



REPUBLIC OF KENYA



**Belladonna Pharmacy Limited v Belmont Pharmaceutical Limited (Insolvency Petition E016 of 2022) [2023] KEHC 23651 (KLR) (Commercial and Tax) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E016 OF 2022**

**JWW MONG'ARE, J**

**OCTOBER 16, 2023**

**BETWEEN**

**BELLADONNA PHARMACY LIMITED ..... PETITIONER**

**AND**

**BELMONT PHARMACEUTICAL LIMITED ..... RESPONDENT**

**RULING**

1. The Petitioner, Belladonna Pharmacy Limited has moved this Honourable Court by a Notice of Motion Application brought under a Certificate of Urgency dated 6<sup>th</sup> June 2022 seeking the following orders:-
  - i. Spent
  - ii. Spent
  - iii. That pending the hearing and determination of the liquidation petition herein, the Judgment dated 3<sup>rd</sup> May, 2022 against the 1<sup>st</sup> Defendant in Civil Suit No. CMCC No. 1045 of 2019 (*Bellamont Pharmaceutical Limited v Belladonna Pharmacy Limited & 2 Others*) at Milimani Commercial Courts be stayed AND any other civil suit regarding debt recovery or execution of the Orders therefrom against the Petitioner/Applicant be hereby restrained.
2. The application which has been brought under Section 428 of the *Insolvency Act* and Order 51 of the *Civil Procedure Rules* is supported by the grounds set on its face and the supporting affidavit of Martin Ogang, a director of the Petitioner, sworn on 6<sup>th</sup> June, 2022. The Application is opposed and two creditors, M/s Forleys Limited and M/S Laborex Kenya Limited, has filed grounds of objection to these proceedings. Forleys LTD, has filed grounds of objection dated the 27<sup>th</sup> June, 2022 and a Replying affidavit sworn by its director Dinesh Vekaria. Similarly, Laborex Kenya Limited, a creditor,



has filed its grounds of opposition dated 7<sup>th</sup> December, 2022 and a Replying affidavit sworn by Renaud Bauchamp, a finance manager of the Laborex Kenya Limited Company on 7<sup>th</sup> December, 2022.

3. In its petition for liquidation, the Petitioner seeks the following prayers:-
  - a. That Belladonna Pharmacy Limited be liquidated by the Court under the provisions of section 421(1) (g) of the Insolvency Act.
  - b. That the court appoints a liquidator for purposes of winding up the affairs of the company.
  - c. That the liquidation order acts as a stay of the legal suits or of execution of any decree or order for debt recovery against Belladonna Pharmacy Limited pending the winding up of the affairs of the company.
  - d. The costs of the petition be in the cause and be paid out of the assets of Belladonna Pharmacy Limited.
4. Martin Ogang, a director of the Petitioner, in his supporting affidavit to this application avers that he has been made aware of a judgment against the company for the sum of Kshs.858,357/- by the Respondent and that the company has gone out of business and is unable to pay its debts and is therefore seeking the appointment of a liquidator to proceed over its winding up to avoid the company being embarrassed or suffering serious prejudice.
5. In opposing the application for stay of proceedings by the company pending the liquidation Forleys Limited, a creditor, has urged the court to find that, the Petitioner despite being aware of the judgment and decree in CMCC No. 7264 OF 2018. *Forleys Ltd v Belladonna Ltd* of Kshs.12,729,381.70/-, failed to disclose the same in the Petition and the application herein.
6. Forleys Limited further submitted that the Petition and the Application are purely being used by the Petitioner to avoid settling the Company's decree against the Petitioner in that the Petitioner by its own Audited Accounts presented to this court has demonstrated that the Directors siphoned money out of the Petitioner's accounts and invested the same elsewhere to avoid paying debts. Forleys Limited averred that it had carried out its own investigations and come into possession of evidence that part of the money siphoned out of the company was used to purchase a property in the Nairobi City in the name of a company wholly owned by one of the Directors of the Petitioner. Forleys Limited urged the court to find that the Petition and the application are brought purely for purposes of frustrating the execution of a lawful decree in its favor and should not be allowed since the Petitioner would use the stay, if granted, to siphon out the known assets in which the Petitioner has interest and deny the creditor an opportunity to satisfy its decree.
7. Laborex Kenya Limited, a creditor, also opposed the application for stay of proceedings and urged the court to find that the petition has been brought to frustrate the execution of its decree the in CMCC 7036 between *Laborex Kenya Limited v Belladonna Pharmacy Limited*.
8. Laborex Kenya Limited urged the court to find that the Applicant has completely failed to show and demonstrate in the Petition and the application the whereabouts of the payments that the Petitioner realized from the sale of medicine and medical equipment that the Company supplied to the Petitioner. Further, Laborex Kenya Limited urged the court to find that the application and the petition were full of inconsistencies in that in seeking to stay the proceedings in the lower court in the matter between the Petitioner and Laborex Kenya Limited, the Petition referred to a company resolution of the Petitioner dated 3<sup>rd</sup> May 2022 while in the current application the Petitioner talks of a resolution of the company dated 16<sup>th</sup> December 2020. Laborex Kenya Limited urged the court to find that this



was a clear demonstration that the Petitioner was being crafty and using the courts to hide its assets and avoid settling debts due to its suppliers.

