



**Dry Associates Limited & 59 others v Multiple Hauliers (E.A) Limited & another (Civil Case 419 of 2018) [2023] KEHC 23542 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 419 OF 2018  
JWW MONG'ARE, J  
OCTOBER 13, 2023**

**BETWEEN**

**DRY ASSOCIATES LIMITED & 59 OTHERS ..... PLAINTIFF**

**AND**

**MULTIPLE HAULIERS (E.A) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MULTIPLE ICD (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On December 16, 2022 the Plaintiffs herein filed an application before this Honourable Court seeking to have the court enter judgment against the Defendants on admission for the sum of Kshs 437,040,977.88/- and Usd 502,935.93 together with interest on the same at court rates.
2. On February 6, 2023 the Defendants herein filed an application seeking to stay the proceedings before this honourable court pending the hearing and determination of the Insolvency Petition No. E010 of 2020- In the matter of Multiple Hauliers.
3. Subsequently parties were directed to file their respective submissions to both applications and appear before the Court to highlight the same. Both parties have filed their respective responses to the two applications.
4. The Plaintiff's application of December 16, 2022 is premised on the fact that during the pendency of this suit the 1<sup>st</sup> Defendant could not meet its financial obligations when they fell due and Synergy Industrial Credit petitioned for its liquidation on March 3, 2020. The Defendant subsequently moved to court and filed an application seeking the dismissal of the liquidation petition. The same was allowed and the liquidation petition stayed until further orders of the court.



5. The Plaintiffs in urging the Court to enter Judgment on admission have placed reliance on the statement of indebtedness filed by the 1<sup>st</sup> Defendant in response to the Insolvency Petition against it filed on March 2, 2020. The two applications are therefore interrelated.
6. Having carefully considered the pleadings and the submissions filed by the parties herein, the court has identified two issues for determination, to wit:-
  1. Whether judgment on Admission in favour of the Plaintiffs against the Defendants should be entered.
  2. Whether the Court should stay the proceedings herein pending the determination and conclusion of the Insolvency Petition No. E010 of 2020.
7. As to “Whether judgment on admission in favour of the Plaintiffs against the Defendants should be entered”. Order 13 Rule 2 of the [Civil Procedure Rules](#) provides as follows:-

“ Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties and the court may upon such an application make such order, or give such judgment as the court may think just.”
8. The Plaintiffs in urging the court to find that there is admission of indebtedness by the Plaintiff that is clear, unequivocal and unambiguous on a plain perusal of the admission have referred the court to various decided cases which I have considered. Among the authorities relied upon by the Plaintiffs include the case of [Synergy Industrial Credit Limited v Oxyplus International limited & 2 Other](#)(2021) eKLR, [Choitram v Nazari](#)(1984)KLR 327, [Guardian Bank Limited v Jambo Biscuits Kenya Limited](#) (2014) eKLR, among others which I found very useful. In these cases, the court is urged to only enter judgment on admission where the facts are clear, unambiguous and unequivocal.
9. I have considered carefully the facts of the case before me. I note that this suit has been filed by 60 Plaintiffs in total and that there are two Defendants. I note also that the Insolvency Petition No. E010 of 2020 has been brought to liquidate the 1<sup>st</sup> Defendant only. I also note that as required by the [insolvency Act](#), the 1<sup>st</sup> Defendant, in disclosing to the Insolvency Court the extent of its indebtedness listed the 1<sup>st</sup> Plaintiff as one of its debtors and provided the sum of Kshs 534,291,000 as the debt due and owing at that time. I also note that the Plaintiffs in their plaint seek judgment for the sum of Kshs 437,040,977/- and Usd 502,935.93 which sums are different from the amount disclosed in the Insolvency Petition.
10. The Defendants have also filed a defence to the suit herein in which they deny the claim. I further note that the 1<sup>st</sup> Defendant does not list the other 59 Plaintiffs as part of its debtors in the said disclosure. I further note that there is no such admission on the part of the 2<sup>nd</sup> Defendant in the suit herein. I am therefore satisfied that the disclosure in the 1<sup>st</sup> Defendants affidavit pursuant to the insolvency proceedings does not satisfy the requirements of Order 13 Rule 2 of the [Civil Procedure](#) to warrant the court entering judgment on admission. The application for entry of judgment on admission therefore fails.
11. The second issue the court has identified is “Whether the Court should stay the proceedings herein pending the determination and conclusion of the Insolvency Petition No. E010 of 2020.” It is an admitted fact by both parties that there is pending before the courts an Insolvency Petition brought against the 1<sup>st</sup> Defendant by a debtor in Insoveny Petition No. E010 of 2020- in the matter of Multiple



