



Multiple Haulers (E.A) Limited v Prime Bank Limited; The Standard Bank of South Africa Limited (Intended Interested Party) (Civil Case E183 of 2021) [2023] KEHC 23307 (KLR) (Commercial and Tax) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E183 OF 2021
A MABEYA, J
OCTOBER 12, 2023**

BETWEEN

MULTIPLE HAULERS (E.A) LIMITED PLAINTIFF

AND

PRIME BANK LIMITED DEFENDANT

AND

THE STANDARD BANK OF SOUTH AFRICA LIMITED INTENDED INTERESTED PARTY

RULING

1. There are two applications before me. The first one is dated 31/7/2022 filed by the defendant (“the first application”) while the second one is dated 7/11/2022 filed by Barak Fund SPC Limited (“the second application”). There is also a preliminary objection dated 20/3/2023 filed by the Defendant.
2. The first application is a Motion on Notice brought inter-alia under Order 1 Rule 10, Order 40 Rule 6 of the *Civil Procedure Rules* and Sections 101 & 104 of the [Land Act](#). In the Motion, the defendant sought the joinder of The Standard Bank of South Africa as an interested party in these proceedings and for the property known as L.R No.MN/I/214 MOMBASA (the “charged property”) owned by the plaintiff sold by public auction and for the proceeds thereof to be distributed as set out under section 101 of the [Land Act](#).
3. The application was premised on the grounds that on 27/5/2021, the court issued an injunction restraining the defendant from exercising its statutory power of sale and that 12 months had lapsed since the interlocutory injunction was granted. That in the premises, the lapse was on 27/5/2022.



4. That there was no valid reason for extension of the injunction order since the plaintiff had not made any offer to settle the outstanding debt despite facing insolvency proceedings.
5. Further, that in its ruling dated 27/5/2021, the Court recognized that the charged property was also charged to other lenders hence the necessity of joining the intended interested party which has a charge dated 27/11/2017 that is supplemental and ranks second in priority to the defendant's legal charge dated 9/2/2015.
6. That since 2018, the plaintiff had refused to service the debt which continues to accrue on account of interest applied at the stipulated rate from 1/2/2022 until payment in full; that as at 31/1/2022, the debt stood at Kshs.499,204,074/=.
7. The defendant pleaded that the debt was outstripping the value of the charged property and that if the same was not disposed of, irrecoverable losses would be occasioned.
8. In opposition to the first application, the plaintiff filed a replying affidavit sworn on 18/4/2023 by Rajinder Singh Baryan, its Chief Executive Officer and Managing Director. He averred that it was not true that the charged property was to be a continuing security for all facilities advanced to the plaintiff since all the offer letters/contracts executed between the plaintiff and defendant between 2014-2016 stipulated specific securities for specific 4 facilities at specific times.
9. That the charged property was held as security for the first loan and the second loan only and that the same was not charged to the other overdraft facility made by the defendant to the plaintiff. That it had settled loan 1 and 2 on 28/12/2017 and that therefore, the defendant ought to have discharged the charged property.
10. The plaintiff averred that the sums claimed by the defendant are contested and that the plaintiff was in the process of sourcing for financiers to enable it settle any outstanding debts. That it had demonstrated that it has a prima facie case with high chances of success as the suit property was security for loan facilities that have since been settled in full.
11. Further, the plaintiff pleaded that unless restrained by this Court, the defendant would exercise its statutory power of sale over the charged property causing substantial loss that cannot be compensated by damages.
12. The defendant filed a supplementary affidavit sworn on 2/5/2023 by Alka Shahi, its Assistant Manager- Credit, in response to the plaintiff's replying affidavit.
13. He averred that recent developments had occurred whereby the plaintiff had entered into an agreement with Aria Commodities to, inter alia, sell the assets listed in an appendix including the charged property. That the plaintiff never sought the consent of the defendant to sell the property to Aria Commodities or any other Third Party.
14. The proposed interested party filed grounds of opposition dated 4/10/2022 to the first application.
15. It contended that the proposed interested party has no proprietary or equitable right over the charged property. That it was named as chargee in the charge dated 22/11/2017 as security trustee and has since resigned from that position in favour of Barak Fund SPC Limited. It therefore argued that the proper party should have been Barak Fund SPC Limited.
16. I note that the second application dated 7/11/2022 filed by Barak Fund SPC Limited sought the same orders to have Barak Fund SPC Limited enjoined in this suit as a defendant on the same basis as the one provided in the grounds of opposition.



17. I have analysed the pleadings and the respective submissions on the first application. The first issue for determination is whether Standard Bank of South Africa and Barak Fund SPC LTD ought to be enjoined in this suit as an interested party and defendant, respectively.
18. The plaintiff submitted that it does not oppose the enjoining of the two entities as parties to this suit arguing that it would help the Court understand and arrive at a just determination as regards the realisation of the charged property upon conclusion of this suit.
19. The intended interested party argued that Barak Fund SPC LTD was the right party in these proceedings.
20. Through a Mezzanine Facilities Agreement dated 2/10/2007, Barak Fund SPC LTD and other lenders made available some facilities to the plaintiff. Further, by an Intercreditor Agreement dated 2/10/2017, it was agreed that the proposed interested party would act as security agent for the lenders. This meant that Barak Fund SPC LTD would be registered as chargee over the charged property as a security trustee for the secured lenders.
21. However, it would seem that subsequently, the proposed interested party resigned as security agent and appointed Barak Fund SPC LTD in its place.
22. Based on the events above, the right party to these proceedings is Barak Fund SPC LTD and not the proposed interested party. None of the parties would be prejudiced by the joinder of Barak Fund SPC LTD as a party. Further, the intended interested party no longer has interest in the charged property. The upshot is that Barak Fund SPC LTD ought to be enjoined in this suit and not Standard Bank of South Africa.
23. The second issue is whether the Defendant has a legal right to realise the charged property. The defendant submitted that the injunction granted to the plaintiff halting the defendant's statutory power of sale lapsed on 27/5/2021 by operation of the law as it was not extended by the Court. That in the circumstances, it was entitled to sell the charged property by public auction. That the full redemption amount was not paid and the defendant was legally entitled to realise its security.
24. The plaintiff on the other hand adamantly submitted that the charged property was not among one of the defendant's securities and that it did not prosecute this suit after the injunction was issued on 27/5/2021 due to the institution of insolvency proceedings whereby, an administrator was appointed in Insolvency Cause No. E022 of 2021 NCBA Bank (K) PLC vs. Multiple Hauliers (E.A) Ltd.
25. In the ruling of 27/5/2021, when granting the interim injunction, the Court observed in paragraph 57 thereof as follows: -

“I am satisfied that the plaintiff has established a prima facie case with a probability of success. It will be a question at the trial whether; with the wording of the above cited clauses of the Charge, there was room for the Charge to secure increased borrowing, whether the subsequent Letters of Offer acted as a variation to the charge, whether the liabilities under the said Letters of offer constituted proper security under the Charge.”
26. What the foregoing meant was simply that there was doubt if the charged property was fully covered by all the facilities advanced by the defendant. It is clear that the plaintiff contends that the debt secured by the charged property was fully paid off and therefore, there is no statutory power of sale to be exercised over the charged property. It is clear that that is a serious issue that can only be determined on tested evidence.



27. Order 40 Rule 6 of the Civil Procedure Rules provides:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”
28. It is clear that subsequent to the granting the interim injunction, insolvency proceedings, to wit, Insolvency Cause No. E022 of 2021 NCBA Bank (K) PLC vs. Multiple Hauliers (E.A) Ltd were instituted against the plaintiff. Under section 560 of the *Insolvency Act*, once an insolvency proceeding is instituted against a company, there is an automatic stay of all pending and intended proceedings unless the Insolvency Court otherwise orders.
29. There is no evidence to show that the Insolvency Court did permit these proceedings to be continued with. The letter and spirit of Order 40 Rule 6 of the Civil Procedure Rules was to guard against an applicant who obtains an interim injunction and goes to slumber. That is not the case here.
30. There is discretion under Order 40 Rule 6 of the Civil Procedure Rules for the Court to extend such an interim injunction. This is because of the use of the words “unless for any sufficient reason the court orders otherwise.”
31. In this regard, although the interlocutory injunction lapsed by expiry of 12 months, the circumstances are that in the interest of justice the injunction is extended. This is because, first, there is doubt if there is any debt due under the charged property and secondly, due to the insolvency proceedings, which is an act beyond the powers of the plaintiff, this suit could be prosecuted at all.
32. The Court can here observe that, since by the institution of the Insolvency proceedings, the plaintiff could not by itself prosecute the suit, the defendant had the liberty to apply to the Insolvency Court and seek leave that this suit be prosecuted. It never did so. The injunction is for extension.
33. The third issue for determination is whether the firm Kaplan & Stratton Advocates would be conflicted.
34. In its preliminary objection dated 20/3/2023, the defendant submitted that the firm of Kaplan & Stratton Advocates would be conflicted if it was allowed to continue acting for Barak Fund. This was because the firm had been sued in Nairobi E395/2018(O.S) Kiruti & Co. Advocates v Kaplan & Stratton Advocates.
35. That in the said suit, Ruth Kirunga, a partner in the firm, swore an affidavit where she exhibited various emails informing its clients of the unpaid overdraft facility, that the supplementary charge to Standard Bank of South Africa was subordinate to the charge of Prime Bank Ltd and that the redemption amount of Kshs.295,995,174.43 needed to be paid so that the firm could be discharged from its professional undertaking.
36. I have looked at the record and annexures, it is plausible that Kaplan & Stratton’s partner may be called as the defendant’s witness in Nairobi E395/2018(O.S) Kiruti & Co. Advocates v Kaplan & Stratton Advocates on the contents of her replying affidavit filed in the said case.
37. Further, the professional undertaking by the firm imposed an obligation requiring the firm to procure payment by the lenders whom it now represents.
38. The firm would be in conflict if it were to represent Barak Fund as the defendant’s pleadings set out various admissions as regards the redemption amount made by a partner who would be summoned by the defendant.



39. The upshot is that the application dated 31/7/2022 lacks merit and is dismissed with costs while the application dated 7/11/2022 and preliminary objection dated 20/3/2023 are allowed and upheld but are put in abeyance to await the directions of the Insolvency Court.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

