

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY PETITION NO. E018 OF 2020

IN THE MATTER OF THE LIQUIDATION OF TUSKER
MATTRESSES LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT, NO 18 OF 2015

BETWEEN

HOTPOINT APPLIANCES LIMITED.....
PETITIONER

VERSUS

TUSKER MATTERSSES LIMITED.....1ST
RESPONDENT

DIAMOND TRUST BANK KENYA LTD.....2ND
RESPONDENT

OWEN KOIMBURI NJENGA (suing as interim liquidator of)
TUSKER MATTRESSES LTD

(in
liquidation).....LIQUIDATOR/APPLICAN
T

RULING

1. The Applicant, Tusker Mattresses Limited (in Liquidation), moved this Court by way of a Notice of Motion dated 5th April 2024 brought under Order 40 Rules 1, 2, and 3 of the Civil

Procedure Rules. The Applicant seeks two substantive prayers:

- i. That the 2nd Respondent, whether by itself, its agents, servants or assigns, be restrained from alienating, interfering, dealing and/or exercising its statutory power of sale over L.R. No. 337/646 or any other property of Tusker Mattresses Limited (in Liquidation) which it holds as security; and*
 - ii. That the Liquidator be granted 120 days to engage a forensic auditor and conduct a forensic audit on the financial status of the company, and thereafter finalize and file the statement of affairs of the company.*
2. The application is premised on the grounds on record and supported by the affidavit of Owen Koimburi, the Interim Liquidator of the Applicant company. He deposes that there exists a liquidation order issued on 31st May 2023, effectively halting any dispositions or dealings with the company's assets except through the liquidator. By an order of 18th August 2023, he was appointed interim liquidator of Tusker Mattresses Limited.
3. The Liquidator avers that despite the subsistence of the liquidation order, the 2nd Respondent has threatened to dispose of the property known as L.R. No. 337/646 through auctioneers in purported exercise of its statutory power of sale. He contends that such action, if undertaken without leave of the Court or involvement of the liquidator, would

amount to usurpation of the liquidator's statutory functions and contempt of court. He further avers that the company is currently relying on its last audited financial statements for the year ending February 2019, over five years ago, and that a forensic audit is necessary to ascertain its true financial position.

4. The 2nd Respondent opposes the application through a replying affidavit sworn by Faith Ndonga, its Legal Officer, on 7th May 2024. She deposes that the 1st Respondent had obtained a loan facility from the 2nd Respondent secured by L.R. No. 337/646 situated in Athi River. The 1st Respondent defaulted on its repayment obligations, thereby entitling the 2nd Respondent, as chargee, to exercise its statutory power of sale under Section 96 of the Land Act.
5. It is deponed that pursuant to the said provision, the 2nd Respondent exercised its right of sale by way of private treaty and concluded a sale agreement on 19th September 2023. In seeking to grant vacant possession to the purchaser, the 2nd Respondent wrote to the Applicant to vacate the premises, but the Applicant declined on the basis of the liquidation proceedings.
6. The 2nd Respondent maintains that its rights as a secured creditor are not fettered by the insolvency proceedings and that under the Insolvency Act, secured creditors are ranked first in priority. It contends further that the statutory power of sale is not subject to or suspended by the commencement of

liquidation proceedings, and that the interim liquidator cannot interfere with the exercise of a secured creditor's rights.

7. It is also contended that the instant application is *res judicata*, the issues having been determined by Hon. Justice Majanja in a ruling delivered on 29th March 2022 in this very petition, where the Court held that a bank, as a secured creditor, is entitled to exercise its statutory power of sale without recourse to the insolvency process.

Analysis and determination

8. Having considered the pleadings, affidavits, and submissions on record, the issues that arise for determination are:
- i. Whether the Applicant has met the threshold for the grant of a temporary injunction restraining the 2nd Respondent from exercising its statutory power of sale;*
 - ii. Whether the Liquidator is entitled to the 120-day extension sought to conduct a forensic audit; and*

9. **Section 432(2)** of the **Insolvency Act** provides that:

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate...”

10. However, the rights of secured creditors take precedence over those of other creditors, and the appointment of a liquidator does not in any way affect or extinguish a secured creditor's statutory right to realize or otherwise deal with its security.
11. Insolvency proceedings do not suspend a secured creditor's right to enforce its security, though such enforcement must be exercised in good faith and in accordance with the law - see **Kenya Deposit Insurance Corporation v Richardson & David Limited [2021] eKLR**.
12. The right of a chargee to exercise the statutory power of sale is derived from Sections 90 and 96 of the Land Act, which vest the chargee with the power of sale upon default by the chargor, provided the requisite statutory notices have been properly issued. The courts have consistently affirmed this position, as seen in **Muthoni Kihara v Housing Finance Co. of Kenya Ltd [2009] eKLR** and **Ngugi v Kenya Commercial Bank Ltd [2006] 1 EA 60**, holding that once the power of sale crystallizes, the chargee's right takes precedence over other interests unless there is evidence of fraud or non-compliance with statutory requirements.
13. Accordingly, while the existence of liquidation proceedings places the company's management and assets under the control of the liquidator, the law expressly

recognizes that secured creditors stand outside the collective insolvency process in relation to their securities.

14. Similarly, in **Re Nakumatt Holdings Limited [2017] eKLR**, the Court observed that the moratorium imposed by insolvency proceedings is not intended to extinguish or unduly delay the rights of secured creditors, but rather to ensure the orderly administration of the company's affairs.

15. The Court therefore finds that while a liquidation order protects the company's assets, it does not automatically extinguish or stay a secured creditor's statutory power of sale. However, such enforcement must be conducted transparently, with notice to the liquidator, and under the general supervision of the Court to avoid disruption of the liquidation process.

16. On the material before the Court, the 2nd Respondent has demonstrated that the charge over the property was duly registered, that default occurred, and that the statutory notices required under Sections 90 and 96 of the Land Act were properly issued. The Applicant has not disputed the debt or pointed to any irregularity in the process of sale beyond the issue of timing vis-à-vis the liquidation proceedings.

17. Consequently, the Applicant has not demonstrated a *prima facie* case to warrant the grant of an injunction restraining the exercise of the statutory power of sale.

18. The Court reiterates that the commencement of liquidation proceedings does not automatically suspend or fetter a secured creditor's statutory right to exercise its power of sale, provided procedures stipulated under the law are strictly observed. Secured creditors retain priority and may exercise their rights independently of the liquidation process unless expressly restrained by the Court - see **Kenya Commercial Bank Ltd v Opodo Limited [2022] Eklr.**

19. On the issue of the Applicant's request for an injunction, injunctive relief is an equitable remedy granted to prevent acts that would amount to a breach of the Court's authority or cause irreparable harm. The guiding principles were set out in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, where the Court held that an applicant must demonstrate a *prima facie* case with a probability of success, that they will suffer irreparable loss not compensable by damages, and that if in doubt, the balance of convenience should favour the applicant.

20. Here, the Applicant contends that the intended sale of the property without the Court's approval or involvement of the liquidator would undermine the liquidation process and interfere with the Court's supervisory role. While such concern is not without basis, the Court notes that the power of sale is a statutory right, and its exercise in compliance with the law cannot be curtailed merely by the pendency of

liquidation, absent evidence of fraud, bad faith, or non-compliance with statutory requirements.

21. Having found that the 2nd Respondent's power of sale has crystallized and is protected under the law, and that the issue has previously been determined, the Applicant has not established a *prima facie* case. Moreover, any loss arising from the sale can adequately be compensated by damages should the sale later be found unlawful.
22. With respect to the prayer for an extension of 120 days to conduct a forensic audit, the Applicant has not demonstrated what prejudice would result if the audit proceeds concurrently with the lawful realization process, nor shown that such extension is necessary for the just and efficient winding up of the company.
23. In the result, I find no merit in the Notice of Motion dated 5th April 2024. The same is hereby dismissed. The interim orders, if any, are vacated. The Costs shall be borne by the Applicant.

RULING delivered virtually, dated and signed at **NAIROBI**

This **16th** day of **October** 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Mwangi & Mr. Wanyoike for Petitioner

Ms. Nechesa for Liquidator
Court Assistant: *Carlos*