Hauliers. Both parties agree that section 428(2) of the *Insolvency Act*, requires that all proceedings pending against a party to whom Liquidation proceedings have been commenced should be stayed until final determination or otherwise of the insolvency petition. Section 428(2) of the *Companies Act* provides as follows;

- “ 1). At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any other 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 pending and against the Company in another court – apply to the Court to restrain further proceedings in respect of that matter in the other court.”

12. The Plaintiff in urging the court to dismiss the application for stay of proceedings has urged the court to be guided by the decision in *Mobile Accord Incorporated v Reelforge Systems Limited* (2021) eKLR where the court stated:-

“Under section 428 the court has jurisdiction to stay court proceedings once a liquidation application, in this case, a petition has been lodged. As section 428(2) of the Act indicates, the court has discretion whether or not to stay the proceedings and may do so on such terms it considers appropriate.”

The Plaintiff urged the court not to whimsically or capriciously exercise its discretion but instead it be guided by the three step test set out by the court in the case of *Gichuki Kingara & Company Advocates v. Mugoya Construction & Engineering Ltd*(2015)eKLR in which the court observed that the court should consider:-

“whether the impugned proceedings would give advantage to one creditor over others; whether the stay will be necessary to protect the assets of the Company and whether there exist exceptional circumstances to refuse stay of proceedings.”

The Plaintiff urged the court to find indeed that exceptional circumstances exist since the Plaintiffs application was not for execution nor was it a claim for distress of rent or attachment from a decree that was capable of putting the property of the Company in direct danger and that the Plaintiff was not seeking to place themselves into a point of advantage against other creditors of the company.

13. The Defendant filed its submissions in support of the application for stay of proceedings, the Defendant urged the court to be guided by the English decision in the case of *Bowkett v Fuller’s United Electric Works Ltd*(1922) ALL ER 281 where the court Emphasised that:-

“once a winding petition had been presented the Court ought; unless there were very exceptional circumstances in the case, to stay all further proceedings in any action against the company where it was necessary to do so to protect the assets of the company and to secure equality among all creditors of the same class.”

14. The Defendants also cited the decisions in *Tusker Mattresses Limited v Hotpoint Appliances Limited* (IC No. E018 of 2020) KEHC 276 where the court stated that:-

“It is common ground that there are ongoing litigation or threats of such proceedings against the company and unless stay is granted there shall, all likelihood, be a run for the company



assets. Those unsecured creditors who will have been able to complete the proceedings and execute against the assets of the company will have gained an unfair advantage over other unsecured creditors. This will go against a core objective of the insolvency law that creditors of like class be treated equally.”

15. I have considered the rival arguments by the parties and the submissions thereto. Section 428(2) urges the court to stay all proceedings where an Insolvency Petition has been filed in order to avoid giving undue advantage to once creditor over others of the same class. This fact has been reinforced by the decided cases availed by both parties to the court. I find therefore that the application for stay of proceedings by the Defendant has merit and I shall allow the same as prayed.
16. Costs follow the event. The application by the Plaintiff for entry of judgment on admission was dismissed by the court. The application by the Defendant for stay of proceedings has been allowed. This court therefore finds that it is proper to award costs to the Defendant who have been successful in both applications.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER 2023**

.....

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

**JUDGE**

In the Presence of:-

Ms. Rita Joyce holding brief for Ms. Asli for the Plaintiff.

Mr. Njiru holding brief for Mr. Mwihuri for the Defendant.

Amos - Court Assistant

