



**Civil Engineering Design Limited v Mark Prime Properties
Limited (Under Administration) (Commercial Case E766 of 2021)
[2024] KEHC 11086 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E766 OF 2021
PM MULWA, J
SEPTEMBER 19, 2024**

BETWEEN

CIVIL ENGINEERING DESIGN LIMITED PLAINTIFF

AND

**MARK PRIME PROPERTIES LIMITED (UNDER
ADMINISTRATION) DEFENDANT**

RULING

Introduction and Background

1. Before the court for determination is the plaintiff's Notice of Motion dated 15th December 2023 principally seeking to stay the execution of the ruling delivered by Hon. Mary Osoro on 15th November 2023 taxing the defendant's bill of costs at KShs. 569,790.00, pending the hearing and determination of HCCIP No. [E010 of 2021](#) - Ponangipalli Venkata Ramana Rao and Mark Prime Properties Limited (the insolvency proceedings). The application is supported by the grounds on its face and the affidavit of the plaintiff's Managing Director, Hardip S. Sura sworn on 15th December 2023. It is opposed by the defendant through the replying affidavit of its Administrator, Ponangipalli Venkata Ramana Rao, sworn on 29th January 2024. The application was disposed by way of written submissions which are on record.
2. A brief background of the facts leading to the instant application is that the plaintiff filed this suit vide a plaint dated 21st August 2021 seeking judgment against the defendant for KShs. 36,233,191.72 being money allegedly owed. The plaintiff claimed that it had been engaged by the defendant to provide civil and engineering services for the pre- construction and construction work stages of the development on Plot L.R.No. 1870/V/29 in Westlands, Nairobi. The defendant filed a Notice of Preliminary Objection



dated 26th October 2021, which challenged the competence of the entire suit on grounds that the same was incompetent for being filed without the Administrator's consent or that of the approval of the Insolvency Court, contrary to Section 560 (1)(d) of the *Insolvency Act*.

3. The plaintiff elected to withdraw the suit which withdrawal was endorsed and allowed by the court on 4th May 2022 with costs being awarded to the defendant. The defendant then filed its Party and Party Bill of Costs and the same was taxed on 15th November 2023, by Hon. Mary Osoro at Kshs. 569,790.90. It is this Ruling that the Plaintiff now seeks to stay pending the determination of the insolvency proceedings.
4. The plaintiff avers that the defendant's administrator has a statutory duty pursuant to Section 591 of the *Insolvency Act* not to act in a way that detrimentally affects the interests of a creditor. That unless stay of execution is granted, the Administrator will execute for the taxed costs and the plaintiff will suffer further loss and damage despite being owed a substantial amount by the defendant under administration.
5. The plaintiff asserts that it is entitled to set off the sum of Kshs. 596,790.00 against the sum of Kshs. 36,223,191.72 owed to it or otherwise. That during the existence of the moratorium in place preventing any legal proceedings against the defendant, the plaintiff is prevented from filing suit for the amount owed to it without the consent of the administrator or the court. Thus, the stay of execution sought ought to be granted to enable parties finalize the insolvency proceedings.
6. In response, the defendant depones that the application is frivolous, incompetent and an abuse of court process for reasons that; the ruling of the court dated 15th November 2023 is final as the same has not been appealed against; the application is not anchored on any legal provision of the law and the prayers sought are unsustainable; the plaintiff ought to ventilate his claim of any debt owed to it in the insolvency proceedings and the proceedings herein are independent of the insolvency proceedings and the issues in questions are not related at all.
7. Further, the defendant contended that the issue of set off does not arise as these are two separate suits and the Court herein lacks jurisdiction to deal or pronounce itself on the insolvency proceedings; that execution of the costs awarded by the Court is a separate matter from any debts that may be owed to the plaintiff, which is the purview of the insolvency proceedings; that litigation must come to an end and this matter having been concluded with finality and there being no appeal, there is no basis for stay of execution.
8. The defendant contends that it incurred costs in the matter herein and it is only fair and just that the plaintiff settles the costs awarded. It reiterates that the plaintiff's alleged claim against it lies in the insolvency proceedings. The Court is urged to dismiss the application with costs.

Analysis and determination

9. I have gone through the application, the reply and the parties' submissions. The parties agree in their submissions that the power of the court to grant a stay of execution is discretionary. The principles that guide the court in such an application for stay were laid down in the case of Butt v Rent Restriction Tribunal (1982) KLR 417, thus:

“...the discretion should be exercised in such a way as not to prevent an appeal, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion, a judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings, the court should consider the special circumstances of the case and



unique requirements and that the court can order security upon application by either party or on its own motion and failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

10. In this case, it is common ground that no appeal or reference is pending from the Ruling of 15th November 2023 and that this suit has already been marked as withdrawn and closed. This means that the court can only consider whether there are special circumstances of the case and unique requirements for the grant of stay and whether the court can order security on its own motion and allow the stay. It is evident that the defendant is under administration and that the insolvency proceedings are pending. One of the objectives of insolvency proceedings under the Insolvency Act is to ensure that the company is able to operate as a going concern in order to meet its financial obligations to the creditors in full or achieve a better outcome for the creditors as a whole if it is liquidated.
11. The defendant holds a ruling in its favour for Kshs. 569,790.90 which is bound to be extracted as a decree. Such a monetary decree will no doubt bolster the defendant’s financial position and help it in operating as a going concern. For this reason, I find that it would not be appropriate to prevent the defendant from executing the decree emanating from the taxation ruling as that would undermine its precarious position as a company in administration.
12. I agree with the defendant that the awarded costs are part and parcel of its property for which the Administrator is under statutory obligation to realize/recover for the benefit of the defendant and its creditors. Further, the plaintiff’s claim will be best addressed in the insolvency proceedings. A stay of execution is not appropriate in the circumstances. Having so found, the determination of whether security would be appropriate in the circumstances is rendered moot.

Disposition

13. As a consequence, plaintiff’s application dated 15th December 2023 is bereft of merit and the same is dismissed with costs which I proceed to assess at Kshs. 30,000.00.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.

.....

MULWA

JUDGE

In the presence of:

Mr. Andiwo for plaintiff

Mr. Muhizi for defendant

Court Assistant: Carlos

