



**Elite Intelligent Traffic Systems Limited v Gulf African Bank Limited (Insolvency Notice E018 of 2024) [2024] KEHC 11982 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11982 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**INSOLVENCY NOTICE E018 OF 2024**  
**JWW MONG'ARE, J**  
**OCTOBER 4, 2024**  
**AND**  
**IN THE MATTER OF ELITE INTELLIGENT TRAFFIC SYSTEMS LIMITED**  
**AND**  
**IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE LAWS OF KENYA)**  
**BETWEEN**  
**ELITE INTELLIGENT TRAFFIC SYSTEMS LIMITED ..... APPLICANT**  
**AND**  
**GULF AFRICAN BANK LIMITED ..... RESPONDENT**  
**RULING**

**Introduction And Background**

1. By a Petition dated 25<sup>th</sup> March 2024, the Applicant has petitioned the court to make an order for its liquidation citing reasons that it is insolvent and unable to pay its debts. Contemporaneously with the Petition, the Applicant has also filed the Notice of Motion dated 25<sup>th</sup> March 2024 seeking inter alia, injunctive orders against the exercise of the Respondent's statutory power of sale with respect to property LR No. 1160/339 Kwarara Road, Karen Estate Nairobi ("the Suit Property") and stay of all legal proceedings pending before any court against the Applicant. The application is supported by the affidavits of the Applicant's director, Patrick Mwangi Kibaiya sworn on 25<sup>th</sup> March 2024 and 7<sup>th</sup> May 2024 respectively. It is opposed by the Respondent through the Grounds of Opposition dated 27<sup>th</sup> March 2024 and the replying affidavit of its Legal Officer, Lawi Sato sworn on 3<sup>rd</sup> April 2024. The parties also supplemented their arguments by way of written and oral submissions by their respective



counsel which I shall make relevant references to in my analysis and determination later on in this Opinion.

### **The Application**

2. The Applicant's case is that the Suit Property was scheduled for sale by public auction on Tuesday, 26<sup>th</sup> March 2024, at 11:00 am under the instructions of the Respondent and that it filed the Petition due to the to the surmounting debts facing it. It contends that the intended sale by public auction would have greatly prejudiced the insolvency proceedings and particularly the Applicant's unsecured creditors whose interests would best be served through realizing and consolidating the Applicant's assets and debts. The Applicant avers that it is willing to offer a payment plan/arrangement to the satisfaction of the creditors but currently lacks capacity to pay its debts. That if afforded reprieve, the Applicant can settle all of the debts owing as it stands to suffer irreparably if the prayers sought are not granted.
3. The Applicant states that the Respondent still has the option to either relinquish or maintain the security over the Suit Property as the insolvency proceedings continue and that the issuance of the order of injunction shall not prejudice it.

### **The Respondent's Reply**

4. The Respondent states that the Applicant cannot complain on behalf of the unsecured creditors as it purports to do in its assertion that the sale of the Suit Property would prejudice the Applicant's unsecured creditors. That the rights of unsecured creditors are subordinate to the rights of the Respondent as a secured lender and that in any event, liquidation cannot stop the enforcement of a security held by a secured creditor. The Respondent states that the application is misconceived, devoid of merit and a gross abuse of the process of court and should therefore be dismissed with costs.
5. It depones that the application and supporting affidavit are riddled with misrepresentation and concealment of material facts, aimed at misleading the court. That the Applicant has failed to disclose that the Suit Property has been the focal point of numerous court decisions and that these Rulings followed the Applicant's prolonged endeavor to obstruct the Respondent's right to sell the property over a span of four years and that importantly, all court decisions have unequivocally affirmed the Respondent's right to sell the Suit Property.
6. The Respondent states that the Applicant's efforts to impede the realization of the Respondent's security has severely prejudiced the Respondent. That the value of the security provided has been surpassed by the accumulated and outstanding amounts, with a genuine risk of this disparity worsening further over time. It states that the outstanding debt now stands at Kshs. 393,903,788.55/= against a forced sale value of Kshs. 146,250,000/=.

### **Analysis and Determination**

7. From a careful consideration of the pleadings filed before this court, I note that the court is being called to determine whether to grant an injunction in order to restrain the Respondent from auctioning the Suit Property and whether all legal proceedings against the Applicant should be stayed in light of this liquidation proceedings.
8. On the injunction, the Applicant grounds its case on the principles established in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and section 692 of the *Insolvency Act* which gives the court power to grant injunctions in certain cases. Both parties rely on the cases of *East Africa Cables Plc v. Ecobank Kenya Ltd; SBM Bank (K) Ltd (Interested Party)*[2020] eKLR and *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* (Insolvency Petition E004 of 2021) [2021] KEHC



