REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 30 OF 2020

CO-OPERATIVE BANK OF KENYA.....APPLICANT/APPELLANT

-VERSUS-

JUSTUS MBAE WILLY.....1ST RESPONDENT

INVESCO ASSURANCE CO. LTD.....2ND RESPONDENT

RULING

1. Before me is an application dated 5th February 2021, filed under section 428, 429 and 430 of the Insolvency Act, Order 51 Rule 1, section 1A and 1B and 3A of the Civil Procedure Act, seeking the following orders –

> ***1) That this court be pleased to stay these proceedings pending the hearing and determination of Nairobi Commercial & Admiralty Division Insolvency Cause No. E155 of 2019.***
>
> ***2) That this court be pleased to order all modes of execution against the 2nd respondent including the Garnishee proceedings instituted by the 1st respondent as void and unlawful by virtue of the winding up orders issued on the 7th day of November 2019 in Insolvency Petition No. E009 of 2019.***
>
> ***3) That the honourable court be pleased to order that any attachment, sequestration, distress of execution against the appellant/applicant herein is void.***
>
> ***4) That costs of this application be provided for.***

2. The application has grounds on the face of the Notice of Motion that the 1st respondent herein instituted Garnishee proceedings against the appellant for the release of Kshs.322,357/= as held on behalf of the 2nd respondent, that during the pendency of the Garnishee proceedings and prior to issuance of the decree absolute, there had been filed a Creditors Insolvency Petition at the Nairobi Commercial and Admiralty division being Insolvency Cause No. E155 of 2019 and that under section 428 of the Insolvency Act, a creditor or contributory may apply to the court to restrain any further proceedings in that respect.

3. The application was filed with a supporting affidavit sworn on 5th February 2021 by Philip Mwasya advocate for the applicant amplifying the grounds of the application.

4. The application is opposed through a replying affidavit sworn on 14/4/2021 by S.M Makau advocate for the 1st respondent, in which it was deponed that the applicant's counsel had recorded a consent for release of the amount claimed, and an application filed thereafter to set aside the said consent was dismissed by the court.

5. The application proceeded by way of filing written submissions and I have perused and considered the submission on both sides. The 2nd respondent did not respond to the application.

6. Having considered this application, and the submissions of counsel for the parties and the law, I am of the view that this application lacks merits and has to be dismissed.

7. The first reason is that a consent recorded by counsel in this matter is still operational, and an attempt to set it aside has already been dismissed by the court. That consent thus still subsits and cannot be impeded by insolvency proceedings in another court, in which not all

parties herein are parties.

8. Secondly, no moratorium or restraining order has been shown to have been issued in Nairobi Commercial and Admiralty Division Insolvency Cause No. E155 of 2019 as required by law. In this regard section 428(1) and (2) of the Insolvency Act relied upon by the applicant's counsel states as follows –

> **428(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 any contributory may –**
>
> ***a) If legal proceedings against the company are pending in 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 the matter in the other court***
>
> ***(2) On the hearing of an application under sub-section 1(a) or (b), the court may make an order staying or restraining the proceedings on such terms as it considers appropriate.***

9. My understanding of the above provisions of the statute law is that the application for a moratorium or for restraining other court proceedings has to be made in the cause in which there is a liquidation application, not in those other proceedings. The moratorium or restraining orders have to be obtained in that cause. Thus the present application has been made in the wrong case, and is for dismissal.

10. Thirdly, the concept of receivership and liquidation are different concepts and the applicant has referred to a Receivership Cause No. E155 of 2019 in Nairobi Commercial Court, not a liquidation Cause. On the difference between the two legal concepts of receivership and liquidation, I will cite the case of **Thomas and Piron Grands Lacs ltd –vs- Lightouse Property Company Ltd; Chase Bank Kenya Ltd (In Receivership) and Another (Interested Parties) (2019) eKLR** wherein Tuiyot J. as he then was stated as follows –

> ***"The concept of receivership and liquidation as contemplated by the KDI Act are different. The circumstances under which Central Bank can place a bank under receivership are set out in section 43(2) of the KDI Act and include when assets of an institution are less than its obligations to its creditors or the institution has engaged in malpractices or activities contrary to provisions of any Kenyan law or other applicable law"***.

11. In my view, receivership applies when a receiver is appointed to try to revive the company, while liquidation is a process of winding up the company. Only in cases where liquidation proceedings have been taken can stay of other proceedings be applied and effected.

12. In my view therefore, the application herein is misadvised, filed in the wrong court and has no merits. I dismiss the application with costs to the respondents.

DELIVERED, SIGNED & DATED THIS 9TH DAY OF DECEMBER, 2021, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE