Cytonn Investments Management PLC & another v Kirimi David Muthuku & Antony Kinyanjui Waringa t/a Kinyanjui Kirimi & Co. Advocates (Miscellaneous Civil Application E027 of 2020) [2021] KEHC 386 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)

Neutral citation: [2021] KEHC 386 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E027 OF 2020

A MSHILA, J

DECEMBER 10, 2021

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC ..... 1ST APPLICANT

CYTONN HIGH YIELDSOLUTIONS LLP ..... 2ND APPLICANT

AND

KIRIMI DAVID MUTHUKU & ANTONY KINYANJUI WARINGA T/A KINYANJUI KIRIMI & CO. ADVOCATES ..... RESPONDENT

RULING

1. The application is a Notice of Motion dated 27th July 2020 brought under the provisions of Order 42 Rule 6 (1) and Order 43 of the *Civil Procedure Rules* 2010, and is supported by the grounds on the face of the application and on the Affidavit of the PATRICIA NJERI WANJAMA the Statutory Manager of the 2nd appellant/applicant who doubles up as the Company Secretary of the 1st appellant/applicant sworn on an even date; the applicant seeks the following orders;

   (i) SPENT

   (ii) SPENT

   (iii) THAT pending hearing and determination of this Application seeks the following orders:-

      (a) Execution of the order made by the Subordinate Court in; Nairobi CMCC No. 087 of 2020 KIRIMI DAVID MUTHUKU & ANTHONY KINYANJUI WARINGA T/A KINYANJUI, KIRIMI & COMPANY ADVOCATES VS CYTONN INVESTMENT MANAGEMENT PLC & CYTONN HIGH YIELD SOLUTIONS LLP on 10th July 2020 be stayed.

(b) All further proceedings in; Nairobi CMCC 087 of 2020 KIRIMI DAVID MUTHUKU & ANTHONY KINYANJUI WARINGA T/A KINYANJUI, KIRIMI & COMPANY ADVOCATES VS CYTONN INVESTMENT MANAGEMENT PLC & CYTONN HIGH YIELD SOLUTIONS LLP be stayed.

(iv) THAT the costs occasioned by this application be costs in the Appeal.

2. The parties were directed to canvass the application by way of written submissions; the advocates appearing for the applicants was the firm of W. Amoko Advocates whereas Kinyanjui, Kirimi & Company Advocates appeared for the respondent; hereunder is a summary of the parties respective submissions;

APPLICANTS CASE

3. In the Supporting Affidavit, the appellants aver that on or about 19th January 2016, the respondent entered into an investment agreement with the 2nd appellant, then known as Cytonn Investments Cash Management Solution LLP, vide a Contribution Agreement with the common interest of getting a higher yield than is commonly accessible in the market; the appellants also aver that over the six (6) year period that the Respondent invested in the 2nd Appellant, the Respondent renewed the above investment amounts severally with the 2nd appellant, with the latest roll over instructions of 28th October, 2019.

4. The appellants further deposed that the Appeal is clearly arguable and has overwhelming prospects of success as depicted in the Memorandum of Appeal. The appellants assert that unless interlocutory stay is granted, the intended appeal will be rendered nugatory or otiose as the appellants will be forced to;

(a) Take steps in the proceedings thus forfeiting their right to insist on arbitration as agreed including filing defences to the suit against them at the peril of having default judgment entered against them;

(b) Comply with the exparte mandatory injunction issued against them on 10th July, 2020, transforming the respondent to a secured creditor by effectively rewarding its extortionate tactics. The civil case has wholly undermined the interests of all the other 3,500 investors when the law requires equal treatment for them all or risk contempt proceedings;

(c) The effect of this precipitate order is to fatally lead the appellants/applicants to substantial loss and entirely compromising its mandate to ensure that the investment Partners get the Agreed Return from their investments jeopardizing investments in excess of Kshs 13,000,000,000 thus exposing the other investment partners to substantial and irredeemable loss. In the special unique circumstances of this case in which the court has issued a compelling order as against the appellants to a tune of Kshs.12, 654,824/-, while dismissing the arbitration clause, no security pending appeal is warranted.