242 (KLR) (Commercial and Tax) (19 November 2021) (Ruling) to advance their respective positions. In *East Africa Cables Plc* (*supra*), the court (Majanja J.,) held that a secured creditor is entitled to exercise its rights under the security document or statute and that this power is not subject to insolvency proceedings. In *Kimeto* (*supra*), the court (Mabeya J.,) held that there is an element of public interest in the insolvency of a Company and that a court should give deference to the rights of a secured creditor and not stifle any of its rights as such. The court stated that “...While giving public interest consideration, the Court must leave commerce to be undertaken and operated in an environment of freedom and certainty. The lenders must be allowed the requisite freedom to realize their securities without unnecessary interference and/or inconvenience’

9. It was the Applicant’s further submission that the exercise of the Respondent’s statutory power of sale will impede the orderly liquidation of the Applicant’s affairs and further derail the efficient and optimal distribution of its assets to all creditors contrary to section 3 (1) (e) of the *Insolvency Act*. That the Suit Property will be sold at a forced sale value as per section 97 (3) of the *Land Act*, thereby reducing the amount of assets available for distribution to creditors and that it will be nearly impossible to achieve a fair balance of different interests.
10. It is not in dispute that the Applicant is indebted to the Respondent and that the Respondent’s statutory power of sale has crystallized. The court in *Kimetto* (*supra*) and *East Africa Cable Plc* (*supra*) has asserted that a secured creditor’s rights under a security document cannot be curtailed by insolvency proceedings. This position was restated in *Tusker Mattresses Limited v Equity Bank Kenya Limited & another* (Insolvency Petition E018 of 2020) [2022] KEHC 258 (KLR) (Commercial and Tax) (29 March 2022) (Ruling) where the late Majanja J., held as follows:

As a secured creditor, the Bank is entitled to exercise its statutory power of sale without recourse to the court exercising insolvency jurisdiction. I therefore reiterate the holding in *East Africa Cables PLC v Ecobank Kenya Limited* HCCOMM Misc. E043 of 2020 [2020] eKLR that it is settled law that a secured creditor is entitled to exercise its rights under the security document or statute in the event of default by the company and that the power is not subject to insolvency proceedings commenced against the company by any other creditor.

11. I fully associate myself with the above holdings and find that the Respondent, as a secured creditor has a right to exercise its statutory power of sale over a company regardless of whether insolvency proceedings have been instituted against it. The creditors the Applicant purports to speak for have no interest or stake in the secured property, the subject of the Respondent’s right to its statutory power of sale hence an injunction cannot be granted on that basis. I am therefore in agreement with the Respondent’s submission that the Applicant has no legal basis to seek a stay of the exercise of the Respondent’s statutory power of sale.
12. Turning to whether a stay of all proceedings against the Applicant should be granted on the basis of section 428 of the *Insolvency Act*, the Applicant relies on the court’s decision in *Tusker Mattresses Limited* (*supra*) where Tuiyott J., (as he was then) held that “The general rule is that once a liquidation Petition has been presented, absent very exceptional circumstances, legal proceedings against the company should be barred or stayed as a way of preserving the assets of the company.” However, the late Majanja J., clarified that such an order staying proceedings does not apply to a Bank’s exercise of its power of sale in respect of secured property and that the exercise of statutory power conferred by security documents did not constitute “a legal proceeding”. Further, that the intention of granting the order was to ensure equality among the unsecured creditors, as a class, in line with the objects of insolvency law that creditors of a class ought to be treated equally. Therefore, such an order of stay does



not affect secured creditors such as the Respondent. I am therefore inclined to stay any and all legal proceedings, actions against the Applicant or stay of executions of judgment, orders, decrees against the Applicant by unsecured creditors pending the hearing and determination of these proceedings.

13. I note that the Respondent deponed that there are pending cases between the parties, including HCCOMM E265 of 2023; *Gulf African Bank Limited v Elite Intelligent Transport Systems Ltd* which the Respondent filed suit in its bid to realize the security. As stated, any order of stay of proceedings does not affect actions or proceedings of secured creditors in their bid to realize their security and exercise their statutory power of sale and therefore, for avoidance of doubt, the aforementioned proceedings, HCCOMM No. E265 of 2023 cannot be stayed.

### **Conclusion and Disposition**

14. For the reasons stated above, I find that the Applicant's Notice of Motion dated 25<sup>th</sup> March 2024 is partly merited and the same is hereby be allowed to the following extent:
1. There shall be a stay of any and all legal proceedings, actions against the company or stay of executions of judgment, orders, decrees against the company by Unsecured Creditors pending the hearing and determination of these proceedings.
  2. For avoidance of doubt, the order above does not apply to HCCOMM No. E265 of 2023 or proceedings pending by other secured creditors.
  3. The interim orders of injunction are hereby discharged.

**DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4<sup>TH</sup> DAY OF OCTOBER 2024**

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Makau for the Petitioner.

Mr. Ogunde for the Respondent.

Amos - Court Assistant

