



**Deacons (EA) PLC v Ideal Locations Limited (Insolvency Notice E012 of 2018)
[2024] KEHC 11058 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E012 OF 2018
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

DEACONS (EA) PLC APPLICANT

AND

IDEAL LOCATIONS LIMITED RESPONDENT

RULING

1. Before the court is the Applicant's Notice of Motion application dated 20/8/2021 filed pursuant to sections 1, 1A, IB, 3, 3A, 63 (e), *Civil Procedure Act*; Order 22 Rule 22; Order 42 Rule 6; Order 40 Rules 1, 2 and 4; Order 51 Rule 1, Civil Procedure Rules, 2010 and article 1, 2, 19, 20, 21, 22, 23, 24, 25, 27, 28, 40, 48, 50 & 159, Constitution of Kenya, 2010.
2. The Applicant prayed for the following orders:
 - "1. That this Application be Certified Urgent and Service thereof be Dispensed with in the First Instance.
 2. That pending inter partes Hearing of this Application, Interim Orders do issue Ex Parte at the First Instance in the following Terms:
 - i) There be Unconditional Stay Of Execution of the Ruling delivered herein on 18/03/2021 as well as Any/All Orders and/or Process Consequential thereto;
 - ii) An Order do issue to the effect that Messrs Atul Premchand Shah And Peter Obondo Kahi be Temporarily Reinstated to their Appointment as Joint Administrators of the Applicant Company forthwith, with the Mandate to Undertake and/or



Discharge Any and All Duties, Functions and Obligations of Administrators as provided under the [Insolvency Act](#), 2015, Laws of Kenya;

- iii) An Order do issue Restraining the Respondent, whether by Herself, Her Agents/Servants/Employees/Assigns from Interfering in any Way, Manner or from with the Joint Administrators' Open, Quiet, Lawful, Continuous, Exclusive And Uninterrupted Discharge of their Mandate in accordance with. the provisions of the [Insolvency Act](#), 2015, Laws of Kenya, as relates to the Affairs, Operations, Business and/or Property of the Applicant Company;
- iv) An Order do issue Restraining the Respondent whether by Herself, Her Agents/Servants/Employees/Assigns from engaging in Any and All Acts and/or Omissions amounting to and/or capable of construction to amount to Harassment and/or Intimidation and/or Threats to the Affairs, Operations, Business and/or Property of the Appellant.

3. That the Orders subject of Prayer 2 above be served upon:

- i) The Court Bailiff, Milimani Law Courts, Nairobi;
- ii) The OCS, Central Police Station, Nairobi;for purposes of Ensuring Compliance, Supervising the Execution of the Order, Providing Security, and Ensure no Public Disturbance ensues, whilst maintaining Law and Order throughout and after the Execution of the Order;

4. That the Orders subject of Prayers/Items No. 2 and 3 above do Persist until the Hearing and Determination of this Application.

5. That the Honourable Court be Pleased to Grant Unconditional Leave to the Applicant Company to Lodge Appeal against the Ruling delivered herein on 18/03/2021, and the Notice of Appeal lodged on 18/03/2021 be Admitted as Properly Lodged.

6. That the Orders subject of Prayers/Items No. 2 and 3 above do Persist until the Hearing and Determination of the Appeal subject hereof.

7. That the Costs of this Application be provided for.”

- 3. The application was premised on the grounds set out in its body and the supporting affidavit of Muchiri Wahome, the Chief Executive Officer of the Applicant.
- 4. The grounds were that the Applicant appointed Joint Administrators namely Atul Premchand Shah and Peter Obondo Kahi with effect from 23/11/2018 however the court terminated the appointment vide a ruling delivered on 18/3/2021.
- 5. Aggrieved by the aforementioned ruling, the Applicant Company and the joint administrators lodged separate Notices of Appeal to the Court of Appeal against the entirety of the said decision. The Applicant is apprehensive that the Respondent will execute the ruling which would sabotage its operations and render the Appeal academic.



