

AA VISRAM, J

JULY 4, 2024

BETWEEN

**PINE CARE LIMITED 1ST PLAINTIFF
BHARAT KUMAR ALIAS SUSHILKUMAR BHAT'T 2ND PLAINTIFF
BHAT'T PANKAJBEN BHARAT KUMAR 3RD PLAINTIFF**

AND

**PONANGIPALLI VENKATA RAMANA RAO 1ST DEFENDANT
I&M BANK LIMITED 2ND DEFENDANT
SIANA PROPERTIES LIMITED 3RD DEFENDANT**

RULING

1. This ruling determines the Notice of Motion application dated 1st November, 2023, amended on 4th March, 2024; and the Notice of Motion dated 11th January, 2024; I have considered the grounds on the face of the said applications together with the further grounds set out in the affidavits sworn in support of the said applications and the various affidavits sworn in opposition to the same dated 15th January 2024, 29th February 2024 and 12th June, 2024; and the submissions of the parties, and the applicable law.
2. In support of the application seeking interlocutory orders of preservation and restraining the 1st to 3rd Defendants from dealing with the property, the Applicant submitted that there is a conflict of Acts in the present matter. He stressed that the Plaintiff's right to information has not been granted and no explanation has been given by the Defendants. Counsel submitted that the Administrator was appointed on 16th June, 2021, and immediately thereafter his appointment the sale of the property



- took place, which he submitted was in violation of the law. He submitted that the sale was pursuant to the charge and not the administration.
3. Further to the above, counsel for the Applicant stated that the Bank had a duty to the chargor, and may not escape its duties in non-compliance of the *Land Act*.
 4. In opposition to the above, and in support of the application seeking to dismiss the suit, and in opposition to the application seeking to restrain the 1st and 2nd Defendant, counsel submitted that Section 587 of the *Insolvency Act* permits the administrator to take action in relation to the subject property, and that the sale was accordingly lawful.
 5. Counsel admitted that a Statutory Notice had been issued but that the Bank abandoned the same, and opted to pursue the provisions of the *Insolvency Act*. He submitted that there is no bar to the action taken by the 1st and 2nd Defendant in law.
 6. Counsel submitted that this matter had already been litigated in full in the previous insolvency Cause, and the said matters are res judicata. He contended that an Insolvency court is not a special court, as contended by the Plaintiff, but rather a court contemplated under Section 2 of the *Insolvency Act*. He stated this is the court that the insolvency proceedings take place within, and ought to have been completed within.
 7. In support of the application to strike out the suit and in opposition to the application to restrain the Defendants, Counsel for the 3rd Defendant submitted that no prima facie case has been made out by the Applicant. He contended that the stamp duty paid by the 3rd Defendant was based on the government valuation, and therefore, could not have been undervalued as contended.
 8. He further submitted that the Plaintiffs were aware of the valuation at the time, and had not contested it at the time of valuation. The same, if contested, is a matter for trial, if any. He further submitted that Section 90 of the *Land Act* refers to a chargee exercising its power of sale. This is not the case here. The land was sold pursuant to administration and the powers of an administrator exercising such powers. He pointed out that Sections 584 and 587 of the *Insolvency Act*, allow for such action to be taken; and submitted that the Plaintiffs have not shown how the administrator had contravened the said provisions.
 9. In brief rejoinder, counsel for the Plaintiff submitted that the charge in question was a fixed charge and not a floating charge. He could not however point out where in the debenture or documentation the same is expressly provided for, and what, if any, is the consequence of the categorization.
 10. Having considered the above, from the outset, I note that the property in question was sold during the course of administration, by the administrator as the agent of the Plaintiff to the 3rd Defendant, and by way of private treaty.
 11. It is also not lost on me, that the above sale was carried out sometime in the year 2021, and the administration was completed and duly terminated on 16th June, 2022, through a notice of termination. Proceedings in Insolvency Cause No. E025 of 2021: in the matter of Pine care Limited, were concluded on 8th August, 2022 and the file was thereafter closed.
 12. Based on the record before me in the above said proceedings, the Plaintiff had previously filed numerous applications relating to the reliefs sought in the present one. In particular, the application dated 4th October, 2021, sought an injunction to stop the sale of the suit property, which was withdrawn by notice of withdrawal dated 2nd December, 2021. In addition, by way of application dated 3rd December, 2021, the Plaintiff sought conservatory orders to stop the sale of the suit property. The



said application was dismissed by way of ruling dated 24th June, 2022. The same are annexed as Exhibit NS 1 to the replying affidavit of Niraj Shah, sworn on 29th February, 2024.

