



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 262 OF 2019

BAKERY CONFECTIONERY FOOD MANUFACTURERS

& ALLIED WORKERS UNION (K).....CLAIMANT/APPLICANT

VERSUS

TAHIR SHEIKH GRAIN MILLERS LIMITED.....RESPONDENT

RULING

1. This is a **Ruling** with regard to the **Notice of Motion** application dated **21st November 2018** brought by the Claimant/Applicant pursuant to the provisions of **Section 560(9)(d) of the Insolvency Act, 2015, Section 3 of the Labour Relations Court Act, rule 17 of the Employment & Labour Relations Court (Procedure) Rules 2016**, and other enabling provisions of the law. The application seeks for the following orders:-

a) Spent;

b) That the Claimant/Applicant herein be granted Leave to institute legal proceedings against the Respondent;

c) The Costs of this application be provided for or to abide by the main cause as the court may order.

2. The application is premised on the **Nine (9) grounds** on its face and further supported by the **Affidavit** of **Daniel Amalemba**, the Applicant's Legal Officer sworn on **21st November, 2018**. **Mr. Amalemba** deponed that the Applicant received instructions on behalf of over **200 ex-employees** who were unlawfully and illegally rendered redundant by the Respondent entity with effect from **January to March of the year 2016**.

3. The Applicant consequently lodged a dispute with the Minister vide a **Letter** dated **27th May, 2016** and later on **16th June, 2016** while unaware of the appointment of an administrator, filed **ELRC Cause No.463 of 2017**. The said suit was however struck out vide a **Ruling** dated **31st March, 2017** on grounds that the dispute resolution mechanism had not been exhausted and further that the suit had been instituted without Leave of the Court or the Administrator in view of the provisions of the **Insolvency Act, 2015**.

4. The deponent also avers that after the delivery of the **Ruling**, the Applicant re-activated the conciliation proceedings but the Respondent through the administrator failed to submit to the conciliation process as a result of which a Certificate of unresolved dispute was issued by the conciliator. The said Certificate is annexed to the application and marked "**DM-4**".

5. Having now exhausted the disputed resolution mechanisms under **Section 62 of the Labour Relations Act, 2007**, the Applicant asserts that it is not imperative that the court grants the Leave as sought for the Applicant to ventilate the interests of the said ex-employees of the Respondent.

6. The Respondent filed a **Replying Affidavit** sworn by the Administrator of the Respondent Company, **Ponangipalli Venkata Ramana Rao**, on **31st August 2020**. It is deponed therein that the Respondent Company was placed under **Administration** on **30th May, 2016** by **KCB Bank, Kenya Limited** in exercise of its right as the holder of a floating charge in the form of an all assets debenture under the provisions of **Section 523(b) as read together with Section 534 of the Insolvency Act, 2015**.

7. Further that he (the deponent, **Mr. Ponangipalli**) was duly appointed as the administrator vide a **Letter** dated **30th May, 2016** which offer he accepted. The deponent also stated that he advertised in the **Daily Nation** on **3rd June, 2016** and notified the Public of the administration as well as his appointment as an Administrator.

8. According to **Mr. Ponangipalli**, the instant application and the anticipated suit by the Applicant is defective and in controversy to **Section**

560 of the **Insolvency Act 2015**, which provides that a suit against a Company under administration is only commenced with the Consent of the Administrator or the Leave of Court. The deponent laments that the Applicant before moving this court to seek Leave, it did not seek the Consent of the Administrator hence the application in premature.

9. In the deponent's view, courts have always leaned towards not granting Leave than granting the same when a Company is under administration. The reason being that the law intends that while a Company is under administration, the Administrator should be left to assess the situation and work out arrangements which are in best interest of the creditors without distractions by numerous claimants.

10. It is the Respondent's case that the Applicants are not in an attempt to re-introduce a suit on grounds which were considered and dismissed by a court of competent jurisdiction in **Mombasa ELRC No.463 of 2016**. It is averred that this court should not be called upon to re-open a matter that has already been adjudicated upon and finalized by a court of competent jurisdiction.

11. For the reasons stated above, the respondent is of the view that the Applicant has not demonstrated unique and/or compelling reasons as to why this court should exercise its jurisdiction and grant the Applicant Leave to institute a suit against the Respondent while under administration.

12. Following directions of this court, parties have canvassed the application by way of written submissions. Both parties complied with the said direction, with the Applicant filing its submissions on **26th October, 2020** whilst the Respondent filed its submissions on **1st September, 2020**.

13. In its submissions, the Applicant reiterates that the Trade Union appointed a Conciliator by the name **Mr. Charles I. Opalakadi** in line with the provisions of **Section 62** of the **Labour Relations Act, 2007**. However, the Respondent's Administrator was unwilling to cooperate as a result of which the Applicant, vide a **Letter** dated **28th March, 2018**, protested the non-responsiveness on part of the Administrator and his casual approach to the dispute. On that basis, the Conciliator issued a Certificate of unresolved dispute vide a **Letter** dated **22nd May, 2018**.