6. The Applicant urged the court to preserve the substratum of the subject Appeal pending the determination of the Appeal.
7. In opposition, the Respondent filed a Preliminary Objection and Grounds of Opposition both dated 28/9/2021.
8. In the Preliminary Objection, the Respondent stated that this court lacks the jurisdiction to entertain the instant application and that the jurisdiction of this court on determination of an application for stay of execution has not been properly invoked.
9. That the court is functus officio having determined with finality the issue of appointment of the Joint Administrators and that the Applicant has no locus to file the instant application and the orders sought cannot be granted by this court.
10. The contents of the grounds of opposition are similar to those in the Preliminary Objection.

Analysis and Determination:

11. In summary, the Applicant seeks a stay of execution of the ruling delivered by this court on 18/3/2021; an order to temporarily reinstate Atul Premchand Shah and Peter Obondo Kahi as Joint Administrators of the Applicant Company and an order to restrain the Respondent from interfering in any manner with the discharge of the administrators' mandate in relation to the Applicant Company. The prayers were sought pending the determination of the Appeal against the ruling of 18/3/2021 filed by the Applicant.
12. On 18/3/2021, this court delivered a ruling in respect of an application dated 7/8/2019 which sought an order to revoke the appointment of the Joint Administrators with regards to the Applicant Company. In the ruling, the court revoked the appointment of the aforementioned Administrators for reasons that it contravened the provisions of section 545(3) of the *Insolvency Act*. The court was of the view that the appointment was a nullity in law and therefore void.
13. It is clear therefore that the court pronounced itself with finality regarding the appointment of Atul Premchand Shah and Peter Obondo Kahi as Joint Administrators of the Applicant Company. Having done so, the court is now functus officio and cannot consider nor grant the prayers in the instant application that seek the temporary reinstatement of the Administrators and an order to restrain the Respondent from interfering in any manner with the discharge of the administrators' mandate.
14. The other issue for determination is whether the threshold for a stay of execution order has been met.
15. A grant of stay of execution pending Appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant parts state as follows:

“No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”



16. The Applicant Company has the obligation to show the court that it would suffer substantial loss if the order is not granted. In the case of *Mukoma v Abuoga* [1998]KLR 645 it was held:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

17. The Applicant Company submitted that substantial loss shall be occasioned to it in terms of dealing in the property and conduct of business without any safeguard from the threat of execution by creditors thereof and that the subject Appeal shall be rendered nugatory should the orders sought not be granted as the court shall be unable to reverse the harm done on the affairs of the Company.

18. While the Applicant has submitted that it would suffer substantial loss if the stay orders are not granted, it has not substantively established the same nor shown how the Appeal would be rendered nugatory if execution proceeds. It is not sufficient for the Applicant to plead that it would suffer substantial loss, evidence of the same ought to be presented to the court.

19. The court has the obligation to balance the right of the Applicant to Appeal and that of the successful litigant to enjoy the fruits of his/her judgement. This was held in the case of *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR, where the court stated as follows:-

“To be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.

The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending Appeal.

Of course, in the application of that ordinary principle, the court must have its sights firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

20. I concur with the authority above. In this case, while the Applicant has a right to Appeal, it has not sufficiently satisfied the court that it would suffer substantial loss if a stay of execution pending Appeal is not granted and on the other hand, the Respondent has a right to enjoy the fruits of ruling issued in its favour.

21. All things considered, the application before this court lacks merit and is dismissed with costs with the exception of prayer 5 which is granted as follows; “That the Honourable Court be Pleased to Grant Unconditional Leave to the Applicant Company to Lodge Appeal against the Ruling delivered herein on 18/03/2021, and the Notice of Appeal lodged on 18/03/2021 be Admitted as Properly Lodged.

22. Each party to bear its own costs. It is so ordered.

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

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Wangai for the Respondents/Applicants.
2. Mr. Ngonze for the Administrators of the Company.
3. Amos - Court Assistant