13. Based on the submissions of the 1st and 2nd Defendant, the subject matter of the present suit has therefore been litigated in full during the insolvency proceedings. No sufficient response to that submission has been tendered by the Plaintiff, and I am therefore in agreement that the relief sought in the present application have either been raised, or ought to have been raised in the original insolvency cause.
14. A further reason for this, is that the insolvency court was seized for the material facts at that time, and was accordingly best suited to deal with applications that arose during the course of the administration. In the event this court were to accept the view that no such court known as the insolvency court is contemplated under our structure, the effect would be that multiple and contradictory decisions emanating in respect of a single insolvency proceeding would ensue from different courts of concurrent jurisdiction. Such a scenario would embarrass the court and be confusing for the parties. I am therefore of the view that multiple courts ought not, where possible, deal with an insolvency matter concerning the same company.
15. I am therefore of the view that the Plaintiff having withdrawn his applications, and in light of the ruling stated above, which deals with the same suit property, cannot now, two years later, and after the administration proceedings have come to an end, seek the same prayers in a new suit founded on the basis of the previous insolvency proceedings.
16. That time has passed, the property has been sold, and the land has been developed by the buyer. The question of whether or not the administrator carried out the sale legally, or for undervalue, would have been best placed before the insolvency court.
17. However, I still take note of Sections 580 to 587 of the [Insolvency Act](#), which provide an Administrator with various powers and functions. The same are set out below:-

580. General powers of administrator

1. The administrator of a company may take any action that contributes to, or is likely to contribute to, the effective and efficient management of the affairs and property of the company.
2. A provision of this Part that expressly permits the administrator to do or not to do a specified act does not limit the effect of subsection (1).
3. A person who deals with the administrator of a company in good faith and for value need not inquire whether the administrator is acting within the administrator's powers.

18. Further, section 584 of the [Insolvency Act](#) grants the administrator powers to assume control of the company's property. It reads as follows:-

584. Duty of administrator to assume control of property of company

Immediately on being appointed as administrator of a company, the administrator shall assume control of all the property to which the administrator believes the company is entitled.

19. Further and in any event, section 586 of the [Insolvency Act](#) makes the duly appointed administrator act as an agent of the company. It reads as follows:-

586. Administrator is agent of company



In performing and exercising the administrator's functions and powers under this Part, the administrator of a company acts as its agent.

20. Under section 587 of the *Insolvency Act*, an administrator has the powers to dispose of property under a floating charge. The same reads as follows:-

587. Power of administrator to dispose of, and deal with, charged property:

floating charge

a. The administrator of a company may dispose of, or take action relating to, property that is subject to a floating charge as if it were not subject to the charge.

21. Based on the above law, and in the absence of evidence to the contrary, I am of the view that the actions carried out by the administrator fell within his mandate. Further, I am not aware of any bar in law that prevents the Bank from pursuing the provisions of the *Insolvency Act* over the *Land Act*. Sections 580 to 587 quoted above expressly provides such power, and the power to deal with property which is the subject of a charge as if it were not subject to a charge.

22. Further, I am of the view that once the Administrator is appointed, he acts as an agent of the company. Therefore, it is the company that sold the property to the 3rd Defendant, and not the Bank.

23. Having found the above, I do not think that an injunction ought to be granted on the grounds that a sale has been conducted at undervalue. In *Giella v Cassman Brown* [1973] EA 358, the requirements upon which an injunction will be granted were stipulated in the following terms; the Applicant must:-

a. Establish his case only at a prima facie level,

b. Demonstrate irreparable injury that cannot be compensated by way of damages if a temporary injunction is not granted, and

c. Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

24. To my mind, the question of under valuation is a matter that may adequately be compensated by way of damages. This was confirmed in the decision of *Zum Zum Investment Limited v Habib Bank Limited* (2014) EKLK where the court held that undervaluation is not a reason to stop the sale by auction.

25. Finally, I am of the view that on a balance of convenience, the 3rd Defendant would stand to suffer a greater injustice if the court were to grant the orders sought in the Plaintiff's application. I say so because no adequate explanation has been offered by the Plaintiff for the delay in making in this application, while in the meantime, the 3rd Defendant has since charged the said property, constructed units on the same, and is presently repaying a loan arising out of the development. Accordingly, restraining the 3rd Defendant at this point would amount to halting the project and undue prejudice.

26. In conclusion, I am of the view that the subject matter herein was either dealt with or ought to have been dealt with conclusively in Insolvency Cause No E025 of 2021. The issues may not be relitigated over and over several years down the line.

27. The Notice of Motion dated 11th January, 2024, is allowed and the Plaintiff's application dated 1st November, 2023, is dismissed with costs. Accordingly, the suit is dismissed.

28. The file is marked as closed.



DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 4TH DAY OF JULY 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

- For the 1st Plaintiff
- For the 2nd Plaintiff
- For the 3rd Plaintiff
- For the 1st Defendant
- For the 2nd Defendant
- For the 3rd Defendant

