



DAC Aviation (EA) Limited v AMRA Leasing Limited & 3 others (Insolvency Petition E039 of 2020) [2023] KEHC 20528 (KLR) (Commercial and Tax) (14 March 2023) (Ruling)

Neutral citation: [2023] KEHC 20528 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E039 OF 2020
DAS MAJANJA, J
MARCH 14, 2023
IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND IN THE MATTER OF
DAC AVIATION (EA) LIMITED
AND
IN THE MATTER OF AN APPLICATION FOR
STAY OF LIQUIDATION ORDER

BETWEEN

DAC AVIATION (EA) LIMITED APPLICANT

AND

AMRA LEASING LIMITED 1ST RESPONDENT

FINEJET LIMITED 2ND RESPONDENT

SAIC Q400 LIMITED 3RD RESPONDENT

KCB BANK KENYA LIMITED 4TH RESPONDENT

RULING

Introduction And Background

1. On September 23, 2022, the court issued a liquidation order against the Applicant (“the Company”) after coming to the conclusion that it was unable to pay its debts (“the Liquidation Order”) following a petition presented by the 1st Respondent (“the Petitioner”). However, the court stayed the Liquidation Order for a period of three months from the date of the order to enable the parties agree on terms of



payment of the judgment debt of GBP 8,992,980.25 due to the Petitioner. The parties were at liberty to move the court for further and other orders.

2. The Company has now filed the Notice of Motion dated December 15, 2022 made, *inter alia*, undersection 3(1)(c) of the *Insolvency Act*, 2015 (“the Act”) seeking the following orders:
 1. Spent
 2. That pending the hearing and determination of this application, the Honorable Court be pleased to issue an order extending the stay orders on the liquidation order issued on the 23rd day of September, 2022 for a period of 120 days to enable the parties conclude negotiations on debt repayment structure already initiated.
 3. That pending the hearing and determination of this application, the Honorable court be pleased to order all modes of execution against the applicant/company including any garnishee proceedings instituted by other parties not in this proceedings as void and unlawful by virtue of the Liquidation order issued on the 23rd day of September 2022 in this Insolvency Petition No E039 of 2020.
 4. That pending the hearing and determination of this application, the Honorable court does issue an order staying any and all execution of all judgments, decrees, orders interim or otherwise execution proceedings against the applicant’s assets including inter alia proclamation of attachment, seizure, repossession, sequestration, enforcement of security and any other form of execution proceeding or analogous process or action against the applicant for this Court may in its discretion deem fit and just.
 5. That the costs of this application be in the cause.
3. The application is supported by the affidavit and supplementary affidavit sworn by the Company’s Managing Director, Peter Muga, sworn on December 15, 2022 and February 22, 2023 respectively. It is opposed by the Petitioner through the replying affidavit by Paul Clark, who is engaged by MDT (investments) Limited, the Lease Manager of the Petitioner, sworn on February 7, 2023. It is also opposed by the 3rd Respondent (“SAIC”) a creditor of the Company, through the replying affidavit sworn on February 17, 2023 by Alonna Goldfarb, a director of Almada Inc., the owner of SAIC. The 2nd Respondent (“Finejet”), another creditor of the Company also opposes the application through the affidavit of John Kinyi Kimani, its Managing Director, sworn on February 10, 2023. In addition to the positions taken in their pleadings, the parties’ advocates supplemented their arguments by making oral submissions.

The Arguments

4. The Company relies on the legislative objective of the Act and submits that the court has inherent power to make any order that will enable the Company continue to operate as going concern so that ultimately it may be able to meet its financial obligations to its creditor in full or at least to the satisfaction of those creditors. That its application is intended to achieve a better outcome for the creditors as a whole than would be the case if it were to be liquidated immediately. The Company avers that liquidating would be a draconian step when its financial position is currently and greatly improving.
5. Counsel for the Company submits that since the court issued the Liquidation Order, it has made substantial payments to its creditors including those who are not part of these proceedings. The Company states that its discussions with the Petitioner have not been concluded as an initial deposit of Kshs 50 million demanded by the Petitioner could not be met by the Company but it gave a



counteroffer and that negotiations are ongoing. The Company contends that it is making an effort to settle all its debts to more than 150 creditors.

6. The Petitioner opposes the application by stating that the debt owed to it arose in 2017 way before the Company had any financial hardship and before the COVID-19 pandemic. It asserts Company has not acted in good faith because it never follows through its proposals for payment and has failed to respond Petitioner's counteroffers. In the circumstances, the Petitioner urges the court to confirm the Liquidation Order as discharging it will allow it to execute its judgment in the normal way and that would take it back to the difficulties it had encountered when enforcing the judgment debt.
7. SAIC also opposes the extension of the Liquidation Order. It submits that the Company does not have any agreed payment plan in respect of its debt and that the Company is hiding behind the Liquidation Order to frustrate the creditors. SAIC states that the Company does not have any assets and has been dealing with leased aircraft whose leases have since been terminated. SAIC urges the court to allow the Liquidation Order to vest so that the Company can stop avoiding its obligations to pay its debts.
8. Finejet also opposes the application. It states that it has been pursuing its debt since 2020 and that it is only recently that the Company finally acknowledged that it is indebted to it. It seeks to be formally recognized as one of the creditors and states that while an extension of the Liquidation Order would be favourable to Finejet, it is apprehensive that the Company has too many creditors and that it is unlikely that the Company would be able to settle all debts. Finejet thus supports the liquidation of the Company so that it can pursue its debt as a creditor.