### **Analysis and Determination**

9. I have carefully considered the application by the Petitioner herein and the supporting affidavit sworn in support thereto by the director of the Petitioner, Mr. Marting Ogang and the submissions filed subsequent thereto. I have equally considered carefully the grounds of opposition and the replying affidavits by both Laborex Kenya Limited and Forleys Limited and the submissions as well. I note only one issue emerges for determination, to wit, “whether the Applicant is deserving of a grant of stay of proceedings under Section 428 of the *Insolvency Act*.”
10. Section 428 provides as follows:-
  428. Power to stay or restrain proceedings against company when liquidation application has been made-
    - (1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may —
      - (a) if legal proceedings against the company are pending in the Court— apply to the Court for the proceedings to be stayed; and
      - (b) if proceedings relating to a matter are pending against the company in another court—apply to the Court to restrain further proceedings in respect of that matter in the other court.
    - (2) On the hearing of an application under subsection (1)(a) or (b), the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.
11. Courts have held that section 428 of the Insolvency Act, cited above is not a mandatory requirement that requires the court upon application to automatically stay all proceedings against an Applicant. Indeed, decisions emerging from the courts point out that the courts have discretion in deciding whether to allow an application under Section 428 of the *Insolvency Act* or not. In urging the court to find that it has discretion to decline the application as filed, the two creditors urged the court to be guided by the decisions in Civil Application No. 62 of 2010 Between *John K. Kilei v Interim Liquidator Of Lakestar Insurance Co. Ltd* [2010]eKLR, Insolvency Petition No. E155 OF 2019 *Kinyanjui Njuguna & Co. Advocates v Invesco Insurance Limited*, 2021] eKLR.
12. In the decisions cited above the courts declined to grant a stay of proceedings in applications filed under Section 428 of the Insolvency Act. In the case of HCC NO. E239 OF 2021, *Mobile Accord Incorporated v Reelforge Systems Limited* [2021] eKLR the Honorable Majanja J. held that the Court's power to stay proceedings under Section 428 of the Insolvency Act is discretionary and the Petitioner's rights therefrom are not automatic but discretionary It's incumbent therefore for the Petitioner to prove that it is entitled to the relief sought. Where the Petitioner is not able to convince the court of the merit of the application the court will dismiss the application regardless of the pending Petition.
13. The above decision of Majanja J, although persuasive, is useful in the matter before this court. The facts of the case before me point to a scheme by the Applicant to hide behind the courts to refuse or run away from its obligations. In its petition and subsequent application, the court notes that the Applicant does not provide information as to what has caused the current state of its affairs leading to a situation where it is no longer able to meet its financial obligations. The court notes that the two



creditors were suppliers of the Petitioner who supplied goods for trade to the Petitioner and yet there is no disclosure as to what happened to the said goods after being supplied or to what was the proceeds of the sale applied. The court further notes that despite there being active litigation by the two creditors against the Petitioner, these are not disclosed in the main petition as debts of the company. Instead, only the decree by the Respondent has been disclosed as the reason for the application to wind up the Petitioner.

14. The court further notes that despite an allegation of fraudulently siphoning out of the profits of the Petitioner to purchase a property in the name of the directors of the Petitioner, this has not been rebutted or controverted even by way of supplementary affidavit or made reference thereto in the submissions before this court. The Petitioner's failure to provide a rebuttal of the above allegations leads to conclude that the same are true.
15. The sum total of the above findings is that the Applicant/Petitioner has not demonstrated to the court that it is deserving of the prayers sought. The application is therefore dismissed for lack of merit with costs to the Respondents and the two creditors, Laborex Kenya Limited And Forleys Limited.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF OCTOBER 2023**

.....

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

**JUDGE**

In the Presence of:

Mr. Jackech for the Applicant/Petitioner.

Ms. Nkatha for Laborex Kenya Limited, A Creditor.

Mr. Fred Okeyo for Forleys Limited, A creditor.

