



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 277 OF 2018

ISOLUX INGENIERA S.A.....1ST APPELLANT

ANDRES ALVARES GONZALES.....2ND APPELLANT

-VERSUS-

ENG PAUL MUTEMI T/A NYIKALAND

INTERNATIONAL TECHNOLOGIES GROUP.....RESPONDENT

RULING

1) The respondent took out the motion dated 5th July, 2019 in which it sought for the following orders:

i. THAT the application herein be struck out.

ii. THAT funds held in the joint bank account CIF Number 0176315 Reference 0020176315550151 at I&M Bank Limited in the names of Kaplan & Straton Advocates and Thuita Kiiru & Co. Advocates be released to the respondent's bank account inclusive of the interest as detailed below.

Account Name: Nyikaland International

Technologies Group Ltd

Account Number 0230015025588201

Bank Ecobank Limited

Swift: RECOCKENA

Branch: 023 (Valley Arcade)

Bank Code: 043

iii. THAT the costs of this application be provided for.

The motion is supported by the affidavit of Paul Mutemi.

2) When served, the appellant filed grounds of opposition and the replying affidavit of James Muthui to oppose the application. When this motion came up for interpartes hearing, learned counsels made oral submissions in support of the respective positions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion together with rival oral submissions.

It is the submission of the respondent that the appeal should be ordered struck out and dismissed on the basis that the Record of Appeal has not been filed within the timeline of 21 days given by this court. It is pointed out that the proceedings have been ready since the month of October 2018.

3) It is further argued that since the appellants obtained an order for stay of execution of the decree on 12th July 2018 they have never taken any step to have the appeal ready for hearing.

4) The appellants opposed the motion arguing that on 24th October 2018, the High Court made an order recognising ordinary insolvency proceedings 700/2017 in Spain in respect of the 1st appellant herein as foreign main proceedings by this court. It is argued that the fact that the 1st appellant is undergoing foreign insolvency proceedings that have been recognized by this court, this effectively stays the commencement or continuation of individual actions or proceedings in respect to the appellant including this appeal pending the conclusion of the insolvency proceedings.

5) The respondent was quite emphatic that the stay of all legal proceedings in respect to the appellants is automatic. The appellants also argued that the 1st appellant is still under receivership and therefore presently lacks the *locus standi* to prosecute this appeal since the insolvency proceedings in respect to the 1st appellant have to be concluded to enable it proceed with this appeal.

6) It is not in dispute that the 1st appellant is undergoing insolvency proceedings in Spain and that an Order appointing Data Concursal S.L.P as the single receiver in the ongoing insolvency proceedings has been issued.

7) The question which needs to be answered is what is the impact of this court's recognition of the ordinary insolvency proceedings 700/2017?

8) With respect, I am persuaded by the appellants' argument that under Section 22(a) of the Insolvency Act, 5th Schedule that an automatic order of stay issues. I am therefore satisfied that the appellants' hands are tied by the statute thus they cannot take any step until the insolvency proceedings are heard and determined.

9) It is therefore apparent that the respondent's application cannot succeed. The same is ordered dismissed with each party bearing its own costs.

Dated, Signed and Delivered at Nairobi this 13th day of November, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Appellant**

..... **for the Respondent**