In re Cape Holdings Limited (Insolvency Cause E049 of 2021)
[2021] KEHC 366 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)

Neutral citation: [2021] KEHC 366 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E049 OF 2021

A MABEYA, J

DECEMBER 10, 2021

IN RE: CAPE HOLDINGS LIMITED

IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND THE INSOLVENCY REGULATIONS, 2016

IN THE MATTER OF AN APPLICATION BY SYNERGY INDUSTRIAL CREDIT LIMITED FOR LEAVE PURSUANT TO SECTION 560(1) (D) OF THE INSOLVENCY ACT

RULING

1. This is a ruling on an application by Synergy Industrial Credit Limited ("the applicant") dated 22/10/2021. It is brought under section 560 1(d) of the *Insolvency Act*, and sections 1A, B and 3A of the *Civil Procedure Act*.

2. The application seeks orders for leave to proceed with execution against Cape Holdings Limited ("the Company") in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015; Cape Holdings Limited vs Synergy Industrial Credit Limited ("the said suit").

3. The application is based on the grounds set out in the affidavit of Jacob Mbae Meeme sworn on 22/10/2021. Its case is that; it has been engaged in a long legal battle with the Company from arbitration, the High Court, the Court of Appeal and even the Supreme Court as the Apex Court in the land.

4. The dispute between the parties emanate from the sale of L.R No. 209/19436 (I.R 120877) "the suit property"). The applicant paid the company, kshs. 750M in 2010, but the company failed to transfer the property purchased. The applicant then sued for the money and an award was made in its favour. In the said suit, the applicant obtained a decree issued on 25/3/2021 for Kshs. 4,497,776,260.35 and interest at 18% per annum. The said decree remains unsettled to date.

5. The Company's application to the Supreme Court challenging the said decree was dismissed on 8/10/2021. In the premises, the Company had exhausted all the available legal avenues to challenge the award. Before the decree could be settled, the applicant realized that the Company was placed under administration by I & M Bank ("the bank") from 12/10/2021 pursuant to a debenture of US Dollars 25,000,000. Ms. Vruti Shantilal Shah was appointed as the administrator.

6. The applicant contends that the process of placement of the Company under administration was fraudulent and was meant to defeat the applicant's effort to execute the decree. That the debenture was created after the Court of Appeal had ruled in its favour on 6/11/2020. That no money was lent to the Company but the debenture was in respect of facilities afforded to an entity known as Nandlal & Company Limited. That most importantly, the floating charge did not relate to any of the immovable assets of the Company. That the debenture was registered after Prohibitory Orders had been issued and registered against the title on 23/12/2020.

7. The applicant further contends that the bank's statutory declaration made no reference to the Company's inability to pay its debt. That the Company was not insolvent or incapable of paying its debt as it receives rent from the suit property. The Company has no other known asset but the suit property.

8. The Company opposes the application vide the replying affidavit of Vruti Shantilal Shah, the administrator, sworn on 3/11/2021. Its case is that; vide a letter dated 23/9/2020, the bank extended various facilities to the Company. Amongst the securities given was a floating charge created on 15/12/2020 over the Company's assets to secure USD 25,000,000. In the premises, the bank had priority over the unsecured creditors. That the Company had breached its obligations under the Offer Letters and the debenture.

9. The Company further contends that having been placed under administration, there was an automatic moratorium by virtue of section 560 of the *Insolvency Act* ("the Act"). That effectively bars the commencement or continuation of legal proceedings against the Company without the administrator's consent. That the appointment was valid and the Company's assets are less than its liabilities.

10. The bank also opposes the application vide the affidavit of Peris Wairimu Chege, an Assistant General Manager with the bank. She avers that the bank had advanced several facilities to the Company and created a floating charge/debenture over all the Company's assets to secure a sum of USD 25,000,000.

11. That by virtue of clause 13 of the debenture, the floating charge crystallized into a fixed charge once the bank was served with the Garnishee Order Nisi dated 7/4/2021. That the applicant had not fulfilled the necessary conditions under section 560A of the *Insolvency Act* for the lifting of the legal moratorium. That the prohibitory orders over the suit property were registered after the registration of the debenture in favour of the bank.

12. It is further contended that the Company owed the bank USD 25,075,404.29 as at 4/11/2021 and the amount continue to attract interest. If execution is allowed, the bank and other creditors would suffer loss and the Company would be crippled hence it would be against the objectives of administration.

13. The applicant responded to those two affidavits vide its further affidavit sworn by Jacob Mbae Meeme on 11/11/2021. It contends that the only charge created over the suit property is the one registered on 16/9/2010 for Kshs. 400,000,000/=. That no first charge of USD 25,000,000 was ever created over the suit property.

14. That under clause 4 and the first schedule of the debenture, the bank did not have a floating charge over the immovable property of the Company. That the Letter of Offer dated 23/9/2020 and amended on 7/10/2020 created a first charge for USD 25,000,000 over a property known as L.R. 209/11880 Parkside Towers Nairobi registered in the name of Nandlal & Company Limited.

15. That the bank could not have created or secured its facility over the suit property as a caveat had been registered on the property by way of an order dated 1/9/2011 in Milimani ELC 440 of 2011 (O.S). That caveat was registered against the title on 7/9/2011 and a Caveat Emptor advertisement placed on the dailies on 13/9/2011.

16. That there is no evidence to support the claim that the Company was insolvent or had more liabilities than its assets. To the contrary, the Company is solvent as evidenced by the bank statements produced in the bank's affidavit and in the statements filed in response to the Garnishee application dated 7/4/2021. That despite numerous letters to the bank inquiring about the status of the facility subject of the Charge, the bank had remained unresponsive.

17. That by the time the floating charge allegedly crystalized, the Company's right over the suit property had already transferred to the applicant by virtue of the Court of Appeal Judgment delivered on 6/11/2020 and commencement of the execution proceedings at the High Court.

18. The respondent submits that the floating charge had crystalized. That the applicant has not met the requirements under S560A for the lifting of the statutory Moratorium. The cases of Lochab Brothers vs Kenya Furfural Co. Ltd [1983] eKLR, Menengai Rolling Mills Ltd & Anor vs Blue Nile Wire Products Ltd & Anor [2019] eKLR among others are relied on in support of those propositions.

19. It is also submitted that the purpose of administration is to secure the assets of the Company. That the applicant can still execute its decree within 12 years.

20. In his submissions, the administrator raises two issues for determination, viz, whether the right to appoint an administrator under the debenture had arisen and whether the threshold for seeking leave to continue has been met. He submits that the purpose of administration is to keep a distressed company as a going concern. That allowing the application would defeat that purpose. The case of *Midland Energy Ltd vs George Muiruri T/A Leakeys Auctioneer & Anor* [2019] eKLR is relied on in support of that contention.

21. On its part, the applicant submits that the substantive rights of the parties have been fully determined and the application is purely a procedural one. That the applicant has met the threshold for granting the leave sought. The cases of *Landmark Port Conveyors Ltd vs Buzeki Enterprises Ltd & Anor* [2019] eKLR and *Prest vs Petrodent Resources Ltd & Others* [2013] UK SC 34 are relied on in support of the contention that, the conduct of the parties warrant the granting of the orders sought.

22. I have carefully considered the respective contestations, the submissions, the law and the authorities relied on. The only issue for determination is whether leave should be granted to the applicant to proceed with execution against the Company in the said suit.

23. It is not in dispute that the main dispute between the applicant and the Company has already been heard and determined in various courts including the Court of Appeal and the Supreme Court.

24. Section 560 (1) of the Act provides: -

    While a company is under administration—

    a) .....

b) .....

c) .....

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".

25. It is clear from the foregoing that while a Company is under administration, one may take steps to enforce, begin or continue legal proceedings against it but only with the consent of the Administrator or with the approval of the court.

26. The Company and the bank contends that the application is premature as the consent of the administrator was not sought. With due respect, the present application is not a proceeding meant against the Company, but one which seeks the approval of the Court to proceed with execution/ proceeding. A party has the right to choose whether he should seek the consent of the administrator or the approval of the court under section 560(1)(d) of the Act. In this regard, it was not necessary for the applicant to seek the administrator's consent before bringing the present application. Accordingly, that objection is without basis and is rejected.

27. The other contention was that the application has not met the threshold under section 560A of the Act. The court's discretion in granting the approval under section 560 of the Act is not capricious. It has to be exercised judiciously and in terms of the principles set out in section 560A of the Act.

28. In *Owiti, Otieno and Ragot Advocates –vs- Mumias Sugar Co. Limited (Under Administration)* [2020] eKLR, the court held: -

> " When considering whether to grant approval under section 560, the court may in particular take into consideration – (a) the statutory purpose of the administration: (b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss; (c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and (d) the conduct of the parties".

29. The foregoing are the principles that will guide this Court in determining the present application.

30. In the instant case, there is no doubt that the applicant has an unexecuted decree against the Company. It has commenced execution proceedings in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015; Cape Holdings Limited vs Synergy Industrial Credit Limited. As it were, the applicant is a creditor and has a legitimate interest which cannot be overlooked even though the company has been placed under administration.

31. The first principle to be considered is the purpose of the administration. Under the Act and as declared in Midlands Energy Case (supra) the purpose of administration is to give a distressed company a second chance to survive. Administration is a pathway to resuscitate a company in distress.

32. In the present case, there is no evidence that has been preferred to show that the Company is in distress. There was no averment that the Company had defaulted in its obligations. There is nothing to show that the Company was on the verge of collapsing financially to warrant its being placed under administration. What triggered the administration was that an order NISI had been issued and served on the bank in April, 2021.

33. It has been alleged by the applicant and not denied by either the bank or administrator that; the company was deriving huge rentals which it was using to develop other properties with the consent of the bank. That the advances for which the debenture was created were made to hinder or defeat the judgment of the Court of Appeal of November, 2020. That while the 'act of default', viz the service of decree NISI took place in April, 2021, the bank did not take any action whatsoever against the Company until only immediately after the Company lost its bid of getting a stay in the Supreme Court.

