



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY CAUSE NO. 14 OF 2018

IN THE MATTER OF THE INSOLVENCY ACT (NO. 18 OF 2015)

AND

IN THE MATTER OF ARM CEMENT PLC (UNDER ADMINISTRATION CLAUSE)

RULING

1. This matter came before me by virtue of my being the duty judge during the current High Court vacation.
2. This Ruling is to determine very restricted issues, which are:

(a) Whether the injunction issued on 12th July 2019, and extended up to 19th September 2019, should be discharged?

(b) If the answer to (a) above is in the positive should that subsisting injunction be permitted to subsist on condition and if so what should be the condition?

BACK GROUND

3. UBA Kenya Bank Limited (UBA) is a holder of a qualifying floating charge in respect of the property of ARM Cement PLC (the Company). Following the company's default on its payment obligation, UBA appointed Anthony Muniu Thoithi and George Muriithi Weru as administrators of the Company, under the Insolvency Act, which appointment they accepted by their letter of 18th August 2018.

4. An application, dated 11th July 2019, was filed by Pradipkumar Harjivandas Paurana (the applicant) where he sought the prayer:

“That an order does issue permanently restraining the Respondent (that is the administrators) and ARM Cement PLC (under Administration) their employees, agents, assigns from selling, offering for sale, transferring and/or dealing in any manner whatsoever with the assets of the ARM Cement PLC (under Administration) and/or proceeding with or undertaking any further acts in furtherance of the proposed sale of the cement and non-cement assets and the business of the Respondent to National Cement Company Limited”

5. The ex parte interim order, as prayed above, was issued on 12th July 2019. That order was subsequently extended up to 19th September 2019.

6. That court order restrained the administrator from concluding the process of sale of the company to National cement Company Limited (NCCL). NCCL made an offer to buy the company for USD 50 million. Before signing an agreement with NCCL the administrator requested and obtained from NCCL an irrevocable bank guarantee for up to a maximum limit of Ksh. 1 Billion.

7. After the signing of that agreement another offer was made by Rai Group for Ksh. 6.5 Billion. That offer was accompanied by a letter of comfort from Barak Fund. The letter by Barak Fund made certain conditions which would be required to be met before it issued the financing.

8. The applicant applied for the above order on the grounds, amongst others, that he believed the administrators had conducted and were intending to conclude a transaction for the disposal of the company's assets and business, in a flawed process that had irregularities and illegalities. The applicant innumerate in his application the various alleged irregularities he perceived.

9. I need to say very categorically that I am not called upon, in this Ruling, to determine the merits or demerits of the application by the

applicant. I am also not called upon to determine the propriety of the ex parte order issued on 12th July 2019. Those will be determined by the judge handling this matter. What I am called upon to resolve is the issues set out above. Those issues came up following an oral application made by counsels representing the administrator, the NCCL and the Financiers of the administration.

ISSUE(a) Whether the injunction issued on 12th July 2019, and extended up to 19th September 2019, should be discharged?

10. Injunctions are issued under Order 40 of the civil Procedure Rule. Order 40 Rule 7 provides:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

11. The main thrust of the application to set aside the injunction order is that the order delayed the process of sale of the company’s assets. That is the injunction has left the process of administration in a limbo. The financiers have been financing the administration which according to their counsel they cannot proceed to do indefinitely. Further it was submitted that the applicant obtained the injunction order when he had not made a firm commitment for the purchase of the company and its assets. Those arguments were vigorously opposed by the applicant and one unsecured creditor who were of the view that to fail to extend the order would lead to the sale of the company’s assets for less than was being offered by Rai Group. This would mean that there would be less money to settle the company’s debts to the detriment of the unsecured creditors.

12. Because I am restricted in the determination I should make hereof, as stated above, I will not proceed to consider the very detailed submissions made on the Insolvency Act, or authorities. My task is simply to determine whether the order should be extended.

13. Having considered the submissions made and the justice of this case I do find that there is merit in extending the order of injunction.

ISSUE (b) If the answer to (a) above is in the positive should that subsisting injunction be permitted to subsist on condition and if so what should be the condition?

14. Bearing in mind the need for the administrator to have certainty in the administration process I am of the firm view that there is need for conditions to be set in extending the order. The condition that commends itself to me is the one met by NCCL. That is the applicant will be required to provide an irrevocable bank guarantee for 20% of the offer made, that is Ksh.6.5 Billion. In addition the order will be varied to exclude assets of the company that are outside Kenya.

CONCLUSION

15. The following are the orders of this court:

a. *The order issued on 12th July 2019 and extended to 19th September 2019 is hereby set aside.*

b. *Until 19th September 2019 an order is hereby issued restraining the administrators of ARM Cement PLC (under Administration) their employees, agents and/or assigns from selling, offering for sale, transferring and/or dealing in any manner whatsoever with the **Kenyan** assets of the ARM Cement PLC (under Administration) and/or proceeding with or undertaking any further acts in furtherance of the proposed sale of the cement and non-cement assets and the business **in Kenya** of the ARM Cement PLC (under Administration) to National Cement Company Limited.*

c. *The Oder in (b) above is granted on condition that the applicant shall provide **to the administrators** an irrevocable bank guarantee for 20% of Ksh. 6.5 Billion on or before 10th September 2019. The administrators shall determine whether the bank guarantee of the applicant meets their requirement for the sale of the Kenyan assets of ARM Cement PLC (under Administration) . Failure to provide a bank guarantee for the stated amount on the stated date and failure to satisfy the administrators on the quality or validity of such bank guarantee will lead to the vacation of the order made in (b) above.*

d. *Orders accordingly*

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of SEPTEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE APPLICANT**

..... **FOR THE COMPANY**