

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

INSOLVENCY PETITION NO. 25 OF 2018

IN THE MATTER OF UCHUMI SUPERMARKETS PLC

AND

IN THE MATTER OF THE INSOLVENCY ACT

RULING

1. This Insolvency Petition against **UCHUMI SUPERMARKETS LIMITED** (hereinafter the company) was filed by **GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY** on 3rd September 2018. **OWEN NJENGA KOIMBURI** was appointed the Provisional Supervisor of the company by the company. The court by its Ruling of 26th September 2019 directed the Provisional Supervisor together with the company to engage secured creditors in respect to the Company **Voluntary Arrangement (CVA)** that would be tabled at a creditors' meeting.

2. I have before me two applications for consideration.

3. One is filed on behalf of the company and is a Notice of Motion dated 27th March 2020. By that application the company calls for the court to make an order approving the company's Voluntary Arrangement passed at the creditors meeting on 2nd March 2020.

4. The second application is filed by UBA Bank Kenya Limited a secured creditor. The application seeks order that the company's CVA approved at the creditors meeting held on 2nd March 2020 be declared null and void.

5. It will be noted that those applications are contra to each other. The success of one will mean the failure of the other.

6. I will begin by considering the application filed by **UBA Bank Kenya, (UBA)** dated 19th March 2020.

7. Before that consideration it is important as a background to state that the provisional supervisor convened a creditors meeting to consider and approve the CVA as means of restructuring the company's debt. That meeting took place on 2nd March 2020 at Bomas of Kenya.

8. UBA's application seeks that creditors meeting and the approval of the voluntary arrangement to be declared null and void due to what it terms as material irregularity. The application is supported by the affidavit of **Mercy Wambugu**, UBA's legal officer. She confirmed that she attended the creditors meeting on behalf of UBA. That at that meeting **Kenya Commercial Bank Limited (KCB)** and the **Co-operative Bank of Kenya Limited (Co-op Bank)** were misclassified as secure creditors and irregularly allowed to vote under the secured creditors category. That this was allowed to occur despite UBA's protest and that that irregularity altered the nature of the value of the votes being tallied by providing the unsecured creditors with preferential voting right. The deponent termed that misclassification as a material irregularity in the voting process because that distorted the number and value of the votes cast. That the CVA was approved at the meeting without UBA's consent. The deponent referred to that consent as a condition precedent to the approval.

ANALYSIS OF THE NOTICE OF MOTION DATED 19TH MARCH 2020

9. Under section 663 of **The Insolvency Act** (hereinafter the Act) the Provisional Supervisor has the power to convene meeting of the company and its creditors. The main purpose of that meeting is to decide whether to approve the proposal of the voluntary arrangement or that proposal with modification. Section 664 (6) of the Act is key and I will reproduce it as herein under:

(6) If the proposal or a modification to it affects the right of a **secured creditor** of the company to enforce the creditor's security, it may not be approved unless-

(a) the creditor consents to it; **or**

(b) if the **creditor does not consent to it, the creditor-**

(i) would **be in a position no worse than if the company was in liquidation;**

(ii) would **receive no less from the assets to which the creditor's security relates**, or from their proceeds of sale, than any other secured creditor having a security interest in those assets that has the same priority as the creditor's; and

(iii) **would be paid in full from those assets**, or their proceeds of sale, before any payment from them or their proceeds is made to any other creditor whose security interest in them is ranked below that of the creditor, or who has no security interest in them. (Emphasis mine)

10. That section, to reiterate, requires secured creditor to approve the proposal or in the event the secured creditor does not consent the CVA would be approved if the secured creditor would not be in a worse position than if the company went into liquidation, would not receive less from the asset to which security relates and would be paid in full from those assets.

11. UBA alleges that KCB and Co-operative Bank were included and counted as secured creditors which they were not. He who alleges must prove it. That is what is referred to as burden of proof which is found in section 107 of the Evidence Act. That section is set out as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

12. Bearing in mind that section UBA had to prove that, firstly KCB and Co-op Bank were unsecured creditors, and secondly that they both voted as secured creditors.

13. Apart from the deposition of UBA’s legal officer, that both banks were unsecured and that they voted at the creditors meeting there is no document or any other proof of that allegation. For that reason that allegation remains unproved.

14. Further section 664(6) (b) provides scenarios where the secured creditor does not consent to the proposal. For the proposal to be considered as unapproved the secured creditor needs to prove that the proposal would leave the secured creditor in a worse position than if the company was liquidated, had to prove that it would receive less than the asset that the security relates, and would not be paid in full for those assets.

15. To consider the provision of the above sub-section (6) of Section 664 of the Act it is necessary to have in mind the proposal made and approved at the creditors meeting. It included, inter alia that:

i. The secured creditors would receive a portion of their old debt as an upfront payment subject to the completion of the disposal of non-core assets with the balance being paid over a period of 6 years and in other instances over a period of 5 years;

ii. The preferential creditors would receive a portion of their old debt as a lump sum payment with the balance being paid over a period of 6 years; and

iii. Unsecured creditors would make a discount of 30% of the balance of the old debt would be paid over a period of 6 years and another 40% would be converted to non-cumulative convertible preference share.

16. UBA did not prove that the above proposal would leave it in a worse position than if the company was liquidated nor did it prove it would receive less than the asset the security relates, and did not prove that they would not be paid in full from the assets.

17. It is also important to consider what is provided under section 665 (1) and (2) of the Act which provides as follows:

665. (1) This section applies to the decisions taken at the meeting of the company and the meeting of the company's creditors held in accordance with section 664 to consider a proposal for a voluntary arrangement (with or without modifications).

(2) The **proposal** (including any modifications) **is approved if-**

(a) it is approved-

(i) by a majority the members of the company present (either in person or by proxy) at the meeting of the company; and

(ii) by a majority (in number and value) of the members of each group of creditors present (either in person or by proxy) at the meeting of creditors; or

(b) if, despite not being not approved by a majority of the members referred to in paragraph (a)(i), it is approved by a majority (in number and value) of the members of each of the groups of creditors referred to in paragraph (a)(ii).

18. That section shows that approval can be in two tiers. First it is approved by majority of members present and majority in number and value of the members of each group.

19. The votes by numbers is reflected as follows:

	Total	Yes	No	Spoilt
Secured	4	3	1	-

Preferred	3	3	-	-
Unsecured	145	115	27	3
Total	152	121	28	3

The creditors Ballot Tally by value is as follows:

Class	By Value (Ksh)	Yes (Ksh)	No (Ksh)	Spoilt (Ksh)
Secured	2,182,03857.02	1,973,934,577.37	208,096,279.65	-
Preferred	408,476,864.95	408,476,864.95	-	-
Unsecured	2,116,692,278.32	1,136,377,436.31	977,244,515.01	3,070,327.00
Total	4,707,200,000.29	3,518,788,878.63	1,185,340,794.66	3,070,327.00

20. From the above tables it will be seen that the yes vote was the majority both in numbers and value. It follows that the requirements in Section 665 (2) (a) and (b) were well met.

21. It also needs to be borne in mind that for an application to be made challenging the approval of voluntary arrangement under section 667 of the Act, that can only be made after the voluntary arrangement has **'taken effect'**. Section 666 of the Act defines **'take effect'** as on the day after the date on which it is approved by the court by order made under Section 665 (7). UBA filed its application challenging the proposal of the voluntary arrangement before it had **'taken effect'**. That is fatal to the application and it will fail on that ground alone.

22. Even if it did not fail on that ground I do find and hold that there is no material irregularity shown by UBA to have occurred at the creditors meeting.

23. The Notice of Motion dated 19th March 2020 for the reason stated above will be dismissed with no order as to costs.

ANALYSIS OF THE NOTICE OF MOTION DATED 27TH MARCH 2020

24. I believe in my consideration of 'UBA' application I have largely considered the Notice of Motion dated 27th March 2020. By this application the company seeks an order of the court approving the company's voluntary arrangement passed at the creditors meeting of 2nd March 2020. That proposal was approved by majority in number and in value at that meeting. In my view it is right and just for this court to approve that proposal without modification.

CONCLUSION

25. In view of the above findings I grant the following orders:

1. The Notice of Motion dated 19th March 2020 is dismissed with no order as to costs.
2. This court does hereby approve the Company's Voluntary arrangement (CVA) passed at the creditors meeting of 2nd March 2020 in the following terms:
 - a. All monetary decrees, debt recovery claims, outstanding loan facilities, and rent claims including interest and penalties against the Company as at 2nd March 2020 ("the old debt") be paid in accordance with the CVA;
 - b. All pending execution proceedings inter alia proclamations of attachment, sequestrations, statutory power of sale, distress for rent, or eviction from premises occupied by the Company and any other form of execution proceedings in respect of the old debt be set aside;
 - c. All pending debt recovery cases, outstanding loans and rent claims before the court of appeal, high court, magistrates courts or tribunals be henceforth marked as settled with the costs of the respective suits to be agreed upon or taxed and paid together with the old debt as per the terms of the CVA;

d. All other contingent liabilities including damages for torts allegedly committed by the company on or before 2nd March 2020 be settled as per the terms of the CVA upon determination of the liabilities thereof by a court or such other competent tribunal;

e. The CVA be subject to review after every six (6) months through a meeting of the creditors from the date the CVA is approved herein;

3. In the event the company defaults on clause 2 above, six (6) months from the date a CVA order is made herein:

i. A person may take steps to enforce a security over the Company's property only with the consent of the Supervisor or with the approval of this Honourable Court;

ii. A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the Supervisor or with the approval of this Honourable Court;

iii. The company's landlords may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with consent of the Supervisor or with the approval of this Honourable court.

4. The winding up petition herein be and is hereby marked as settled with costs to the petitioner to be agreed upon or taxed and paid together with the old debt as per the terms of the CVA.

5. There shall be no order as to costs to the Notice of Motion dated 27th March 2020.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Petitioner:

For the Creditor:

For the Creditor:

For the Creditor

ORDER

This decision is hereby virtually delivered this 1st day of **July, 2020**.

MARY KASANGO

JUDGE