



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
INSOLVENCY PETITION NO. E001 OF 2019
CONSOLIDATED WITH INSOLVENCY PETITION NO. 19 OF 2017
IN THE MATTER OF HI-PLAST LIMITED

AND
INTHE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

OFFICIAL RECEIVER (ADMINISTRATOR).....APPLICANT
HI-PLAST LIMITED.....RESPONDENT/APPLICANT
SAVICHEM INTERNAL LTD.....CREDITOR/PETITIONER

VERSUS

I& M BANK LIMITED.....SECURED CREDITOR/RESPONDENT

RULING (2)

This ruling relates to a Notice of Motion Application dated 20th August 2019, brought under the provisions of **Section 1A, 1B and 3 of the Civil Procedure Act, Order 45 rule 3 of the Civil Procedure Rules, Section 522 (1),(2),(3) and (4) 531 (b) of the Insolvency Act** and all other enabling provision of the law. The Applicant sought orders;

- a) That this Court to review and/or set aside its ruling and orders issued on 31st July 2019;
- b) That this Court to review and/or set aside its ruling and orders issued on 31st July 2019, specifically allowing the secured creditor to exercise statutory power of sale over L. R. Number 209/8611/2 based on current valuation report(s) at the market value;
- c) That this Court be pleased to review and/or set aside its ruling and orders issued on 31st July 2019, specifically excluding the secured Creditor from participating in the administration process of the Company;
- d) That this Court in the alternative gives directions as to the orders issued on 31st July 2019.
- e) That the costs of this application be provided for.

The Application was based on the following grounds;

- a) That the Court issued an Administration order against the Hi-Plast Limited (**“the Company”**) on 31st July 2019 and the Official Receiver was appointed Administrator thereof;
- b) That by the same order the Court gave leave to the Secured Creditor to dispose of the Company’s main asset, L. R. Number 209/8611/2 (**“the suit property”**) without any reference to the Administrator and excluded the Secured Creditor from participating in the Administration process;

- c) That the suit property is the Company's main asset and the Company's main place of business and area of operation;
- d) That the purpose of an Administration is to enable restructure and rescue of a business entity, and where not possible, to trade the company temporarily and dispose of the company and its assets as a going concern, would be achieved through liquidation;
- e) That by granting leave to the secured Creditor to dispose of the Company's main asset and source of income, the secured Creditor may not do so to best interest of the other creditors and the Company.
- f) That by granting leave for sale of the company's most main asset, the Court has already made a pre-determination that the company is no longer viable and ought to be liquidated;
- g) That should the company's most valuable asset be disposed of by the Secured Creditor, the Administrator will be denied an opportunity to assess the Company's viability and put together a package to ameliorate the company's position;
- h) That an Administration will only be effective if a moratorium on actions against the company is effective; if the order is effected as allowed, it would defeat the purpose of administration as it will fail to protect the company and deny the administrator ample time and space to come up with an effective rescue plan.

SECURED CREDITOR'S REPLYING AFFIDAVIT

The Application was opposed vide an affidavit dated 11th October 2019, sworn by Mr. Musa Dumbuya the Senior Manager, Debt Recovery with the I & M Bank Limited (**the "Secured Creditor"**). He stated that he was aware that Hi-Plast Limited (under Administration), (**"the Company"**) had through its advocates on record, filed an appeal in the Court of Appeal against the Court's decision made on 31st July 2019; **Civil Appeal No 400 of 2019 HI-PLAST vs I&M BANK LTD and annexed is a copy of Memorandum of Appeal.**

He asserted that in view of contents of the Memorandum of Appeal, that the Official Receiver is a party to the Appeal and the decision made on 31st July 2019 was therefore, not available for review, keeping in mind the provisions of **Order 45 of the Civil Procedure Rules** which militate against a court entertaining an application for Review when an appeal is pending.

The deponent deposed that the issues raised in the application for review are the same issues and reliefs sought by the Company in the appeal. If the Court entertains the application for review, the Court would usurp the jurisdiction of a matter already pending before Court of Appeal.

He confirmed that he had read and taken advice on the matters set out in paragraphs 6 of the grounds in support of the application, paragraphs 6, 7, 16, 17, 19, 20 and 22 of the supporting Affidavit sworn by Madam Diana Mumo; the Official Receiver.

