Ritz Enterprises Limited ((UNDER ADMINISTRATION))
v Equity Bank Limited (Insolvency Petition E053 of 2022)
[2024] KEHC 12917 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12917 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY PETITION E053 OF 2022

A MABEYA, J

OCTOBER 25, 2024

BETWEEN

RITZ ENTERPRISES LIMITED ..... APPLICANT

(UNDER ADMINISTRATION)

AND

EQUITY BANK LIMITED ..... RESPONDENT

RULING

1. Before Court are two applications, the one dated 22/5/2023 for injunction and the other one dated 26/3/2024 for liquidation.

Application dated 22/5/2023

2. This was brought under section 560(1a), 561(4c), clause 5 of the fourth schedule of the *Insolvency Act*, section 1A, 1B and 3A of the *Civil Procedure Act* CAP 21, Order 51 rule 1 of the Civil Procedure Rules.

3. It sought to restrain the respondent from transacting with respect to bank account numbers 141037XXXX and 1410580XXXX without the express authority of the applicant. That the respondent be restrained from selling or disposing the apartment no D2 Golden Jubilee Apartment located in Nairobi pending administration.

4. The application was supported by the grounds on the face of it and the affidavit of Kamal Bhatt sworn on 22/5/2023. He argued that the company was placed under administration, with the administrator appointed on 28/3/2022 and the appointment extended on 5/5/2022. That in carrying out his duties, the administrator investigated the applicant's assets and found that the applicant was the registered owner of apartment number D2 at Golden Jubilee Apartments, located on property L.R.

No 209/19102, 4th Parklands Avenue. In addition, it was established that the applicant had two bank accounts with overdraft facilities with the respondent. As a result, the administrator contacted the respondent to request bank statements and details regarding any encumbrances related to legal charges and debentures.

5. That the respondent failed to disclose any information regarding the applicant, including the rent collected from the apartment. According to section 560(1a) of the *Insolvency Act* ("the Act"), the respondent is barred from realizing security, which can only occur with the administrator's consent. That furthermore, the two bank accounts were accessed after the passing off of the sole director of the applicant and following the appointment of the administrator. The applicant claimed that if not restrained, the respondent would sell the apartment and use the funds from the bank account.

6. The respondent opposed the application through a replying affidavit of Samuel N Wamaitha on 21/6/2023. It was contended that the applicant's director completed loan applications on 25/5/2020 for a term loan of Kshs. 12 million, using the three-bedroom apartment as collateral. An additional loan of Kshs 9,500,000 was granted to the applicant and was secured by a first legal charge over apartment D2 on the ground floor of property LR NO 209/19102.

7. The respondent emphasized that the charge would remain valid regardless of death, bankruptcy, or settlement of the account. The respondent claimed that the applicant defaulted on payments, breaching the loan agreement and accruing arrears of Kshs. 6,106,591.

8. That Statutory notices were issued on 26/8/2022, followed by a notice to sell on 27/1/2023, at which point the arrears stood at Kshs 6,446,690. The bank then instructed auctioneers to sell the property at a public auction, with a notification of sale being issued by the auctioneer on 31/3/2023. It was argued that despite multiple notices, the applicant did not repay the outstanding amount.

9. That the two account numbers were fixed deposits and the funds thereon were used to settle an overdraft of Kshs 19,748,661.59. The respondent claimed that the statutory notices were issued before the administration became known, and that the rights of a secured creditor and the administration process could not be hindered.

10. In a supplementary affidavit sworn on 4/9/2023 by Kamal Bhatt, the applicant contended that the respondent's attempt to enforce security while the administration was ongoing violated sections 560(1)(a) and 561(4)(c) of the Act. The applicant claimed that the statutory notices and all other notices were illegal and thus unenforceable.

11. Parties canvassed the application by way of written submissions which I have considered. The applicant submitted that from the loan statement, the respondent continued with the loan recovery even after the appointment of the administrator and without his authorization. That there was no evidence to show the operation of the alleged overdraft and authority to deduct the said sums. Counsel submitted that the property in question was integral in maintaining the company as a going concern and catering the interest of all the creditors.

12. It was submitted that the administrator was investigating suspicious withdrawals made on the two bank accounts maintained by the respondent during the administration process. That there was a likelihood that the applicant's obligations had been met prior to the withdrawal of the amount.

13. On its part, the respondent submitted that the debt was admitted and the property was secured by a charge over the property in dispute notwithstanding the death, bankruptcy or any settlement of account. That the rights of the respondent under the charge remained intact notwithstanding the internal affairs of the company under administration.

14. With respect to the two bank accounts, it was submitted that the same were fixed deposits which were redeemed to the current account and ceased to exist. That the parties had agreed that the sums held therein would act as a pledge for the overdraft and therefore the applicant could not run away from its obligation.

15. I have considered the pleadings and the submissions on record. The main issue is whether the applicant has met the threshold for grant of the interlocutory injunction sought. The principles for consideration in an application for injunction are well in the case of of Giella –versus- Cassman Brown and Company Limited (1973) E.A 385. These are that an applicant must show a prima facie case with a probability of success, that he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and that if the court is in doubt, it will decide an application on the balance of convenience.

16. A prima facie case was defined in the case of Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125, as being a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

17. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal held that: -

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

18. In the present case, the applicant has sought to retrain the respondent from transacting on two bank accounts belonging to the applicant and from disposing the property known as apartment number D2 Golden Jubilee Apartments. The applicant's argument is that the company was placed under administration on 28/3/2022 and the same was extended to 5/5/2022. That during the administration, period the respondent interfered with the two bank accounts and was purporting to sell the suit property to realize its security. The applicant contended that the applicant was estopped form acting as such by virtue of section 560 (1)(a) of the Act.

19. On its part, the respondent contended that it holds a valid charge over the suit property and the company having defaulted, its right to exercise the statutory power of sale had accrued. That the pendency of the administration process was not a bar to the respondent's right to exercise its statutory power of sale.

20. It is not in dispute that the company was placed under administration and an administrator was appointed to manage the affairs of the company. An administration order is made when a company is unable to pay its debts and that the administration is reasonably likely to achieve the objective of administration. Once an administration order is made, a moratorium comes into force to ensure that the company is granted an opportunity to reorganize and rehabilitate the company's financial position.

21. Section 560 (1)(a) of the Act provides that: -

> " 1) While a company is under administration—

a. a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;

..."

22. The respondent opposed the applicant's contentions by placing reliance on the case of re Hi-Plast Ltd [2019] eKLR where the court stated that: -

> " The rights of the Secured Creditor under the charge are intact. These rights are subject to the legal regime that regulates the processes of executing these rights. The secured creditor is held accountable in the exercise of rights under the registered charge. In order to exercise statutory power of sale, the secured creditor does not require the Court's intervention. In the circumstances, this Court cannot grant orders to impair the exercise such rights unless the Court's jurisdiction is triggered by procedural non- compliance of mandatory statutory provisions of relevant legislation or if the validity of the registered charge that confers priority rights is challenged."

23. The respondent further placed reliance in the case of East Africa Cables Plc v Ecobank Kenya Limited; SBM Bank (K) Limited (Interested Party) [2020] eKLR wherein the court expressed itself thus: -

> " I find that the law is settled that a secured creditor is entitled to exercise its rights under the security document or statute in the event of default by the company. That power is not subject to insolvency proceedings commenced against the company by any other creditor. Further, an administrator or liquidator cannot interfere with the exercise of those rights. A fortiori, any other creditor of the company cannot intervene in the exercise of the secured creditor's rights against the secured property."

24. From the foregoing, it is this Court's view that a secured creditor's rights are protected under the charge instruments and they rank superior than the other unsecured creditors by virtue of the charge. This however, does not mean that the process of realization of the security has to be conducted in utter disregard to the provisions of section 560 of the Act.

25. They are not to be exercised without reference to the administrator or the court where the process of administration has kicked in. This is because the process of administration calls for identifying all the assets secured and unsecured belonging to the distressed company in order to achieve a better outcome for all the creditors both secured and unsecured.

26. While the court does not dispute that the respondent ranks higher than the other creditors and its rights are secured, it is of the view that any process cannot proceed without the authorization of the court or the consent of the administrator. I believe that the spirit under section 560 of the Act is meant to prevent any actions that would undermine the administration process or negatively impact the equitable treatment of all creditors. The administrator plays a crucial role in overseeing the management of the company's assets, ensuring that all creditors are considered fairly.

27. The court emphasizes that while the rights of secured creditors must be acknowledged and protected, they are not to be exercised wantonly and without care, they are to be exercised in a manner that respects the administration's integrity and its objectives. In my view, holding otherwise will make a mockery to the protection given in section 560 of the Act. In any event, I believe that if it was the intention of Parliament that a secured creditor may move to exercise its right under a security, nothing would have

been easier than to expressly state so in that section. The section is wide enough and it covers realization of all rights against a company under distress.

28. In this case, the attempts by the respondent to enforce security without the administrator's consent or the court's intervention not only contravene the provisions of the *Insolvency Act* but also risk compromising the overall objectives of the administration. The respondent further admitted to the interference with the two bank accounts pending the administration process. In doing so, it is not clear whether the debt is fully settled or there is an amount owing.

29. Based on the above considerations, I conclude that this would have been an appropriate case to grant an injunction but for the reason to be stated later in this ruling. The bank, as a secured creditor, may proceed to realize its security, provided that it should have complied with the provisions of section 560 of the Act.

Application dated 26/3/2024

30. The application was brought under sections 427 and 437 of the *Insolvency Act* Cap 53, Sections 1A, 1B&3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya& Order 51 rule 1 of the Civil Procedure Rules 2010. It sought for a temporary order appointing Kamal Bhatt as the provisional liquidator of Ritz Enterprises United.

31. The application was founded on the grounds on the face of the Motion and undated affidavit of the administrator Kamal Bhatt. He stated that the company had been placed under administration and he been diligently running and managing the affairs and business of the company in order to meet the objectives of the administration.

32. That during the administration process, the company had ceased its operations and its assets had been sold to settle the debt owing. That having sold the machinery, the company was unable to operate as a profitable venture and thus the administrator has been unable to settle all claims. He stated that the company's remaining assets was apartment no D2 Golden jubilee apartments located at Parklands Nairobi as well as the funds unlawfully withdrawn from its two bank accounts by the respondent.

33. That the company's tools of trade were sold to settle the debt through DTB through debentures and settling of the immediate bills of the company. The applicant therefore stated that there was a need to appoint a provisional liquidator to oversee the interests of the creditors.

34. The Court is therefore tasked with establishing whether an order for provisional liquidation should be issued. The objectives of administration are set out in section 522 of the Act as follows: -

> "(1) to maintain the company as a going concern;
>
> (a)
>
> (b) to achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);
>
> (c) to realize the property of the company in order to make a distribution to one or more secured or preferential creditors."

35. The administrator stated that the company cannot continue as a going concern as the machinery and tools of trade have already been sold to settle certain debts. According to the records, the company is not generating any profits, making the administration unsustainable since the objectives outlined in section 522 of the Act cannot be achieved.

36. Given that the objectives of administration are to rescue the company or achieve a better return for creditors than would result from liquidation, the current circumstances suggest that these goals are unlikely to be realized. Therefore, the Court notes that the application was not opposed by any of the creditors.

37. Consequently, the court finds this is a proper case for termination of the administration and appointing an interim Liquidator as sought. This is to ensure an orderly process for the settlement of debts and to maximize the recovery for creditors under the prevailing conditions. Accordingly, the Court finds the application meritorious and allows the same.

38. I should now turn to the issue of granting an injunction against the respondent. It has been admitted by the administrator that he has since disposed off substantial assets of the company to pay off one of the secured creditors. It was not disclosed how diligently the administration was conducted. Were the creditors' meetings called? What were the resolutions made? Why is it that it is only DTB that was paid and what was the position of the other creditors? This probably explains why there was chaos in the realization of the securities in this company.

39. The questions that have not been answered by the administrator are, at the commencement of the administration, who were the creditors and their respective debts? What were the securities held and by who? What assets were sold and how much was realized and how was it shared?

40. In my view, failure to give answers to the foregoing is fatal to how the administration was conducted. No wonder each creditor resulted into self-help.

41. In the circumstances, issuing the injunction sought would negatively affect the respondent's legally held securities. One of the secured creditors, DTB seems to have been treated with priority and favor to the detriment of others. I decline to injunct the secured creditor.

42. Accordingly, the application for injunction is declined. The application for appointment of an interim Liquidator is allowed as follows: -

    a. An interim liquidation order is hereby issued with respect to Ritz Enterprises Limited.

    b. Kamal Bhatt is hereby appointed as the provisional liquidator of Ritz Enterprises Limited.

    c. Costs of these applications shall be borne by the company assets.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE