



Nyamai v Oshwal Aluminium Limited (Under Administration) (Employment and Labour Relations Cause 1893 of 2016) [2024] KEELRC 848 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 848 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1893 OF 2016**

AN MWAURE, J

APRIL 12, 2024

BETWEEN

PAUL KIEMA NYAMAI CLAIMANT

AND

OSHWAL ALUMINIUM LIMITED (UNDER ADMINISTRATION) RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Application dated 4th October 2023 seeking orders THAT:
 1. spent
 2. spent
 3. spent
 4. an order be and is hereby issued declaring the entire execution process commenced by the Claimant vide the Warrants of Attachment of Movable Property in Execution of Decree of Money dated 12th September 2023 as well as the Proclamation and Invoice from Kamandio Investments Auctioneers dated 28th September 2023, null and void for being in breach of the express provisions of Section 560(1)(d) of the *Insolvency Act* No. 18 of 2015.
 5. the costs of this application be awarded to the Respondent/Applicant.

Respondent/ Applicant's Case

2. The Respondent/ Applicant avers that vide an advertisement in the newspaper of 16/09/2021, Mr. Ponangipali Venkata Ramana Rao (the Administrator) was appointed by the Bank of Baroda Kenya



Limited (Appointed Creditor) on 26/08/2021 which came into effect on 13/09/ 2021. This term was extended by this Court for 1 year from 28/11/2022.

3. The Respondent/ Applicant avers that Section 560 of the *Insolvency Act* provides that a statutory moratorium automatically applies to all legal process against the Applicant unless the same is sanctioned by the Administrators of the Applicant or the High Court.
4. The Respondent/ Applicant avers that no sanction has been granted to the Claimant by the Administrator or the High Court to begin or continue legal proceedings (including execution and distress) against the company or the company's property as provided under Section 560(1)(d) of the *Insolvency Act*.
5. The Respondent/ Applicant avers that on 29/09/2023, the Administrator was served with Warrants of Attachment and a Proclamation Notice and invoice from Kamandio Investment Auctioneers informing him that the proclaimed properties would be sold within 7 days.
6. The Respondent/Applicant avers that the Administrator had no prior knowledge of the Claimant's claim.
7. The Respondent/Applicant avers that if this court does not issue an injunction, there is imminent threat of illegal attachment and sale of the proclaimed properties without sanction of the Administrator or the High Court.
8. The Respondent/Applicant avers that should the orders sought be denied, the proclaimed properties will be sold by the Claimant through their appointed auctioneers.
9. The Respondent/Applicant avers that no prejudice will be occasioned to the Claimant if the orders sought are granted.

Claimant/Respondent's Case

10. In opposition to the application, the Claimant/Respondent filed a replying affidavit dated 1st December 2023.
11. The Claimant/Respondent avers that the application is incompetent and fatally defective.
12. The Claimant/Respondent avers that at the time of the Administrator's appointment the suit was ongoing and the Administrator did not take any steps until judgment was delivered.
13. The Claimant/Respondent avers that his claim was still under adjudication when the notice calling for creditors or claimants to lodge their claim with the Administrator was lodged.

Respondent/Applicant's Submissions

14. The Respondent/Applicant submitted that Section 560(1)(d) of the *Insolvency Act* provides that a person may begin or continue legal proceedings (including execution and distress) against the company or its property only with the consent of the administrator or with the approval of the Court.
15. The Respondent/Applicant submitted that since taking over the administration of the Respondent, neither Mr. Rao or the High Court, ever sanctioned the continuation of these legal proceedings and/or execution thereof. Further, before being served with the Warrants of Attachment dated 12/09/2023, Mr. Rao had no prior knowledge of the Claimant's claim despite his appointment being advertised in the Daily Nation Newspaper.



16. The Respondent/Applicant submitted that the Claimant expressly admitted that at the time of the Administrator's appointment, this suit was ongoing and judgment had not been delivered. Despite of this, the Claimant did not offer any explanation why he did not seek leave of the Administrator or the High Court to continue with the proceedings.
17. It was submitted for the Respondent/Applicant that the Claimant continued the proceedings without leave of the court or consent of the Administrators and so the same is incompetent and therefore null and void.
18. The Respondent/Applicant submitted that should the execution be allowed to proceed without the consent of the Administrator or leave of the court in line with Section 560 of the [Insolvency Act](#), this application will be rendered nugatory.
19. The Respondent/Applicant submitted that the Claimant will not be prejudiced if the orders sought are granted as it was his own fault not to adhere with the mandatory provisions of the [Insolvency Act](#) despite being aware that the Respondent was under administration.

Claimant/Respondent's Submissions

20. The Claimant/Respondent submitted that the Respondent is no longer under administration under section 560 of the Act therefore, the proceedings are not subject of any moratorium.
21. The Claimant/Respondent submitted that the core purpose of administration is to save the company as a going concern. The Respondent/Applicant has not made any effort to inform the court the status of the company after administration. It is the Claimant/Respondent's submission that in the absence of this information, the assumption is that the Administrator was able to save the company from liquidation hence any legal proceedings can be undertaken.

Analysis and Determination

22. Section 560 of the [Insolvency Act](#) provides for statutory moratorium on other legal process while administration order has effect as follows:
 - “(1) 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.



(2) In giving approval for a transaction under subsection (1), the Court may impose a condition on, or a requirement in connection with, the transaction.”

23. It is not in disputed that Mr. Ponangipalli Venkata Ramana Rao was appointed as the Respondent’s Administrator by the Bank of Baroda Kenya Limited on 26/08/2021 which came to effect on 13/09/2021. This term was subsequently extended by the High Court for a period of 12 months from 23/11/2022 in Insolvency Cause No. E061 of 2021 and a further 12 months extension from 23/11/2023.
24. Accordingly, the Respondent is still under administration, the Administrator being Mr. Ponangipalli Venkata Ramana Rao
25. Justice D.S. Majanja held in *Hoggers Limited (In Administration) v John Lee Halamandres & 11 others* [2021] eKLR that:

“Turning to the tenor and effect of a moratorium, the court in *Cook v Mortgage Debenture Ltd* [2016] EWCA Civ 103 outlined the purpose and effect of a moratorium under the *Insolvency Act* following the appointment of an Administrator as follows;

In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. First, given that the property of the company or individual stands under the statute to be realised 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 injuries 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.”

In the case of an administration, this is not a sufficient description of the purposes of the moratorium in paragraph 43(6). An administration may be a prelude to a liquidation or, once an administrator gives notice of an intention to make distributions to creditors, may become a substitute for a liquidation. In such circumstances, the purposes described above apply also to the moratorium in the case of an administration. But before that point is reached, the principal purpose of an administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. As Nicholls LJ put it in *In re Atlantic Computer Systems plc* [1992] Ch 505 at 528, the moratorium provides “a breathing space”. Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so. [Emphasis mine]”



26. In view of the foregoing, the moratorium under Section 560(1) (d) of the *Insolvency Act* applies herein and the Respondent/Applicant is entitled to the reliefs sought seeing that the claimant continued with execution of the respondents' property whereas the respondent was under an administrator.
27. In view of the foregoing the respondent's application dated 4th October 2023 is merited and is granted accordingly.
28. Each party will meet their respective costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