That he was advised by Mr. Joseph W. Gathuri, from Messers. COG Consultants Limited, a firm of valuers instructed by the Secured Creditor, that on 7th and 8th October 2019 and further on 9th October 2019, Mr. Joseph W. Gathuri visited the suit premises, **L.R. No. 209/8611/2 Nairobi Runyenjes Road**, with the intention of valuing the same. Mr. Gathuri found that no factory production was taking place in the premises and therefore, the deposition contained in paragraphs 6 and 7 of the affidavit sworn by Ms Mumo is not factual.

He deposed that despite the orders in place, granting the Administrator's powers over the Company to the Official Receiver, the Official Receiver does not appear to have taken possession and control of the Company's property. He verily believed that the assertion that the Official Receiver requires to be allowed to deal in the property, L. R. No. 209/8611/2 Runyenjes Road had no basis.

He further stated that Mr. Gathuri, the valuer from COG Consultants Limited advised him that he established that that the suit property L. R. No. 209/8611/2, was occupied or leased to Messrs. Carton Exerts Limited. Consequently, and unless the income from the leasing had been suppressed, the same was clearly being paid or remitted to the Directors of the Company and therefore, there was really no substantive Administration in place.

OFFICIAL RECEIVERS (ADMINISTRATOR'S) SUBMISSIONS

The Official Receivers' in its submissions stated the matter of **T.S.S Grain Millers Ltd (under Administration)-vs- NIC Bank Kenya PLC (2018)** under paragraph 12 and 13, the court expressed the following views regarding **Section 560, 571 and 581 of Insolvency Act**

"...I read the three provisions to be intended and purposed to achieve:-

i) The protection of the company asset once an administrator is appointed. The protection is against all secured creditors, hire purchase sellers, landlords from re-entry and distress for rent and for any suits being instituted against the company unless with the concurrence of the administrator or leave of the court.

ii) Secure and facilitate the functions of the administrator as defined under the fourth schedule.

iii) Restriction of the company and its officers, from performing actions and powers as to be able to interfere with the functions of the administration as defined.

Broadly put, the sections cited seek to protect the property of the company under administration from wastage while entrenching

the position of the administrator so as to achieve the object of administration. Of the two broad subject, I hold the opinion that the paramount one is the protection of the company assets...

Moratorium on all Action Following Administrators Appointment

It submitted that upon issuance of Administration orders, there is a moratorium on actions against the company. The moratorium has the effect of pausing all insolvency proceedings and legal processes that are being taken against the company in question. It also means no other legal processes can be commenced without the consent of the administrator or permission of the court.

Under Section 560(1)(a) of the Insolvency Act, 2015,

“(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...”

From the above section the Official Receiver noted that although during the period of moratorium, all actions against the company are prevented, there are certain exceptions to this rule; consent of the Administrator or approval of the court.

Further that, while the court has the right to exercise discretion in granting approval, the court needs to take into consideration a number of factors as laid down under **section 560 A** of the Insolvency Act as follows;

“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.”

Section 560A above provides a guide on what the court needs to take into consideration when allowing creditor action during a moratorium. In the case of ***Re Atlantic Computer Systems PLC [1992] Ch 505***, it was established that the court has to balance the legitimate interests of (i) the Claimant and (ii) the company’s other creditors. It was noted by the court that in such an exercise, great weight is normally given to the proprietary interests of the claimant. It is normally sufficient to make a successful case if it can be demonstrated that not granting permission would cause significant loss to the claimant, unless doing so would cause a greater loss to others.

COMPANY’S SUBMISSIONS- HI-PLAST SUBMISSIONS

The Company (the “**Hi- Plast Limited**”) submitted that **Section 522 of the Insolvency Act** (hereinafter referred to as “**the Act**”) underpins the purpose of administration as follows;

- a) To maintain the company as a going concern;
- 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 traders.

The Company reiterated the submissions by Official Receiver and relied on the import of **Section 522 & 560 (1) of Insolvency Act** and the case of ***TSS Grain Millers Ltd vs NIC Bank Ky Ltd PLC (2018)***

To fortify its position, the Company referred the Court to the following cases;

Bristol Airport PLC & Anor vs Powdrill & Others (1990) 2 WLR 1362 where it was held;

“The Court can give leave to the Administrator to dispose of such property, the proceeds of sale being applied in discharge of the secured debt.”