14. The Applicant further submitted that when a Certificate of unresolved dispute is issued under **Section 68** of the **Labour Relations Act 2007**, the parties are therefore at liberty to escalate the dispute to court for adjudication pursuant to **Section 73** and **74** of the **Labour Relations Act**.

15. The Applicant is of the view that by dint of provisions of **Section 560(1)** of the **Insolvency Act 2015**, the fact that no Consent was sought from the Administrator does not preclude a party from seeking the Consent of the court to initiate the proceedings. Therefore, this Court should exercise its discretion in favour of the Applicant.

16. The Respondent on the other hand, submitted that Leave to commence legal proceedings against a Company under Administration is not granted as of right. Therefore, the discretion must be exercised with extreme caution and circumspect. However in Kenya, there is no established principles for purposes of governing the exercise of discretion in deciding whether or not to grant such Leave. However, **Section 560** of the **Insolvency Act, 2015** which is *pari-materia* to **Section 440D, 5.741B** of England, should guide the court on the instant subject matter. Reliance was placed on the cases of **Foxcroft...Vs...The Ink Group PTY Ltd, Supreme Court of New South Wales, 31 October, 1994, Brian Fochfor Ltd...Vs...Textile Clothing and Footware Union of NSW[1998] 3o ACR 388 and Arpic P/L Australia P/L[2004] Adj.L.R 02/04**.

17. In the above cases, the purpose of **Section 440D, 5.741B** as well as our **Section 560** of the **Insolvency Act** is to allow the Administrator to have time to assess the situation and work out a situation in common interests of the creditors. According to the Respondent, if Leave is then granted the objective of the Administrator will be defeated, and there will be a flood gate of similar applications.

Analysis and Determination

18. I have carefully considered the application, the response thereof as well as the submissions made by each party, the law and the authorities relied on. The only issue for determination is whether leave should be granted for the Applicant to institute proceedings against the Respondent while under administration.

19. It is also important to indicate that this suit was transferred from the Employment and Labour Relation Court to this court solely for purposes of determining on whether or not leave should be granted as highlighted above.

20. **Section 560(1)** of the **Insolvency Act** provides 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) A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;

c) A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and

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."

21. From the above-mentioned Section, it is clear that while a Company is under Administration, for one to take steps to enforce, begin or continue legal proceedings against the Company, one has to obtain a Consent of the Administrator or act with approval of the court.

22. In the instant case, there is no doubt that Applicant had initiated proceedings vide **Mombasa ELRC No. 463 of 2016** against the Respondent but the same were struck out and the Applicant directed to correct the defects as pointed out by the Respondent. These defects were that the Applicant had not exhausted the process of conciliation and further that leave to initiate the proceedings had not been sought. The question which then follows is whether these defects have been rectified.

23. It is a common ground that a Conciliator, one **Mr. Charles Opalakadi** was appointed to adjudicate over the matter but according to him the dispute could not be settle due to unwillingness of the management and he consequently issued a certificate of Unresolved dispute. I have also noted that the Applicant vide a **Letter** dated **28th March, 2018** protested the casual approach to the matter by the Administrator. The Respondent has not responded to those allegations and hence the court assumes the same to be the truth.

24. Since the applicant has rectified the first defect in exhausting the conciliation process as directed in the **Ruling of 31st March, 2017** the next hurdle in the matter would be to seek the Leave of the Court or the Consent of the Administrator.

25. In that regard, the Respondent reiterates that the Applicant has not sought the consent of the administrator and therefore the application is premature. It is also submitted that the practice of court has been more in denying Leave than granting the same so that the Administrator's duties are not defeated. In response, The Applicant submits that if the dispute remains unresolved upon exhaustion of dispute resolution mechanisms, the party is at liberty to move the court for adjudication. The same is provided for under **Section 73** of the **Labour Relations Act**.

26. While addressing the Respondent's concern that the application is premature, the consent of the administrator having not been sought, this court will refer to **Section 560(1)(d)** of the **Insolvency Act**. The section provides that a person may begin or continue legal proceedings against the company under administration only with the consent of the administrator or with the approval of the court. Therefore, Such person need not to seek the Consent of the Administrator if the court approves the commencement of the suit.

27. From the submissions before this court, I find no ground to deny the Applicant Leave to institute suit against the Respondent, the applicant having exhausted the conciliation process. If the Respondent failed to cooperate and was reluctant to participate in the conciliation process, it is less likely that he would consent to having suit filed against the applicant.

28. **Article 50 (1)** of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided upon in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In the circumstances, since the dispute between the parties was not resolved through conciliation, it will be a clog to justice in denying the parties a day in court. All other issues can be addressed once the suit is filed.

29. In the resultant, I find the application dated **21st November, 2018** merited and the same is hereby allowed. The Applicant is granted leave in terms of **prayer (2)** of the Application. Costs to abide by the main cause.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 2nd day of December, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE