



Synergy Industrial Credit Limited v Cape Holdings Limited (Environment & Land Case 440 of 2011) [2024] KEELC 4710 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 440 OF 2011**

**JE OMANGE, J
JUNE 13, 2024**

BETWEEN

SYNERGY INDUSTRIAL CREDIT LIMITED PLAINTIFF

AND

CAPE HOLDINGS LIMITED DEFENDANT

RULING

1. This matter has a long history in the corridors of justice. The Petitioner filed an application to enforce an Arbitral Award dated 30th January, 2015 in which the Respondent was ordered to pay the Petitioner a sum of Kshs. 1,666,118,183/= while the Respondent sought to set aside the award.
2. The High Court found that the Arbitrator had acted outside his scope of reference and set aside the award in its entirety and dismissed the Petitioners application for enforcement of the award. The Petitioner filed an appeal at the Court of Appeal which struck out the Notice of Appeal and Record of Appeal on the basis that there is no right of appeal from decisions of the High Court.
3. The Petitioner filed an appeal against this decision to the Supreme Court which by a majority decision delivered on 6th December, 2019 set aside the Ruling of the Court of Appeal and referred the Appeal back to the Court of Appeal for determination.
4. On the 18th December, 2019, this court was informed that the Supreme Court Judgement had been delivered. Parties agreed to mention the matter on 12th May, 2020. The matter was thereafter mentioned twice. On the 21st April, 2021, the court was notified that the Court of Appeal had delivered a Ruling in the matter and that this Ruling had extinguished the cause of action before this court. Parties agreed to take a further mention date.
5. On the 26th January, 2021 the court was informed that Defendant had been placed under management by I&M Bank hence all proceedings would have to be stayed. The matter was next to come up on 26th September, 2022 on which date the court was notified that the dispute had been resolved and



the Defendants application dated 23rd March 2016 should be dispensed with and the Originating Summons dated 23rd August, 2011 be marked as settled. Pursuant to this request the court marked the matter as, settled with costs to the Plaintiff.

6. It is this award of costs that has ignited the current dispute. The Defendant/ Applicant by application dated 15th November, 2023 seeks the following orders;
 - i. The application be certified as urgent and heard ex-parte at the first instance.
 - ii. Pending the hearing and determination of this application the delivery of the Ruling to be delivered on 8th November, 2023 be arrested.
 - iii. The court be pleased to set aside the delivery of the Ruling and order the hearing of the Bill of Cost dated 27th June, 2023 on the merits.
 - iv. The Plaintiff be ordered to furnish the Defendant with the Order awarding costs to the Plaintiff when the suit was terminated on 26th September, 2022.
 - v. Cost of this application be in the cause.
7. The Defendant/ Applicant challenges the order marking the matter settled on several grounds firstly that on the date when the order was made, the Defendant was under administration and hence leave should have been sought either from the administrator or the insolvency court. It is the Defendant's/ Applicant's contention that given that the matter was under administration from 12th October, 2021 to 9th June, 2023 proceedings that took place are a nullity.
8. The Defendants also argue that the bill of costs extend to the entire suit property yet Hon. Lady Justice Nyamweya J as she then was, on 18th January, 2012 ordered that the parties file submissions so as to enable the court determine the issue; The Defendant argues that this issue has never been resolved
9. In any event it is the submission of counsel for the Defendant/Applicant that there was no indication to the court of the terms of the settlement which would then justify the award of costs to the Plaintiff/ Respondent. Counsel further argues that the issue of costs had already been addressed in other proceedings, hence an award of costs in this matter would amount to double jeopardy.
10. The Defendant/ Applicant also submitted at length on the import of the Plaintiff/ Respondent choosing to rely only on grounds of opposition and failing to file a Replying Affidavit.
11. The Plaintiff/ Respondent on their part insisted that leave was granted in a ruling delivered on the 10th December 2012 in insolvency cause E0459 of 2021. That the leave allowed the Plaintiff to execute. That the leave was applicable in the current suit and hence there was no need to seek leave again.

It was further their argument that marking the matter as settled did not amount to a proceeding hence there was no need to seek leave. The respondents quoted the reasoning of Justice Majanja in *Hoggers Limited (in administration) Vs John Lee Halamandres and 11 others [2021] eKLR*.
12. The applicants filed a further supplementary affidavit and submissions where they insisted leave granted was for execution and was specific to HCCC NO. 114 OF 2015 Cape Holdings Limited versus Synergy Industrial Credit Ltd consolidated with HCCC No. Misc. Application No. 126 of 2015 Synergy Industrial Credit Ltd versus Cape Holdings Ltd and not the current suit. That when a party fails to obtain leave from the insolvency court then all applications have no legal effect as so held in *Midland Energy Limited -vs- African Banking Corporation Limited & another [2020] eKLR*.