AIB Capital Markets PLC & Anor vs Atlantic Computer Systems PLC & Others (1990) EWCA CIV 20 it was held;

“The making of an administration order triggers the prohibition on proceedings being brought or continued against the Company... the owners of property, and of charges over property are disabled from exercising their proprietary rights unless the Administrator consents or court gives leave.

.....The Prohibition in Section 11(3) (c) & (d) is intended to assist the Company, under management of the administrator, to achieve the purpose for which administration was made.... The Court has to carry out a balancing exercise, balancing the legitimate interest of the lessor and the legitimate interest of other Creditors of the Company.....”

SECURED CREDITOR’S SUBMISSIONS

The Secured Creditor submitted that the Honourable Court cannot properly grant the orders sought herein by the Official Receiver.

a) The orders sought constitute a rehearing and review of the matters led to the issuance of the orders of 31st July 2019. Which orders provided;

i) That the Secured Creditor shall carry out its legal rights under the valid registered charge; more particularly exercise statutory power of sale based on current valuation report(s) at the market value of L. R. No. 209/8611/1. The Secured Creditor to sell the property at the best price reasonable obtainable with regard to the current valuation report.

ii) That the secured Creditor is not obliged to participate in the administration process of the Petitioner/Company – Hi- Plast Company Limited

The requirements of **Order 45** of the Civil Procedure Rules and **Section 80 of the Civil Procedure Act** have not been met.

The orders sought amount to a collateral appeal from the Official Receiver and the Company against the ruling of the court when one is already pending in the Court of Appeal, In **Civil Appeal No. 400 of 2019 Nairobi. Hi-Plast Limited –vs- I & M Bank Limited** Nairobi.

b) Crucially, the orders are sought by a party who has ceded possession and control of the charged property L. R. No. 209/8611/2 Runyenjes Road Nairobi. Therefore, for all intents and purposes, the Official Receiver is not in possession or control of the alleged business of the company. Failure on the part of the Official Receiver to disclose this issue confirms that the application is not made in good faith.

REVIEW NOT PERMITTED WHEN THERE IS AN APPEAL

1. There being an appeal pending against the orders made on 31st July 2019. The memorandum of appeal seeks orders to the effect that;

“the order and ruling of this Court delivered on 31st July 2019 allowing the Secured Creditor to sell L. R. No. 209/8611/2 by itself be set aside and be substituted with an order directing the Official Receiver to sell the property on behalf of the Secured Creditor”.

2. Crucially, the Memorandum of Appeal shows that the Official Receiver is one of the persons served with the Appeal.

3. That the Official Receiver’s application is a clone of the pending appeal. This court does not have proper jurisdiction to entertain the Official Receiver’s application.

The secured Creditor relied on the Court of Appeal case of **Pancras T. Swai –vs- Kenya Breweries Limited [2014]eKLR**, where the Court stated as follows at page 9 and 10 thereof;

“it seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction.”

The secured Creditor relied on the Environment and Land case of **Serephen Nyaani Menge –vs- Rispah Onsase[2018] eKLR** Mutungi J. stated;

“Order 45 (2)[CPR]

A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”

The Secured Creditor submitted that since appointment as Administrator, the Official Receiver has not taken possession, custody and control of the suit property. The Secured Creditor alluded to the fact no meeting of Creditors was held and no report or activity was disclosed to Court.

UNSECURED CREDITOR/APRIROSE TRADING LIMITED SUBMISSIONS

The Unsecured Creditor in its submissions relied on the case of **Re Nakumatt Holdings Limited [2017]eKLR** where the judge in explaining the objects of administration stated as follows:-

“The statutory indexation of administration of insolvent companies is under part VIII of the Act. The relevant sections, for purposes of the instant application, read as follows:

1. The objectives of the administration of a company are the following

a) To achieve a better outcome for the company's creditors as a whole than would likely be the case if the company were liquidated (without first being under administration);

b) To realise the property of the company in order to make a distribution to one more secured or preferential creditors

2. Subject to subsection (4), the administrator of a company shall perform the administrator's functions in the interests of the company's creditors as a whole.

UNSECURED CREDITOR SAVICHEM INT'L LTD SUBMISSIONS

It was the Creditors submission that if the Secured Creditor proceeds with the sale of L. R. Number 209/8611/2 there will be nothing to administer and provisions of **Section 522(1)** will be rendered mute.

Further that the provisions of **Section 561 Insolvency Act 2015** protects the company while under administration. It states as follows;

“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)

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.

