



REPUBLIC OF KENYA



Oliech v Komaza Forestry Limited (Under Administration) (Cause E001 of 2023) [2024] KEELRC 1423 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E001 OF 2023**

**M MBARŪ, J
APRIL 26, 2024**

BETWEEN

ALLAN OCHIENG OLIECH CLAIMANT

AND

**KOMAZA FORESTRY LIMITED (UNDER
ADMINISTRATION) RESPONDENT**

RULING

1. The respondent, Komaza Forestry Limited filed an application dated 9 February 2024 under the provisions of Section 560(1) of the *Insolvency Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules* and seeking orders that;
 - i. The court be pleased to stay the suit against the respondent until the conclusion of its administration under Section 560(1) of the *Insolvency Act*, 2015.
 - ii. Costs be in the cause.
2. The application is supported by the affidavit of Anthony Makenzi Muthusi, one of the administrators of the respondent with authority from his co-administrator Julius Muma Ngonga.
3. The application is made on the grounds that the claimant filed his memorandum of Claim on 9 February 2023 against the respondent but on 1st November 2023 in Insolvency Cause No E144 of 2023 the respondent company was placed under Administration and Julius Muma Ngonga and Anthony Makenzi Muthusi were appointed joint administrators over all the assets and undertakings of the company. Section 560(1) of the *Insolvency Act* places a moratorium over all proceedings while administration is in effect except with the consent of the administrator or with approval by the court.
4. Considering the provisions of Section 560 of the *Insolvency Act*, the proceedings in this court against the respondent company ought to be stayed pending the outcome of its administration. By way of



Gazette Notice No 14891 dated 3 November 2023, the Appointment of the joint Administrators was published and parties with a claim against the company were invited to submit their claims against the company and the claimant failed to submit his claim. Proceeding with this matter will be in breach of Section 560 of the *Insolvency Act* and tantamount to interrupting the moratorium that has been placed over all legal proceedings against the respondent who is now under Administration.

5. In reply, the claimant filed his Replying Affidavit and aver that his claim relates to unfair and wrongful dismissal by the respondent. The matter came up in court for hearing on 30 October 2023 when the advocates for the respondent sought leave to substitute its witness and the court allowed it. The matter was re-scheduled for a hearing on 29 January 2024 for hearing when the advocate served an application to cease acting for the respondent.
6. The claimant avers that the respondent has now moved the court seeking that a moratorium be issued staying all court proceedings against the respondent. The application if filed in bad faith since Insolvency Cause No E144 of 2023 was initiated by the respondent's former advocates just a few days after seeking leave to substitute its witness. The firm had a duty to the court to state the correct position concerning the insolvency proceedings but failed to do so.
7. The respondent has not been liquidated but is under administration and can satisfy the outcome for both creditors and intended debtors including the claimant if this case is successfully decided in his favour. A person may begin or continue legal proceedings including execution against the respondent's property only with consent from the Administrators or the approval of the court.
8. Section 560A of the *Insolvency Act* stipulates the conditions to be taken into account by a court or an administrator before approving the applicant particularly whether the applicant is likely to suffer loss and legitimate interests of the creditors of the company, giving the right of priority to the proprietary interest of the claimant. Once the claim herein is heard and determined, there will be an order of the court approving the claim.
9. The applicant hence submitted that proceedings herein should be stayed pending administration of the respondent company which commenced under the provisions of Section 560(1) of the *Insolvency Act*. In the case of *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another* [2019] eKLR the court held that for Administrators to achieve their objectives as contained in Section 522 of the *Insolvency Act*, such company must be insulated from aggressive creditors by way of a moratorium from other legal process.
10. The court has the power to stay these proceedings. To continue with proceedings as requested by the claimant would be contrary to Section 2 of the *Insolvency Act* as held in *Fredrick Okoth Owino v TSS Grain Millers* [2017] eKLR.
11. The claimant submitted that court proceedings can be proceeding while there is a moratorium with the approval of the court under Section 560(1) (d) of the *Insolvency Act*. A person may before of continuing legal proceedings including execution and distress against the company's property only with the consent of the administrator or with the approval of the court. This court has the authority to order the proceedings herein to proceed.
12. In the case of *Kabindi Mumbasa Chome & 23 others v ARM Cement PLC Limited (Under Administration)* [2021] eKLR, the court held that former employees of the company had initiated proceedings before the placement under administration. They were seeking payment of their terminal dues. These are preferential creditors and do therefore have a legitimate interest which should not be overlooked once a company is placed under administration.