5. The applicants relied on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which grants the Court discretionary power to issue such orders. The applicants also cited the case of; *Antoine Ndiaye vs African Virtual University [2015] eKLR*; and submitted that the application was filed without undue delay as the impugned decision was issued on 24th July 2020 and the applicants proceeded to file both a Memorandum of Appeal dated 27th July 2020 simultaneously with the instant application.

6. The applicants also submit that substantial loss will be suffered by the applicants unless the order of stay is granted. In this respect, the applicants cited the case of; *James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR* where the Court discussed at length what constitutes substantial loss.

The applicants asserted that they are at peril as they have no control over the liquidity of the Fund, due to the adverse effects of the SARS-Cov-2 (Covid 19) global pandemic which resulted in acute economic crisis afflicting the whole country. The applicants further stated that their cash flow has been severely disrupted and that the consequences of Ex-Parte Order is not only frightening but will effectively reward the respondent's extortionate tactics at the expense of the other 3,500 investors when the law requires equal treatment of all of them by transforming him into a secured creditor. In addition, the applicants submitted that the effect of the precipitate order inter alia is to fatally lead the applicants to substantial loss and entirely compromise its mandate of ensuring that its investment partners get the agreed returns on their investments. Furthermore, the applicants contended that it jeopardises investments in excess of Kshs. 670,973,097 thus exposing other investment partners to substantial and irredeemable loss.

7. The applicants submitted that their appeal before this Court is not only arguable but has a great chance of success. They contend that the Contribution Agreement entered into between the 2nd applicant and the respondent expressly had an Arbitration clause. They further stated that the rollover instructions issued by the respondent under the Partnership Agreement expressly incorporates both the Partnership Agreement as well as the Contribution Agreement hence the arbitration clause contained in those agreements are part of the rollover instructions. For this contention, the applicants relied on Section 4 (4) of the *Arbitration Act*. That the impugned ruling both fatally undermines the agreed dispute resolution mechanism between the parties and seeks to rewrite the agreement between them. The applicants relied on the Court of Appeal decision in; *National Bank of Kenya Ltd vs Pipe plastic Sankolit (K) Ltd Civil Appeal No. 95 of 1999* for the position that a court of law cannot re-write a contract between the parties.

8. Additionally, citing the case of; *Tabro Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR* the applicants submitted that the intended appeal will be rendered nugatory if stay is not granted. According to the applicants, this is because if stay is not granted, the applicants will be forced to take a step in the proceedings and thus forfeit their right to have the issues resolved through arbitration. Furthermore, the applicants will be required to comply with the ex parte mandatory injunction issued against them on 10th July 2020 and this will undermine the interests of all other 3,500 investors.

RESPONDENTS CASE

9. The respondent's case as can be gleaned from the Replying Affidavit sworn by its Partner, Kirimi David on 13th August 2020 is that the appeal is without merit and the Memorandum of Appeal does not disclose any good ground of appeal at all. In this respect, the respondent deposed that it did not sign any Partnership Agreement or deed of adherence as the lower court rightly found. The respondent also deposed that the only relevant document governing the relationship between the parties is the renewal instructions and contract signed by it on 28th October 2019. It is the said contract which is the subject of the investment fund of Kshs 12,654,824 as at 30th June 2020 before Court. The respondent contends that there is absolutely no denial that the appellant owed the respondent the said amounts of Kshs. 12,654,824 as at 30th June, 2020. The respondent deposed that as at 31st July, 2020 the appellants sent another statement showing the amount owing is Kshs 12,784,822.

10. In addition, the respondent claimed that the appellants breached the agreement by failing to effect mature redemption requests as per paragraph 5 of the said renewal instructions. Also, the respondent averred that the renewal instructions do not envisage any arbitration clauses or force majeure at all.