The provisions of **section 560 and 561 of Insolvency Act 2015** are explicit as they put a moratorium when an application for administration order has been made.

The Insolvency Act as ably put by Justice Tuiyott in **Midland Energy Limited –vs- George Muiruri T/A Leakey Auctioneers & Another [2019]eKLR** was put in place to achieve the following;

“1. The design of our current Insolvency Law is to give a second chance to financially distressed companies. A break from past where the fate of an ailing company would invariably be a winding up or liquidation order.

Administration is one of the alternatives to liquidation and is provided for in part VIII of the Act. The objectives of administration are set out in section 522 of the Act as to be as follows:

a) Maintain the company as a going concern

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.

c) To realise the property of the company in order to make a distribution to one or more Secured or Preferential Creditors.

So as to achieve the objectives, the company must be insulated from aggressive creditors who could cause a run of the company assets.

DETERMINATION

After consideration of pleadings, proceedings and submissions by Counsel on behalf of parties with regard to the instant application by the Official Receiver, the issues that emerge for determination are;

a) Does this Court have jurisdiction to attend to the application of its Orders of 31st July 2019 under a review?

b) Is the Secured Creditor's exercise of right of statutory power of sale on the charged suit property L.R. 209/8611/2 contrary to Insolvency Act 2015?

c) Would the sale of the Company's asset and place of business defeat the purpose of administration and prevent a favourable outcome for other Creditors thereby forcing a liquidation?

ANALYSIS

The Official Receiver lodged the instant application pursuant to this Court's Ruling of 31st July 2019. The import was/is that the Administration Order was issued appointing the Official Receiver as Administrator of Hi-Plast Company.

The Secured Creditor I & M Bank was granted orders to carry out its legal rights under the Fixed charge over suit property L.R. No 209/8611/2 on condition it shall be a sale based on current Valuation Report(s) and in compliance with **Section 97(3) of the Land Act**; sale at the best price reasonably obtainable.

The Secured creditor shall account to the Administrator on sale proceeds, surplus and/or settlement of interest charges contested by the Petitioner/Company.

The Applicant and Unsecured Creditors urged this Court to vary the Orders in the Review to stop the Secured Creditor from exercising statutory power of sale and excluding the Secured Creditor from the Administration process.

The Applicant and Unsecured Creditors urged the Court that the Court orders of granting administration order and exercise of statutory power of sale at the same time are incompatible. Secondly, it has emerged and brought to the Court's attention that the suit property LR 209/8611/2 earmarked for sale is the Company's main base of operations where the Company's factory is located and where it conducts its daily activities. If sale of the suit property is sold, it would result in defeating the purpose of administration as envisaged by **Sections 522 of Insolvency Act**. It is on the basis of discovery of this new and important matter discovered by the Official Receiver who was not party to these proceedings until the Administration Order was granted that necessitated the review of Court's orders.

Be that as it may, these set of facts are contested by the Secured Creditor. Their Valuer, Mr. Joseph W. Gathuri visited the premises and found Hi Plast was not in occupation or in business instead was Carton Exerts Limited in operation. The Official Receiver had not taken charge and it is questionable if the administration of the Company commenced.

Due to divergent and inconsistent versions with regard to the use occupation and operations on suit property **LR No 209/8611/2**, it would not be legally possible or sound for the Court to venture into the review application process when/where the discovery of new and important information /facts are not verified but contested.

Secondly, the Company and by extension Unsecured Creditors and Official Receiver filed appeal **Civil Appeal No. 400 of 2019 Nairobi. Hi-Plast Limited –vs- I & M Bank Limited Nairobi** as shown by Memorandum of Appeal annexed to Secured Creditor's Replying Affidavit. This fact is not denied by the parties. In the absence of the review application being hinged on any of the required legal standards, this Court upon filing of an appeal of its orders is divested of jurisdiction to continue hearing and determination of any new issue and/or take a different position or direction from the substance of the Ruling of 31st July 2019. To do so would amount to the Court arrogating itself appellate jurisdiction to be exercised over its own orders. This Court will not stand in the way of the appeal process as it is bound and shall allow the same to be dealt with in the Court of Appeal. This Court associates itself with the cases of **Pancras T. Swai vs Kenya Breweries Ltd [2014] & Serephen Nyasani Menge vs Rispah Onsase [2018] supra** on the issue that the present matter is not subject to a review but an appeal.

However, a few issues are worth noting, whereas the Applicant Official Receiver sought review to stop sale of suit property LR No 209/8611/2, the company submitted that the sale ought to be undertaken by Administrator by virtue of **Section 560(1) Insolvency Act** so as to allow the Administrator assess financial viability of a Company. With respect, the prayers /orders sought are contradictory, is it the statutory power of sale that is contested or who conducts the statutory power of sale? Whether Bank or Administrator sells the suit property to recover the amount due; the Secured Creditor ranks in priority over the suit property.

Section 2 of Insolvency Act aptly describes and makes a distinction between a secured Creditor and an unsecured Creditor as follows; as in the Court's earlier Ruling of 31st July 2019, this Court found that I& M Bank had/have a fixed Charge with Hi Plast Company registered in both lands Registry and Companies Registry for a facility of Ksh 300million and the security charged is LR 209/8611/2 Nairobi. The validity of the charge is not challenged and it is the agreement that gave rise to rights exercised by the Secured Creditor and the Company Hi Plast. The company has the right of redemption; to pay the debt and be discharged and the bank ranks in priority to realise its security. It is at liberty in law to exercise any of self help processes; sell the suit property or, Appoint Receiver or Administrator, or Foreclose the suit property or enter into possession. The bank may sue the Company for its debts. The Bank chose to exercise statutory power of sale. Therefore, this Court hived off the charged suit property to be sold from rights arising from the legal and registered charge but subject to mandatory statutory requirements; **Sections 90, 96 & 97 of Land Act**. These provisions hold the Secured Creditor accountable to Administrator, Court and other Creditors; on the process and outcome of the sale; the market value and sale value must be from current valuation report(s) and any surplus must be availed to settle other Creditors claims. During the hearing, the Company presented liabilities and assets and the court considered the possibility to salvage the Company through administration. The totality of the facts considered above, it is not mandatory for the sale to be conducted by the Administrator

and there is no legal provision barring the Secured Creditor realizing its security as long as it is accountable to Court Administrator and Creditors.

The Company cited the case of **Bristol Airport PLC vs Powdrill [1990] 2 WLR 1362, 1379 supra** where the English Court observed;

“So far as possible, the administration procedure should not be used to prejudice those who were secured Creditors when the administration order was made in lieu of a winding up order. The same is true regarding the proprietary interests of the lessor. The underlying principle here is that an administration for the benefit of unsecured Creditors should not be conducted at the expense of those who have proprietary rights which they are seeking to exercise, save to the extent that this maybe unavoidable and even this will usually be acceptable only to a strictly limited extent.”

The secured creditor relied on the case of **Andrew Mpemba Nyirenda & Anor vs Bernard Rop & Anor from Malawi Supreme Court of Appeal Misc Civil Appeal No 51 of 2015**, relying on the English case of **Buchler & Anor vs Talbot & Others [2004] 2 AC 298** which in part

reads as follows;

“Bankruptcy and Company’s liquidation are concerned with the realization and distribution of the Insolvent’s free assets among the unsecured Creditors. They are not concerned with assets which have been charged to Creditors as security, whether by way of fixed or floating charge. Secured Creditors can resort to their security; whether by way of fixed or floating charge. Secured Creditors can resort to their security for the discharge of their debts outside bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them. Only the equity of redemption remains the property of the charger.

Both cases cited by Company and Secured Creditor though persuasive but not binding to this Court confirm the position of a secured Creditor in the process of bankruptcy or winding up of a Company where administration under our law is a stop gap remedy/measure to salvage the Company. The Court is called upon to balance competing rights of the charge/mortgagee and other Creditors and the Company remaining a going concern.

The Ruling of this Court considered liabilities of the Company *vis a vis* the Assets as produced by the Company and found that even in the exercise of statutory power of sale by the Secured Creditor of the suit property under the process stipulated by law there would be surplus to pay some other Creditors. If this were not the case the Court would not grant administration but liquidation.

DISPOSITION

1. For reasons above, the Application by Official Receiver for review is not granted/upheld and the Ruling of 31st July 2019 remains in force subject to stay being granted by and the appeal in the Court of Appeal.

2. Each party to bear own Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 18th FEBRUARY 2020

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR THE APPLICANT

MR. NJOROGE FOR THE SECURED CREDITOR

MR. TUPET – COURT ASSISTANT