13. The claimant has a legitimate claim against the respondent and is likely to suffer loss and damage if his claim is not heard and determined to its conclusion as required under the *Insolvency Act*. Section 560A (2) of the *Insolvency Act* provides that an approval granted under subsection (1) shall be for not more than 28 days. It is only fair that the application dated 9 February 2024 be declined and the claimant allowed to prosecute his case.

Determination

14. Under Section 560 of the *Insolvency Act*, no legal proceedings can be undertaken against a company under administration without the leave of court or consent of the Administrator. When the court is considering whether to grant leave or not, the principles to apply are outlined in the case of *Owiti, Orieno and Ragot Advocates v Mumias Sugar Co. Limited (Under Administration)* [2020] eKLR that;
- a. The statutory purpose of the administration;
 - b. The impact of the approval on the applicant particularly when the applicant is likely to suffer significant loss;
 - c. The legitimate interests of the applicant and the legitimate interests of the creditors of the company giving the right of priority to the proprietary interests of the applicant; and
 - d. The conduct of the parties.
15. Concerning the statutory purpose of the administration, save to urge the court that the respondent company is now under administration, Anthony Makenzi Muthusi does not address this in his Supporting Affidavit dated 9 February 2024. Under Legal Notice No 14891, the Administrators are appointed for all assets and undertakings of the company. The powers of the directors in terms of dealings with the company assets ceased. A party having a claim against the company is to submit their claim in writing, with relevant supporting documentation, to the Administrators on or before 24th November 2023.
16. The claim herein is not determined. There is no judgment of the claim to ascertain whether there is a judgment debtor in these proceedings so as to secure either party through an order of the court. To stay proceedings would stop that certain process.
17. The impact of the stay of proceedings must be looked at together with the insolvency proceedings commenced by the respondent under Insolvency Cause No E144 of 2023 when these proceedings were alive and active. The record bears evidence that while the claimant was giving his evidence, the respondent's advocates were prosecuting the application for administration.
18. The claimant is seeking payment of his employment dues by the respondent. Under the *Insolvency Act*, he is a preferential creditor with legitimate interests which can only be secured upon an order under these proceedings. This legitimate interest should not be overlooked once the respondent is placed under administration. The claimant will suffer greater harm and loss.
19. In the case of *In the matter of Zarara Oil & Gas Company Limited* (Miscellaneous Application E532 of 2021) [2021] KEHC 191 (KLR) (Commercial and Tax) (3 November 2021) (Ruling) the court appreciated that upon request, once the court is called to protect the interests of a litigant such as a claimant herein, such protection within the administration of the respondent is lawful and legitimate. His interest in securing his employment claim in these proceedings should not be lost



within the Administration of the respondent company. Such should be legitimately determined in these proceedings and secured by the administrator.

20. This position is affirmed in *Kabindi Mumba Chome & 23 others v ARM Cement Plc Limited (Under Administration)* [2021] eKLR that;

... there is no doubt that the Applicants are former employees of the Respondent and had initiated proceedings prior to the Respondent being placed into administration specifically in ELRC 443 of 2018, ELRC 336 of 2018, ELRC 248 of 2018, SRMCC 230 of 2018, SPMCC 71 of 2016 and RMCC 45 of 2017 claiming their terminal dues. ... former employees claiming their terminal dues are preferential creditors and do therefore have a legitimate interest which should not be overlooked once a company is placed under administration.

21. Under Sections 68 and 69 of the *Employment Act, 2007* employees are protected under an insolvency. The core relationship between insolvency proceedings and employment is to secure employment as held in Insolvency Cause N0. E004 of 2021 *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others*. This is buttressed under the provisions of Article 11 of the *ILO Protection of Wages Convention, 1949*.

22. The court finds no prejudice upon the respondent where a judgment with an order is issued herein while it is pending administration. The purpose of the administration addressed above, proceedings herein shall continue.

23. Accordingly, the application dated 9 February 2024 is dismissed. Costs in the cause.

DELIVERED IN OPEN COURT AT MALINDI THIS 26TH DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Nasra

..... and