34. Taking into consideration the foregoing, the Court can but only agree with the applicant's contention that the timing of the administration was not meant for the purpose known under the Act. It is meant to buy a Moratorium for the Company to enable it evade its legal obligations under a lawful decree in the said suit.

35. As guided by the case of *Owiti, Otieno and Ragot Advocates Case* (Supra), the conduct of the parties must be taken into consideration when considering an application for approval. The bank and the Company cannot be said to be acting in good faith in this matter. The Court notes that the decree being sought to be executed is for money had and received more than 10 years ago. The matter has dragged over in our courts for that period. In order to warn everyone about the suit property, the applicant not only placed a caveat over the title but advertised a Caveat Emptor in the dailies in September, 2011. The whole world, including the bank, was thereby forewarned about the suit property. To that extent the applicant can be said to have been acting in good faith.

36. With such a Caveat, that property was not free to be given as a security. The Court of Appeal entered a judgment in favour of the applicant in November, 2020 and injuncted everyone from deriving any benefit from the suit property. Less than a month later, in December, 2020, the bank and the Company created a debenture the subject of the administration. The debenture must have been crafted to float over the assets of the Company to cushion it on a rainy day, which was on its way.

37. In April, 2021, the bank and the Company knew of the decree Nisi. The applicant wrote to the bank twice asking about the indebtedness, if any, of the Company. The bank remained mute. The bank then waited for 5 months to purport to enforce its rights barely two days after the Apex Court of this land had closed any legal avenue to the Company in its attempts to avoid the decree made against it. Can that be a conduct that a Court of law and equity should contenance? I do not think so.

38. Courts in this country are under a duty to support and enforce legal relations that are entered into in good faith. Legal processes that are entered with ulterior motive, have no place in the halls of justice. Justice will shy away from recognising processes that are visibly engaged in with the intention of frustrating lawful processes.

39. The applicant has toiled in the halls of justice for 10yrs. The bank has but sprung at the eleventh hour not to protect its interests, but to shield the Company from meeting its obligations that it has been running away from for the last 10 years. That won't do. (see Landmark Port Convertors Case (supra). The conduct of the bank and Company pricks the very conscience of the Court.

40. The other principle which the Court has to consider is the impact the approval has on the applicant, particularly if the applicant will suffer significant loss. On this principle, the Court is enjoined to consider the position of an applicant if the approval is declined. Here, the law is concerned with the loss an applicant is to suffer. If the loss is significant, the court is obliged to grant the approval.

41. In the present case, the dispute between the applicant and the Company dates back 10 years. It is all about a whooping sum of Ksh 720 million paid to the Company for some property which it failed to transfer. The applicant has been out of that money while battling it out in our rather slow judicial

system. It has had its rights determined with finality by not only the Court of Appeal but the very Apex Court of this Land, the Supreme Court.

42. It is at the point of realizing the fruits of that judgment that the Company has connived with the bank, to say the least, to defeat that process through the administration. If the approval is not given, the view the Court takes is that the applicant will not only suffer significant loss but total loss. Its bona fide pursuit of justice for 10 years would come to naught at the alter of an orchestrated administration. In this regard, the Court finds that unless leave or approval is granted, the applicant will suffer grave and significant loss.

43. The other principle to be determined is the consideration of the legitimate interests of the applicant and those of the other creditors. The court has already considered the interests of the applicant in the foregoing paragraphs of this ruling.

44. The administration kicked in on or about 12/10/2021. Todate, save for the bank, no other creditor of the Company has showed up, at least until the time of writing this ruling. The interests therefore to be considered vis a vis those of the applicant are those of the bank.

45. The bank alleges that it holds a debenture over the assets of the Company. The Court has already analysed the circumstances under which the debenture was created and found them to have been suspect. That the bank at all times knew the applicant's claim over the suit property since 2011. That is why, in schedule 4 of the debenture, the bank could not specify the suit property as the charged property.

46. Further, it was not been denied that the debt attributed to the debenture is in respect of the debt of a sister Company by the name Nandlal & Company Ltd. Indeed, the actual security that was taken in respect of the debt assigned to the Company is LR No. 209/11880 belonging to the said Nandlal & Company Limited. There is nothing on record to show that the said security would not be sufficient to cover any outlay due to the bank.

47. The Court has considered the foregoing and the fact that it has not been shown that the amount to be realized from the sale of the suit property would not be enough to offset both the decretal amount and a substantial part thereof remain for the bank. The bank having other securities and not having specifically charged the suit property would not in my view, suffer any prejudice if the leave is granted. To the contrary if leave were denied, the applicant would suffer irreparable loss. That is not what our legal system stands for.

48. In view of the foregoing, I am satisfied that the applicant has made a strong case for the grant of the leave sought.

49. Accordingly, I find the application dated 22/10/2021 to be merited and the same is hereby allowed. The applicant is granted leave in terms of prayers (2) and (4) of the application.

It is so ordered.

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

A. MABEYA, FCI Arb

JUDGE