



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO.3 OF 2016

BAKE 'N' BITE MOMBASA LIMITED

(UNDER ADMINISTRATION).....APPLICANT

VERSUS

JANENDRA RAICHAND SHAH.....1ST RESPONDENT

KAMAL JANENDRA SHAH.....2ND RESPONDENT

VIKESH JANENDRA SHAH.....3RD RESPONDENT

NDUTUMI AUCTIONEERS.....4TH RESPONDENT

RULING

1. The Applicant M/s **BAKE "N" BITE MOMBASA LIMITED** (*under Administration*) through a notice of motion dated 9th July 2018 brought pursuant to section 560(1) (c) and (d) of the Insolvency Act, 2015, Regulation 10 of the Insolvency Regulations, 2016 and all other enabling provisions of the law seeks the following orders:-

- 1. This application be certified urgent and service thereof be dispensed with in the first instance.**
- 2. The Respondents jointly and severally do pay a sum of Kshs. 3,000,000/- to the Administrators of the Applicant being the proceeds of sale of the Applicant's assets within 30 days of this order.**
- 3. Any further orders that may be made in the interest of justice.**
- 4. The costs of this application be in the cause.**

2. The application is premised on the grounds on the face of the application thus:-

- 1. The Applicant was placed under administration by STANBIC BANK KENYA LIMITED and KOLLURI VENKATA SUBBARAYA KAMA SASTRY appointed as sole administrator over the whole of the assets of the Applicant.**
- 2. The placement of the Applicant under administration imposed a moratorium in terms of section 560(1) of the Insolvency Act 2015 on any legal proceedings (including attachment and execution) in respect of the Applicant's assets pending end of administration.**
- 3. Under section 560(1) and (d) of the Insolvency Act, any legal proceedings (including attachment and execution) against the Applicant's assets can only be commenced or continued either with the consent of the administrator or with the sanction of the court.**
- 4. Vide an Affidavit filed in this Court on 7th May 2018, the Respondents admitted having attached and sold by public auction valuable assets of the Applicant stored at warehouse at Ganjoni, Mombasa in blatant disregard of the law and at a throw away price of Kshs. 3,000,000.**

5. No consent from the Administrator or the Court had been sought or obtained.

6. Consequently, the aforesaid sale of the Applicant's assets by the Respondents is unlawful illegal and contra-statute.

7. The Respondents are now likely to dissipate the proceeds of sale of the Applicant's assets in furtherance of their unlawful actions aforesaid severely prejudicing the achievement of the objectives of administration and thus making this application extremely urgent.

8. There is reasonable fear that it will be impractical for the objectives of administration (to wit: to maintain the Applicant as going concern; and to achieve a better outcome of the Applicant's creditors than would otherwise be the case in liquidation) to be met if the Respondents are allowed to dissipate the said sale proceeds aforesaid.

9. It is in the interest of justice and for the benefit of all unsecured and secured creditors of the Applicant that the Respondents pay to the Administrators of the Applicant the admitted sum of Kshs. 3,000,000 being the proceeds of the unlawful sale of Applicant's assets.

3. The application is further supported by supporting affidavit of **KOLLURI VENKATA SUBBARAYA KAMA SASTRY**, a duly Licenced Insolvency Practitioner, the Sole Administrator of the property of **Bake "N" Bite Mombasa Limited**, the Applicant in this application who has deponed the affidavit reiterating the grounds on the face of the application and has stated *inter alia*: that on 10th November 2016, **Stanbic Bank Kenya Limited**, a holder of a qualifying floating charge, put the Applicant under administrator and appointed the deponent as a sole administrator over the whole assets of the Applicant (*see copy of Notice of Appointment annexed and marked as Exhibit "KV1"*); that the placement of the applicant under Administration imposed a moratorium in terms of section 560 (1) of the Insolvency Act on any legal proceedings (*including attachment and execution*) in respect of the Applicant's assets pending end of Administrator and that any attachment and execution against Applicant's assets can only be commenced or continued either with the consent of the Administrator or with the sanction of the court.

4. It is further sworn by the Administrator; that by an affidavit filed in this court on 7th May 2018, the 4th Respondent, admitted to having attached and sold by public auction valuable assets of the Applicant stored at ware house at Ganjoni, Mombasa in blatant disregard of the law and at a throw away price of Kshs. 3,000,000 (see a true copy of the said affidavit annexed Exhibit "**KV 2**"; that no consent was obtained from the Administrator and the court; that the aforesaid sale was unlawful, illegal and contra-statute and deserving court sanction; that the Respondent are likely to dissipate the proceeds of sale of the Applicant's assets in furtherance of their unlawful actions; that as a result of the unlawful conduct of the Respondents there is reasonable fear that it will be unpractical for the objectives of administration to be met; if the Respondents dissipate the proceeds of sale of the Applicant's assets aforesaid; that the court has jurisdiction to grant the orders sought and that the Respondents be restrained from attaching and disposing off assets of the Applicant.

5. The Respondents are opposed to the application. The 3rd Respondent **VIKESH JANENDRA SHAH** and the 4th Respondent, **LEONARD J. WANJEGU** filed Replying Affidavits dated 20th July 2018 and 20th July 2018 respectively.

6. The 3rd Respondent **VIKESH JANENDRA SHAH** avers, that he is making the affidavit on his behalf and that of the 1st and 2nd Respondents; that the 1st and 3rd Respondents are the landlord to the premises leased to the Applicant; that the lease expired in March 2018 and tenant stopped paying rent in December 2016 and failed to repair and paint the premises (*copy of lease agreement marked "VJS 1"*); that the tenant left the leased premises carrying away loose assets, but refused to vacate the premises; that the Respondents instructed the 4th Respondent to levy distress and attach Applicant's assets lying in Respondent's premises; that the 4th Respondent followed the laid down procedure to carry out the auction without any objection from the Applicant or the Administrator and that at no time were they notified by either the Applicant or the Administrator that the Applicant had been placed under administration and an order given to conserve its assets.

7. It is further deponed by the 3rd Respondent; that the auction was carried out on 4/3/2018 to recover Kshs. 5,505,761/- and that the Applicant is indebted to the tune of Kshs. 2,505,76/- plus auctioneers charges; that it would be unfair and unjust to order refund of the sum of Kshs. 3,000,000/- having conducted the auction with full knowledge of the applicant and the administrator having not raised any objection; that the application had been brought after unreasonable delay and as such it is vexatious, unmerited and an abuse of the court process; and that the Applicant had adequate time from 23rd March 2018 to 4/4/2018 to notify the Respondents of its insolvency status and obtain an order to stop the auction.

8. The 4th Respondent in its Replying affidavit dated 20th July 2018 has opposed the application and has averred; that it is a licensed Auctioneer (see a copy of Auctioneer License marked "**L.J.W.1**"; that the Applicant was aware of the public auction on 4/4/2018 as deponent of the affidavit in support of the withdrawn application dated 18/4/2018 (*copy of Newspaper annexed containing advertisement*) but applicant failed to notify the 4th Respondent to stop the auction; that the auction was conducted as per laid down procedure (annexture "**KV 2**", that the Applicant, the administrator and 1st to 3rd Respondent did not at any time inform the 4th Respondent that Applicant was under insolvency, that he sold the equipment and released the proceeds of sale to the Landlords and is not holding any proceeds from the sale; that the 1st, 2nd and 3rd Respondents in their instruction letter of 14/2/2018 indemnified the 4th Respondent agent all costs, damages, losses and expenses incurred in the sale (a copy of a letter of instruction marked "**L.J.W.2**" and that the application should be dismissed against the 4th Respondent for lack of merit and being frivolous and abuse of the court process.

9. The Administrator "**KVSK 12**" **SASTRY**, filed further affidavit dated 24th July 2018 taking up issues with the Respondents Replying affidavit and deponed further, that he read the affidavit of the 3rd Respondent sworn on 20th July 2018 and avers the same is frivolous, vexatious and amounts to gross abuse of the process of court; that the Respondents having conceded the lease agreement expired in March 2018, the Respondents cannot seek to enforce the terms of the expired lease agreement against the Applicant; that the Respondents are to blame for the Applicant's failure to maintain the premises in a habitable condition; that on 6th February 2017, the administrator reached an

agreement with the 3rd Respondent, acting on behalf of 1st and 2nd Respondents; to vacate the leased premises along Ganjoni area, Mombasa (see a true copy of e-mail to the 3rd Respondent' annexed as Exhibit "KS 1"; that the Respondent prevented the Administrator's personnel from moving the Applicant's assets stored at Ganjoni house severally (see copy of correspondence Exhibit "KS 2"; that the 1st to 3rd Respondents admitted they instructed 4th Respondent to levy distress on assets of the Applicant, however no consent from the Administrator or court was sought prior to the execution; that it is highly misleading for the 1st, 2nd and 3rd Respondents to aver they were not aware of the placement of the Applicant under administration; that on 9th December 2016, notice of placement of Applicant under Administration was duly published in Kenya Gazette (copy attached as Exhibit "KV 1" on the notice of motion dated 9th July 2018); and placement of Applicant under administration was widely shared in the local newspaper including the Daily Nation Newspaper (a copy of the newspaper article annexed as Exhibit "KV 3").

10. At the hearing of the application Mr. Wafula, learned Advocate appeared for the Applicant whereas Miss Otieno, learned Advocate, appeared for the Respondent. Each of the Advocates relied on the affidavits and annexures on record and left this matter for the court to decide. I have very carefully considered the pleadings and counsel oral submissions and the issue arising thereto for consideration is as follows:-

a. Whether the placement of the Applicant under administration imposed a moratorium in terms of section 560(1) of the Insolvency Act, 2015 or any legal process in respect of the Applicant's assets pending end of the Administration?

b. Whether the Respondents had notice of the Applicant placement under administration, and if so, whether the Respondents jointly out severally can be condemned to pay Kshs.3,000,000 to the Administrator of the Applicant's assets being the proceeds of sale of the Applicant's Asset?

A. Whether the placement of the Applicant under administration imposed a moratorium in terms of section 560(1) of the Insolvency Act, 2015 or any legal process in respect of the Applicant's assets pending end of the Administrator?

11. In the instant application, the Applicant was placed under Administration on 9th December 2016, under Notice of placement of Applicant under Administration which was duly published in Kenya Gazette Exhibit "KV 1" on the Notice of motion dated 9th July 2018). The notice of placement of the Applicant under Administration was widely shared in the local newspapers including the Daily Nation Newspaper (Exhibit "KV 3"). I have perused the annexures which the Respondents have not challenged nor bothered to controvert the Administrator's affidavit of 24th July 2018; I am from the above satisfied that the Applicant herein was placed under Administration and the whole would including the Respondents were duly notified of such a replacement of the Applicant under Administrator.

12. Section 560(1) of the Insolvency Act provides:-

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."

13. From the above-mentioned section, it is clear while a company is under Administration, for one to take steps to enforce a security over the company's property one has to obtain a consent of the administrator or act with approval of the court. This includes even attachments and executions.

14. In the instant case, there is no doubt that the Respondents purportedly proceeded with attachment and execution without the consent of the Administrator or the approval of the court. It is clear from reading of section 560(1) of the Insolvency Act attachment or execution is not totally barred but it is unlawful to proceed to do so without the consent of the administrator or approval of the court so long as a moratorium is imposed on the assets of a company under Administration by dint of section 560(1) of the Insolvency Act 2015. The Insolvency Act comes immediately into force once notice is given by the operation of the law and there is no need by serving a notice to the Respondents in person once the notice is either gazetted or advertised. There is no excuse for anyone therefore to proceed on with attachment or execution to recover debts by attaching company's property once it is placed under Administration. I therefore in the instant case find and hold the attachment, or execution and sale of the Applicant's assets, who was placed under Administration, was illegal, unlawful and contra-statute for want of consent of the Administrator and want of courts sanction.

B. Whether the Respondents had notice of the Applicant placement under Administration and if so, whether the Respondents jointly and severally can be condemned to pay Kshs. 3,000,000 to the Administrator of the Applicant's assets being proceeds of sale of the Applicant's assets?

15. The Respondents contention is that they were not notified by the Administrator or the Applicant, of the Applicant having been placed

under Administration before and during the attachment and subsequent sale of the Applicant's assets. There is no denial on part of the Respondents; that notice of placement of the Applicant under Administration was gazetted in Kenya Gazette on 9th December 2016 and advertised in the local daily newspaper as exhibited under Exhibit "KV 1" and "KV 3" respectively. There is no requirement once Notice is duly gazetted in the Kenya Gazette or advertised in Daily newspaper, for service to be valid, the Respondents should be served personally. I find the Respondents and the whole world were duly notified of the placement of the Applicant under administration and the Respondents are wrong to insist on any other mode of service and denying such service. I find the Respondents were not only notified of Applicant's placement under administration but were aware of the Applicant's placement under Administration having communicated and exchanged e-mail with the Administrator.

16. In the instant case, and from the Respondents affidavits there is no denial that the attached Applicant's assets were sold and fetched Kshs. 3,000,000/- which the 4th Respondent averred the released the same to the Respondents nos. 1, 2 and 3. The Respondents claimed the amount was outstanding rent due and payable by the Applicant notwithstanding the existing lease between 1st, 2nd and 3rd Respondents and the Applicant had terminated or expired in March 2018. It is interesting to note the Respondents in carrying out the execution were purporting to be enforcing the terms of the expired lease agreement against the Applicant. I find that such claim to be baseless, misplaced, gross misconcerned and unlawful. I find the Respondents acted wrongful, unlawfully, illegally and in contravention of section **560(1) of the Insolvency Act, 2015**. I find the Respondent's should be held to account by releasing the proceeds of the auction to the Administrator of the Applicant's assets.

17. The upshot is that the prayers in the application are deserved. I accordingly grant the following orders:-

a. Application dated 9th July 2018 is allowed.

b. The Respondents are ordered to jointly and severally pay the sum of Kshs. 3,000,000/- to the Administrator of the Applicant's Assets being the proceeds of the unlawful and illegal sale of Applicant's assets by 4th Respondent in an auction on illegal and unlawful instruction by the 1st, 2nd and 3rd Respondents within the next 30 days of this order in default execution proceedings do issue against the Respondents.

c. Costs of the Application is awarded to the Applicant.

Dated, signed and delivered at Nairobi this 11th day of October, 2018.

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J .A. MAKAU

JUDGE