



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E043 OF 2020

BETWEEN

EAST AFRICA CABLES PLCAPPLICANT

AND

ECOBANK KENYA LIMITED.....RESPONDENT

AND

SBM BANK (K) LIMITEDINTENDED INTERESTED PARTY/APPLICANT

RULING NO. 2

The Intended Interested Party's Application

1. The application for consideration is a Notice of Motion dated 7th February 2020 filed by the intended interested party/applicant, SBM Bank (K) Limited ("SBM") under the provisions of **Order 1 Rule 10(2)** and **Order 51 rule 1** of the **Civil Procedure Rules** ("the **Rules**"), **section 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**, **section 423** of the **Insolvency Act, 2015** and **Article 159(2)** of the Constitution. It seeks the following reliefs:

- 1. The instant Notice of Motion be certified as urgent and heard ex-parte and service thereof on the Respondents be dispensed with in the first instance.*
- 2. THAT this Honourable Court be pleased to enjoin **SBM BANK LTD (K)** forthwith in this proceedings as an interested party.*
- 3. THAT the Honourable Court be pleased to stay all proceedings in **HC Miscellaneous 043 of 2020 – East Africa Cable Pls –vs- Ecobank Kenya Limited** pending the hearing and determination of this Application.*
- 4. THAT the instant suit to wit **HC Miscellaneous 043 of 2020 – East Africa Cables PLC –vs- Ecobank Kenya Limited** be consolidated with the **HC Insolvency Petition No. 171 of 2019 – In the matter of East Africa Cables Limited**.*
- 5. THAT the Honourable do grant any other or further orders that may favour the cause of justice.*
- 6. THAT the costs of this Application be in the cause.*

Background Facts

2. Before I deal with the arguments by the parties, let me set out the background of this application and cases referred to in the application to provide the context of this application. It is not disputed that the East Africa Cable PLC ("the Company") obtained various banking facilities from the respondent ("Ecobank") from 2011 secured by a two specific debentures dated 7th December 2011 and 30th July 2013 for Kshs. 150,000,000.00 and Kshs. 100,000,000.00 respectively and a debenture dated 11th March 2015 making the secured aggregate sum Kshs. 350,000,000.00. On or about 9th December 2019, the SBM lodged **HC Insolvency Petition No. E171 of 2019** ("the Insolvency Petition") against the Company which was advertised on 27th January 2020 in the print media.

3. The Insolvency Petition triggered Ecobank to make an immediate demand to the Company for payment of Kshs. 190,536,400.16. It

simultaneously appointed a receiver over certain assets of the Company by Deed of Appointment of Receiver dated 31st January 2020. It is the action of appointing the Receiver that precipitated the filing of the Notice of Motion dated 3rd February 2020 by the Company.

Company's Application

4. The Company's Notice of Motion dated 3rd February 2020 ultimately seeks to remove the Receiver appointed by Ecobank. It is made under **sections 1A and 3A** of the **Civil Procedure Act, Order 40 Rules 1, 4** and **Order 51 rule 1** of the **Rules, Article 159(2)(d)** of the Constitution of Kenya and all other enabling provisions of the law seeking the following reliefs:

1. *THAT this application be certified as urgent and be heard ex parte in the first instance.*
2. *THAT the appointment of Mr Kereto Marima as receiver in relation to certain assets of the Applicant by the Respondent by Deed of Appointment of Receiver dated 31st January 2020 be suspended pending the hearing and determination of this Application.*
3. *THAT the Respondent be restrained from appointing any other person as receiver of specific assets of the Applicant or at all pending the hearing and determination of this Application.*
4. *THAT the appointment of Mr Kereto Marima as receiver in relation to certain specific assets of the Applicant by Deed of Appointment dated 31st January 2020 be revoked.*
5. *THAT the Respondent be permanently restrained from appointing Mr Kereto Marima or any other person as receiver of certain specific assets of the Applicant predicated upon the presentation of a petition for liquidation of the Applicant dated 19th December 2019 by SBM Bank (Kenya) Limited in Insolvency Petition Number E 171 of 2019 or any other reasons cited in the Deed of Appointment of Receiver dated 31st January 2020.*
6. *THAT this Honourable Court do grant such other orders as it may deem appropriate and expedient in the circumstances of this cause.*
7. *THAT the costs of this cause be awarded to the Applicant.*

Interested Party's Submissions

5. Back to SBM's application in which it seeks an order of joinder to these proceedings, stay of proceedings and consolidation with the Insolvency Petition involving the Company. The application is grounded on the facts set out on the face of the motion, the supporting affidavit of Kelvin Kimani, SBM's Legal Officer, sworn on 7th February 2020 and submissions advanced by its counsel, Mr Akello.

6. Mr Akello submitted that after SBM instituted the Insolvency Petition against the Company, it was discovered that Ecobank had appointed a receiver in relation to certain assets of the Company. In the circumstances, counsel contended that it would be in the interests of justice that the legality of the appointment be canvassed by all creditors within the Insolvency Petition. That its joinder, as an antecedent, and subsequent consolidation would assist in just and fair resolution of the present cause. Counsel added that SBM being a creditor of the Company, has a legitimate and identifiable stake with sufficient grounds in law and fact to be joined to these proceedings.

7. Mr Akello maintained that an insolvency petition is a public proceedings and it is important that all creditors are involved and that in this respect, the consolidation of this cause and the petition will ensure that the rights of all creditors, who would be adversely affected, are protected by actions of Ecobank to appoint a receiver without consent of the court during the pendency of the insolvency proceedings. He also pointed out that by allowing this application, the court would prevent a multiplicity of proceedings and none of the parties will be prejudiced if the orders sought are granted.

8. Mr Akello relied on the case of **Re: Arvind Engineering Limited ML HC IP No. 03 of 2019 [2019] eKLR** as authority for the proposition that where there are pending insolvency proceedings, any proceeding relating to the Company ought to be made in the insolvency petition proceedings.

Respondent's Submissions

9. Since the issues raised by SBM's application were based on uncontested facts and matters of law, I allowed counsel for the Company, Mr Waiyaki, and counsel for the Ecobank, Ms Lubano, to oppose the application without replying affidavits or grounds of opposition. Both counsel took a common position in opposing the application on the ground that Ecobank was a secured creditor hence its actions were not subject to the Insolvency Petition.

10. Ms Lubano referred to the case of **Re Landmark Corporation Ltd [1968] 1 NSWR 705** where it was held that the receiver of the assets of a company appointed by a debenture holder is entitled to the custody and control and has a superior right to the liquidator of the company's assets in insolvency proceedings. Counsel submitted that the right of a secured creditor such as Ecobank is a stand-alone right that even in cases where a liquidator is appointed by the court, he has no rights and does not exercise control over a secured asset. Counsel maintained that no purpose will be served by the application as no other creditor would be interested in a secured asset and no other creditor, let alone an unsecured creditor like SBM, can interrogate the receiver of a secured asset.

Company's Submissions

11. Mr Waiyaki submitted that consolidation was not possible as the Insolvency Petition was the subject of ruling on 17th February 2020 whether it should be struck out. He emphasized the SBM was an unsecured creditor seeking to hoist itself on a secured creditor without any legal authority. In his view, joining SBM would cause undue delay in the matter and no value would be added to these proceedings. He added that by admitting SBM, the other creditors would also have to be joined leading to unmanageable proceedings in a matter in which they do not have any interest.

12. Counsel for the Company further submitted that *Re Arvind Engineering Limited (Supra)* was not applicable to the facts of this case as it involved competing rights of the Company and the debenture holder to appoint an administrator in a matter where the Company had lodged an application in court for appointment of an administrator under the *Insolvency Act, 2015*.

Determination

13. The application before me is an application for joinder of a party under **Order 1** of the **Rules** and for consolidation of this matter with the Insolvency Petition. Generally, joinder should be permitted if all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. The court is generally guided by the principle that all parties necessary for the effectual determination of a dispute should be joined to the proceedings (see *Rubina Ahmed and 3 Others v Guardian Bank Ltd (as successor of First National Finance Bank Ltd)* NRB CA Civil Appeal No. 2013 of 2013 [2019] eKLR).

14. Consolidation is provided for under **Order 11** of the **Rules** and the principles of consolidation of suits was re-stated in *Stumberg and another v Potgeiter* [1970] EA 323 as follows:

Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.

15. The matter in dispute in these proceedings is the Company's property which is subject of specific debentures. The position of Ecobank as a secured creditor is not in dispute hence in order to succeed SBM must establish its interest in that property and demonstrate that there are common issues of law and fact in this case and the Insolvency Petition. This implicates the position of a secured creditor in relation to insolvency proceedings and the consequences thereof.

16. A secured creditor like Ecobank occupies a special position in insolvency proceedings as it has rights over the property protected by the security agreement and statutory provisions where applicable. These rights take precedence over the administration and liquidation process in the sense that the holder of those rights is entitled to exercise them at any time. The position is summarized in *Halsbury's Laws of England* (3rd Ed, Vol. 6) at **para. 968** where the learned authors state as follows:

As a general rule, however, the holder of a debenture or debenture stock of a company has a charge or where the debenture stock is secured by a trust deed the trustees usually have a legal mortgage on specific assets of the company, and, if so, he or they can enforce the usual remedies of a legal or equitable mortgage against the company in the same manner as it were an individual. One of these rights is to have a sale of the property charged, either under the power given by the charge or by statute, or with the assistance of the court. If the company goes into liquidation, the rights of a secured creditor under his security are not prejudiced, and the liquidator cannot obtain an injunction to restrain a sale by the secured creditor except on the usual terms of paying the amount due, or, if it is not agreed, paying the amount claimed into court.

17. As regards the appointment of a receiver, the learned authors go further, at **para. 969**, to state that:

The power of the secured creditor to appoint a receiver under his security can be exercised after the company has gone into liquidation, and, where a receiver has been so appointed, the court will not, if the appointment is valid, displace the receiver by appointing the liquidator in his place.

18. In *Re: High-Plast Limited* ML HC IP No. E001 of 2019 [2019] eKLR, the question before the court was whether a secured creditor in a liquidation or administration of a company is entitled to exercise its statutory power of sale over a charged property. Kasango J., held as follows:

Where the chargor fails to discharge the debt, the bank is forced to look to its security for repayment of the advance. The rights of the secured creditor are derived from the registered charge whose validity was/has not been contested. The Secured Creditor may exercise self help remedies to recover the facility. These remedies include an action against the Chargor for the amount of debt, statutory power of sale of the charged property, appointment of administrator or liquidator; foreclosure and/or taking possession of the charged suit property.

In liquidation whose purpose is realization of debtor's assets to settle liabilities and dissolution of the Company, the Secured Creditor is protected as the said Creditor will rank in priority and exercise first the lien over the charged property before other Creditors.

Similarly in the process of Administration, the Administrator ought to prioritize the interest of the secured creditor(s) with regard to the charged property to realize the facility granted to the debtor.

The learned judge then concluded:

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.

19. Finally, and as regards the position of a receiver appointed under a debenture, the following statement of law by Street J., in **Re Landmark Corporation Limited (Supra)** is apposite:

The law is well-settled that a receiver of the assets of a company appointed by a debenture holder is entitled to the custody and control of the assets covered by that debenture This entitlement to custody and control is superior to a liquidator's statutory right and duty to take the company's property into his custody and under his control. The secured creditor is entitled to stand outside the winding-up and to rely on his security, including his contractual right thereunder to appoint a receiver.

20. 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. In this respect, the case of **Re: Arvind Engineering Limited (Supra)** has no bearing on these proceedings.

Disposition

21. The position of SBM against the Company is that it is an unsecured creditor. It has no interest in the Company's property of secured in favour of Ecobank. Neither administrator nor liquidator, if appointed in the Insolvency Petition would have an interest in the secured property of the Company. Likewise, other creditors in the Insolvency Petition do not have any stake or interest in the secured property. I therefore find and hold that the SBM has not established a legally recognised interest these proceedings. There are no common issues of law and fact and interest in relief in this matter and in the Insolvency Petition hence SBM cannot be joined to these proceedings. For the same reasons, consolidation of this case and the Insolvency Petition would not serve any purpose and would be a waste of time and costs.

22. I dismiss the Notice of Motion dated 7th February 2020 with costs to the Company and the respondent which I assess at Kshs. 20,000.00 for each party.

DATED and DELIVERED at NAIROBI this 12th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Akello instructed by Robson Harris and Company Advocates for the proposed interested party/applicant.

Mr Waiyaki instructed by Mboya Wang'ongu and Waiyaki Advocates for the applicant.

Ms Lubano instructed by Oraro and Company Advocates for the respondent.