11. Furthermore, the respondent contended that by securing the funds claimed in court or joint interest earning account, the appellants will not suffer any prejudice at all. The respondent further claimed that the present application is an abuse of the court process in that it is bad in law and incurably

defective, a non-starter; an afterthought and a further attempt to aid appellant avoid meeting overdue and legitimate obligations. Finally, the respondent asserted that the instant application is grossly mischievous and vexatious and only meant to deny justice to the respondent and drag this matter unnecessarily.

12. The respondent urged the Court to dismiss the application with costs contending that the applicants were not deserving of an order of stay pending appeal. The respondent asserted that there was no arguable appeal in that there was no partnership agreement or contribution agreement signed by both parties and there was no arbitration clause in the contribution agreement. Secondly, the respondent contended that the appellants have not demonstrated what loss they will suffer by depositing the sum of Kshs. 12,654,824/- in court or in a joint interest earning account of the parties' advocates.

13. In addition, the respondent submitted that the appellants should not be allowed to use the court process to deny justice to a party or delay settlement of an overdue amount. The respondent also contended that it cannot be treated like any other investor as the contract governing the parties is specific and unique to them. Further, the respondent stated that there is no evidence placed before the Court to show that any other investor is demanding for their monies and that if there were such demand from other investors it would indicate that a company was going down and the court should be the first to protect investors by ensuring there is compliance with the order for depositing the funds immediately. In this respect, the respondent cited the case of; Barclays Bank of Kenya Ltd vs Habihalim Company Limited [2017] eKLR where the Court faced with similar circumstances declined to make a determination on whether there could be a run on the bank by its customer due to a ruling to the effect that the bank is required to pay security for costs.

14. On substantial loss, the respondent submitted that the appellants are not going to suffer any loss or substantial loss because monies will be held in court or held jointly by the parties' advocates. For this, the case of; *Superior Homes (Kenya) Limited vs Musango Kithome [2018] eKLR* was cited with respect to what entails substantial loss. With regard to security, the respondent submitted that the best security would be compliance with the court's orders.

ISSUES FOR DETERMINATION

15. The Court after considering the Application, the Supporting Affidavit, the reply thereto and the written submissions framed the following issues for determination;

    (a) Whether the appellants have satisfied the conditions for the grant of stay of execution pending appeal against the Ruling delivered on 24th July 2020;

    (b) What was the effect of the administrative order issued pursuant to Section 532 of the *Insolvency Act* on 6th October 2021;

ANALYSIS

Whether the appellants have satisfied the conditions for the grant of stay of execution pending appeal against the Ruling delivered on 24th July 2020;

16. This is an application for stay of execution pending appeal brought under Order 42 Rule 6 of the Civil Procedure Rules. The applicable law is provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules 2010. It reads as follows:-

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such

decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

17. In other words, the parameters for the grant of orders for stay of execution pending appeal are that:-

i. Substantial loss may result to the applicant unless stay is granted;

ii. The application has been made without unreasonable delay; and

iii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

What was the effect of the administrative order issued pursuant to Section 532 of the *Insolvency Act* on 6th October 2021;

18. This court will not belabour itself in addressing the issue of whether the applicants have met the threshold for the grant of stay pending appeal, as it is noted that the 2nd Appellant is now under administration following the grant of an administrative order pursuant to the *Insolvency Act* issued on 6th October 2021 by Hon. Mabeya J. in Insolvency Cause No. E063 of 2021; the order reads as follows:-

"IT IS HEREBY ORDERED:

1. THAT this Court do hereby appoint KERETO MARIMA of P. O. Box 1796-00606 Nairobi, a licensed Insolvency Practitioner as Administrator of the property of CYTONN HIGH YIELDS SOLUTIONS LLP in accordance with the provisions of the *Insolvency Act*.

2. THAT the order be served upon all the Creditors.

3. ..."

19. Accordingly, in effect, the orders sought for stay of execution have been overtaken by events. The issue that remains for determination therefore concerns the effect of the administrative order issued on 6th October 2021 in respect of the 2nd appellant on this matter. In this respect, Section 560 (1) (d) of the *Insolvency Act* provides that while a company is under administration, a person may only continue legal proceedings against the company or its property with the consent of the administrator or with the Court's approval. Section 560 of the *Insolvency Act* reads thus:-

" "560 Moratorium on other legal process while administration order has effect;

(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;

(b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval-subject to such conditions as the Court may impose;

(c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and

(d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court."

20. The purpose and effect of a moratorium under the *Insolvency Act* upon the appointment of an Administrator was set out by the Court in; *Cook vs Mortgage Debenture Ltd [2016] EWCA* Civ 103 cited in the case of *Hoggers Limited (In Administration) vs. John Lee Halamandres & 11 others [2021] eKLR* as follows:-

> 'In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. First, given that the property of the company or individual stands under the statute to be realised and distributed, subject to any existing interests, among the creditors on a pari passu basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the pari passu basis of distribution. Second, given that both a liquidation and bankruptcy contain provisions for the adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation. In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injuries claim, the court will give permission for proceedings to be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate.
>
> In the case of an administration, this is not a sufficient description of the purposes of the moratorium in paragraph 43(6). An administration may be a prelude to a liquidation or, once an administrator gives notice of an intention to make distributions to creditors, may become a substitute for a liquidation. In such circumstances, the purposes described above apply also to the moratorium in the case of an administration. But before that point is reached, the principal purpose of an administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. As Nicholls LJ put it in *In re Atlantic Computer Systems plc* [1992] CH 505 at 528, the

moratorium provides "a breathing space". Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so.'

21. Section 560A of the *Insolvency Act* sets out the parameters for the lifting of the moratorium on other legal processes while the company is under administration. The Court of Appeal in *Nakumatt Holdings Limited & another vs Ideal Locations Limited [2019] eKLR, Civil Appeal 27 of 2018* noted that the proper court to consider the request for approval to continue with legal process while a company is under administration is the High Court that was seized of the insolvency matter. In so finding, the Court of Appeal cited with approval Makau J. in the case of *Fredrick Okoth Owino vs T. S. S. Grain Millers* [2017] eKLR, E & L Cause No. 833 of 2015where Makau J. observed that:-

> " 14. It is my considered view that the *Insolvency Act* intents (sic) to create a central forum for dealing with all insolvency disputes that may have been filed against the company. It does not matter whether the suits are pending appeal before the senior courts, the only court with the original jurisdiction to grant leave to continue suits against companies under administration, in my opinion, is the High Court. Consequently, I agree with the administrator that this court lacks jurisdiction to entertain the application for leave to continue the Suit pending the administration of the respondent or to enjoin the administrator as a defendant.
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> 15. Under section 2 of the *Insolvency Act*, the right forum for the claimant to seek the said leave is the High Court of Kenya or the administrator himself. Once the leave is granted, this court will proceed with the suit and even allow any necessary joinder of parties as they may become necessary. Consequently, and in view of the authorities cited above, I must now proceed to, down my tools for want of jurisdiction. The merits of the application shall be dealt with by the right forum if the claimant will choose to go there."

22. The appointment of the administrator precludes the continuation of any legal proceedings by or against the company without leave first being obtained from the court or with the consent of the administrator. The applicants have not annexed or demonstrated that such leave or consent was had and or first obtained; in the circumstances this court finds the application to be incompetent and not properly before the court.

FINDINGS AND DETERMINATION

22. For the foregoing reasons this court makes the following findings and determinations;

(i) This court finds the application for the grant of stay of execution pending appeal against the Ruling delivered on 24th July 2020 has been overtaken by events;

(ii) This court finds that the application is not properly before this court due to the Administrative Order issued on 6th October 2021 the application in respect of the 2nd Appellant;

(iii) The application is found to be incompetent and it is hereby struck out with costs to the respondent.

Orders Accordingly

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF DECEMBER, 2021.

HON.LADY JUSTICE A.MSHILA

JUDGE

In the presence of;

Ndung'u holding brief for Amoko for the 1st and 2nd Appellants

Tuwei holding brief for Kirimi for the Respondent

Lucy----------Court Assistant