Analysis and Determination

9. The main issue for determination is whether the court should stay the Liquidation Order and for the Company to continue enjoying the protections flowing from it.
10. The Company is right to state that the court, in insolvency proceedings, has the power to make any appropriate order it considers fit in the circumstances. This position is anchored in section 427(1) of the *Act* which provides, in part, that the court, on the hearing of a liquidation application, "may make such of the following orders as it considers appropriate" or "any other order that, in its opinion, the circumstances of the case require".
11. This discretion is borne out of the fact that the Act was enacted to inter alia "provide for the liquidation of incorporated and unincorporated bodies (including ones that may be solvent); to provide as an alternative to liquidation procedures that will enable the affairs of such of those bodies as become insolvent to be administered for the benefit of their creditors. Mativo J., in *Kenya Artisans Limited v Chemical & Allied Workers Union* ML HC IP No E031 of 2020 [2021] eKLR explained the objective of the Act by stating as follows:
 20. The Preamble shows that insolvency law provides a much-needed orderly process for the reorganization or liquidation of insolvent entities. It provides comfort in the form of a safety net for business activity by offering mechanisms for rescue or value, maximizing exit from the business and to timely distinguish between those firms that can be saved and those that must exit fast. The Preamble leaves no doubt that the insolvency law should inhibit premature liquidation of sustainable businesses.
 21. The predominant objective of the Act is to see whether there are reasonable prospects for revival of the fortunes of the business and if it is not, put the business in liquidation mode and liquidate the assets in a time bound manner. These rationales clearly suggest that the existence of bankruptcy is tied up with an attempt to arrive at a balance, that is the law is seeking to



ensure that there is a balance between the interests of those who, for the want of a better word, are ‘stakeholders’ in a person’s insolvency. The stakeholders are the debtor, the debtor’s creditors, and society in general, and bankruptcy involves these three parties in a compact. These stakeholders, together with the debtor’s family which also can be seen as a stakeholder, have conflicting interests which produce tension, and it is the task of the law to reconcile these interests.

12. The court, in liquidating the Company but staying the order for 3 months and allowing the parties to negotiate on a settlement, was being guided by the statutory objectives of the Act. The court was granting the Company an opportunity to demonstrate that it can be salvaged because liquidation amounts to juristic execution of the Company.
13. In support of its application to extend stay of the Liquidation Order, the Company contends that its business prospects are improving and it is in the course of paying off its creditors. It has attached a schedule of its creditors and the sums paid to them so far which indicate that the Company has made payment of Kshs 349,657,143.17 against debts of Kshs 955,801,345.30. As regards the Petitioner’s debt it had proposed to pay an initial installment of USD 20,0000.00 per month starting 3 months from September 23, 2022 for the next 6 months before further review and adjustment. The Company states that its proposal was grounded on the fact that it initiated a contract with a client based in Nigeria for an aircraft and that business and contracts have started streaming in but which have been hampered by these insolvency proceedings which have had a negative effect on the loan term contracts it is likely to secure. SAIC has also annexed correspondences between itself and the Company. In one email dated January 7, 2023, the Company commits to pay USD 400,000.00 from contracts the Company had with third party firms.
14. From the totality of the evidence before the court, it is apparent that the parties have been in negotiations even though nothing much seems to have come out of the negotiations. I also note the efforts the Company is making in paying off its other creditors. I accept the creditors apprehensions that there are too many creditors and that the payout may not be immediate as they would have wished. It is also true that the Company has been making promises to pay but has failed to follow through.
15. The general policy of the Act is to give a failing business entity the opportunity to turn around its business. In this case, the court has already issued a liquidation order and the issue is whether the Company has presented sufficient evidence to demonstrate that it is overcoming the difficulties it had in resolving the debt through revival of its business or restructuring. From the totality of the evidence, the Company’s business appears to be undergoing a revival. Considering the circumstances of this case, the interests of the parties, the discretion of the court and the objective of the Act, I am inclined to grant the Company time to demonstrate to the court that its business has prospects of revival and is position to pay its debts bearing in mind two key principles. First, the Company must disclose to the court its financial position in the form of statement(s) of account including but not limited to its assets, revenues and liabilities since the information so far does not give a complete picture. This information will enable the court determine whether in fact the Company deserves to be salvaged. Second, the Company must demonstrate that it is treating all the debtors of the same class equally. It is upon these principles that I intend to condition the order of stay.
16. The Company also seeks orders which are intended to protect it from pressure from its creditors by staying execution and proceedings against it. I note that some of the creditors are secured creditors and in a ruling dated February 17, 2023, I held that a secured creditor is entitled to exercise its right under the security documents without recourse to the Insolvency Court (see also *East Africa Cables PLC v Ecobank Kenya Limited* HC COMM Misc E043 of 2020 [2020] eKLR). In my view therefore, the orders sought are too wide and interfere with creditor’s security rights. Moreover, since the Liquidation



Order has been stayed, any stay of proceedings shall be considered on a case by case basis hence I decline to issue a general order.

Disposition

17. For the reasons I have set out above, I allow the Company's application dated December 15, 2022 on the following terms:
1. The Liquidation Order issued on the September 23, 2022 be and is hereby stayed for a further period of 90 days from the date hereof on the terms set out hereunder.
 2. The Company shall file in this court its Statement of Accounts showing its financial position not limited to assets, liabilities and revenues within 21 days from the date hereof.
 3. The Company shall file its plan for payment of its creditors within 21 days from the date hereof.
 4. An order be and is hereby issued staying any and all execution of all judgments, decrees, orders interim or otherwise execution proceedings against the Company's assets. For avoidance of doubt, this order shall not amount to stay of any pending court proceedings or stay of enforcement of security interests by secured creditors.
 5. The matter shall be mentioned in court on a date fixed to confirm compliance.

DATED and DELIVERED at NAIROBI this 14th day of MARCH 2023.

D. S. MAJANJA

JUDGE

