



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
INSOLVENCY PETITION NO. E 004 OF 2020
IN THE MATTER OF MIDAS OIL LIMITED
RULING

The Applicant through a Notice of Motion Application dated 27th March 2020 sought following orders:

- a) That the Court be pleased to find that the Respondent is indebted to the Petitioner to the admitted amount of Kshs 5,496,000/-
- b) That the court be pleased to allow publication of the present Application in a newspaper of national distribution within 21days
- c) That the court be pleased to order the National Land Commission to pay all monies owed to the Respondent corporation into a joint account administered by the Petitioner's and Respondent's legal representatives pending the conclusion of the present suit
- d) That Court be pleased to make any other order it may deem just and fair in the circumstances.

The Application is premised upon Sections 1A, 1B, 3A and 89 of the CPA Order 13, Rule 2 CPR, 2010, Sections 3 of the High Court (Organization and Administration) Act, 2015, Rule 25 of the High Court (Organization and Administration) (General) Rules 2016.

The Notice of Motion application is based on the following grounds as per the supporting affidavit by **Mr. Pedro Alexandre Duarte Pereira Silva**:-

- a. The admitted amount of Kshs.5,640,000 is the total amount invested by the Applicant in Midas Oil Limited to assist them finance Local Purchase Orders.
- b. Given that the Company is no longer trading the publication of the Petition will not unduly prejudice the Respondent. The money in question is the only asset available to the Respondent and should be protected by paying it into an account controlled by the Legal representatives of the parties to this Petition.

RESPONDENT'S CASE

The Application is opposed vide Grounds of Opposition dated 16th June 2020. The grounds are as follows;

- a) That the Applicant's application is incompetent, frivolous, vexatious, lacks merit and is a gross abuse of the Court Process.
- b) That any advertisement of the Petition shall be prejudicial to the Company's image and business
- c) That the only money which is admitted by the Company and can be paid to the Petitioner/Applicant is Kshs. 5,496,000/-
- d) That the prayers to deposit the over Kshs. 70 Million from the National Lands Commission will not be in the best interests of the company as the company has no objection to release to the Petitioner up to Kshs. 5,496,000/-
- e) That no prejudice will be occasioned to the Applicant should the Plaintiff be entitled to the fruits of its judgment.

APPLICANT'S SUBMISSIONS

The Applicant has submitted that this court be guided by **Order 13 Rule 2 CPR** and also relied on *Kenya Commercial Bank Limited V Nicholas R.O Ombija (2015)eKLR* and *Choitram v Nazari [1984] KLR 327, viz* which provide for judgment on admission. He has submitted that there is a clear and unequivocal admission and urged the court to enter judgment on the same.

On the Publication of a notification, he submitted that even though the court had on 18th February, 2020 decided it was premature to make an advertisement in a newspaper of national circulation; the Company is not running at the moment as per a replying Affidavit of 4th March, 2020. The submission is that since the company is no longer running, the fears expressed by the court about impact of a published notification to its affairs are assuaged as it is apparent that such notification will not impact on its day to day operations. That the notification is now essential so that all creditors and stakeholders are notified of the status quo of the company's operations.

He submitted that the Respondent is currently under liquidation and the court is endowed under **Section 451 of the Insolvency Act** with power to make an order for any money due to a company under liquidation to be paid into the Central Bank. He further submits that the court has power to appoint a special manager to oversee the Company's property and urged the court to order the parties advocates open a joint account to receive the NLC money.

RESPONDENT'S SUBMISSIONS

The Respondent has submitted that the company stands to suffer great prejudice if the advertisement is made since it has had a great reputation in the petroleum industry.

He has further submitted that depositing the money into a joint account will not at the best interests of the shareholders. That there is no justifiable reason to deposit the money at the Central Bank where it shall be difficult to access.

ISSUES

Consideration of the pleadings and the parties' submissions raise the following issues for determination;

- a) Whether judgment on admission should be entered against the Respondent for Kshs. 5,496,000/-
- b) Whether the Applicant should be allowed publish the notification
- c) Whether the NLC monies should be deposited in a joint account

ANALYSIS

a) Whether judgment on admission should be entered against the Respondent for Kshs. 5,496,000

The court's power to enter judgment on admission is discretionary. *Cassam vs. Sachania*. The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous.

Order 13 Rule 2 CPR provides as follows:-

"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just."

In *Choitram Vs Nazari (1984) KLR 327* the above provisions were captured under **Order XII rule 6. Madan JA** (as he then was) in the said decision stated thus:-

"For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract.In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial."

Therefore, the admission ought to be obvious on the face thereof and leave no room for doubt. An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made).

In the instant case, paragraph 3 of the Respondent's/ company's grounds of opposition dated 16th June, 2020 provides, "that the only money which is admitted and can be paid to the Petitioner is Kshs. 5,496,000/-."

On the second paragraph of the Company's submissions, it has been stated that "the company pleads to the court to be granted ninety (90) days to regularize the payment of Kshs. 5,496,000/- with the petitioner..."

The Respondent has admitted the claim and as such judgment of Kshs. 5,496,000/ should be entered against it, the totality of the circumstances and facts dictate so.

b) Whether the Applicant should be allowed publish the notification

It is a long-established principle of Company law that Directors must act in the best interests of their Company, but once the Company approaches insolvency, their first duty must be to the creditors. Once it has been established that the Company cannot pay its debts as and when they fall due, a responsible Director should take steps to protect creditors, and if a solution to the problem cannot be found, the Company may enter formal insolvency proceedings.

In Re Ukwala Supermarket Limited [2019] eKLR, the court observed that a creditor ought to be informed of insolvency proceedings for liquidation of a Company unable to pay its debts and allow such other creditors to join in such proceedings.

In the same case, the Court appreciated that the Petitioner put out an advertisement with the intention of providing information to the general public so that anyone with interest in the dispute may join the Petition.

In the instant case, the Applicant has brought to the attention of this court that the Company in another Affidavit indicated that it was not in business, the Court perused the Affidavit and found that to be true. The question arises as to how the Company will be able to pay its debts if it's not in business?

The Court finds, the fact that the company is not in business is the more reason why the advertisement should be published, so that creditors are put on notice.

As earlier stated, it is the duty of company directors to act in the best interest of the Company but once a company is in debt, it should put the interest of its creditors first. It is therefore important to deposit the money into an account managed by any other entity that is not the company.

The Company vide Grounds of opposition filed on 16th June 2020 paragraph 3 admitted that it was indebted to the Petitioner to the tune of Ksh 5,496,000/-. During oral high lights of submissions, Counsel for the Respondent admitted the Company's debt to the Petitioner. Counsel sought 6 months to settle the outstanding amount; March – September 2020. While conceding that the Respondent Company was not in operation, the Respondent objected to the advertisements it would have adverse effect to the Company. Is the Company in liquidation or not is it still a going concern engaged in business? If it is what adverse effect would the Company suffer if it is a going concern? For the Petitioner if the Company is not in business and has not/cannot settle the admitted debt, the advertisement would aid in jumpstarting the process of liquidation of Company assets to realize its debt.

c) Whether the NLC monies should be deposited in a joint account

Section 451 of the Insolvency Act provides that the Court may order any contributory, purchaser or other person from whom money is due to the company to pay the amount due into the Central Bank of Kenya to the account of the liquidator instead of to the liquidator, Such an order may be enforced in the same manner as if it had directed payment to the liquidator, all money and securities paid or delivered into the Central Bank of Kenya in relation to a liquidation by the Court are subject in all respects to the orders of the Court.

It is the Applicant's argument that the money expected from the National Land Commission be deposited in a joint account in the names of the parties' legal representatives on record. No liquidator has been appointed yet. The Respondent company argued that there is no justifiable reason for all the monies from NLC to be deposited in a joint interest earning account or deposited into the Central Bank and this action will not be in the interests of the shareholders.

With regard to disclosure that the National Land Commission owes the Respondent Company 72 million, the Respondent objects to payment to the Petitioner by NLC the outstanding debt of Ksh 5,496,000/- it owes and has not settled to date.

There is nothing provided to this Court to confirm the Respondent Company will receive the Kshs. 72 million from National Land Commission (NLC) The Petitioner has not obtained Garnishee order against NLC. NLC is not a party in these proceedings and orders for or against NLC cannot legally hold in the absence of service of pleadings in this matter to NLC, their reply/response and participation in a fair hearing in these proceedings. A court cannot grant orders against a party not served process and joined to the proceedings

This Court shall not pursue the claim of Ksh 72million allegedly held for the Respondent Company in the absence of confirmation of the claim or joining. The Petitioner may pursue Garnishee orders against NLC for the outstanding debt of the Respondent to the Petitioner.

DISPOSITION

1. The Creditors Petition filed on 5th February 2020 is granted with costs. The advertisement maybe published in default of payment of outstanding debt of Ksh 5,496,000/-

2. Judgment on admission is entered against the Respondent for the Petitioner of Ksh 5,496,000/-

3. The Petitioner may pursue Garnishee proceedings to stake its claim of Respondent's payment of Ksh72 (or any other amount) million by National Land Commission. (NLC)

DELIVERED SIGNED & DATED IN OPEN COURT ON 2ND DECEMBER 2020.(VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MRS MUTUA FOR THE CREDITOR

MR. MOMANYI KAGICHA FOR DEBTOR

COURT ASSISTANT: TUPET