13. Having considered the foregoing application and submissions the court identifies the following issue for determination; Whether it was necessary to obtain leave from the insolvency court before marking the matter as settled.
14. It is the Defendant/Applicant's case that at the time the matter was marked as settled, the Defendant was under administration. Section 560 of the *Insolvency Act* required that the consent of the administrator or insolvency court be obtained before any further proceeding could take place. The Plaintiff/ Respondent argues that consent was obtained in Insolvency Cause No E459 of 2021 and that in any event marking a matter as settled does not amount to proceedings as envisaged by Section 560 of the *Insolvency Act*.
15. Section 560(1) provides; While a company is under administration-
“(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.”

The courts have had occasion to interpret this section. In *Nakumatt Holdings Limited & another versus Ideal Locations Limited* [2019] eKLR the court stated;

“There is good reason, in our view, why Section 2 of that Act specifies the court to grant approval should be the court seized of the insolvency matter, namely the High Court. The administration of an insolvent company is for the benefit all creditors of such company and a situation where creditors separately attack or take assets of a company would defeat the overall objective of the administration.”

In the already mentioned case by the respondent *Hoggers Limited (in administration) Vs John Lee Halamandres and 11 others* (2021) eKLR, the court quoted with approval *Cook versus Mortgage Debenture Ltd* [2016] EWCA;

“In the case of liquidation and bankruptcy, the purpose of these provisions is essentially two-fold. First, given that the property of the company or individual stands under the statute to be realized and distributed, subject to any existing interests, among the creditors on a *pari passu* basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the *pari passu* basis of distribution. Second, given that both a liquidation and bankruptcy contain provisions for the adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation.

In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injury claim, the court will give permission for proceedings to be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate.”

16. The reason for a moratorium is so as to preserve the assets of a company for the creditors. In the absence of such protection the intention of placing a company under administration would be lost. In this case it is not disputed that the Plaintiff/ Respondent was under administration hence leave of the administrator or insolvency court should have been sought. The Plaintiff/ Respondent did try to say that leave which was granted in Insolvency Cause No E459 of 2021 was to apply in this matter. However, this was discounted by the Defendant/ Applicant and the Ruling which made no reference to this suit.



17. The next issue is then whether the act of marking the matter as settled amounted to a proceeding. Justice Majanja in *Hoggers Limited (in administration) Vs John Lee Halamandres and 11 others* (2021) eKLR, grappled with this issue and referred to the case of *Bristol Airport PLC versus Powdrill* [1990] Ch. 744, where the Court of Appeal in England in considering whether the detention of an aircraft amounted to proceedings within the meaning of Section 11(3)(d) of the *Insolvency Act*, 1986 stated;
- “During the period for which an administration order is in force (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid.”
18. Black’s Law Dictionary defines a proceeding as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and entry of Judgement”. It further expounds on proceeding as an act or step that is part of a larger action.
- In an illustrative quotation that follows the definition, Edwin E Bryant, in the Law of Pleading under the Codes of Civil Procedure expounds on the definition of this term thus; ... As applied to actions the term; “proceeding may include,
1. The institution of the action
 2. The appearance of the defendant
 3. All ancillary or provisional steps such as arrest, attachment of property, garnishment, injunction
 4. The pleadings
 5. The taking of testimony before trial
 6. All motions made in the action
 7. The trial
 8. The Judgment
 9. The execution
 10. Proceedings supplementary to execution in code practice
 11. The taking of the appeal or writ of error
 12. Sending back of the of the records to the lower court from the appellate or reviewing court
 13. The enforcement of the Judgment or new trial as may be directed by the court of last resort.”
19. From the above definition of proceeding it is my view that the act of recording a matter as settled is definitely a proceeding as envisaged by Section 560 of the *Insolvency Act*.
20. Having found that no leave had been sought as required, the court’s jurisdiction to entertain the proceedings was not invoked as jurisdiction could only be invoked once leave was obtained under



Section 560 of the Act. As such the proceedings are void and cannot be the basis for other proceedings.
To quote Lord Denning;

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurable bad.”

21. In the end the application is allowed in the following terms;
- a. The order marking the matter as settled with no orders as to costs is hereby set aside.
 - b. A mention date to issue for directions on the way forward.
 - c. Each party to bear their own costs for the application.

DATED, SIGNED AND DELIVERED ON 13TH DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.

J. OMANGE

JUDGE

In the presence of: -

-Ms. Asli for the Plaintiff/Respondent

-Mr. Frank Otieno for the Defendant

-Court Assistant -Steve Musyoki

