



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 505 OF 2017

SHEE HAMISI MASHIPA.....CLAIMANT

VS

MARE NOSTRUM LIMITED.....RESPONDENT

RULING

1. By its Notice of Motion dated 12th October 2020 and filed in court on 15th October 2020, the Respondent seeks an order of stay of proceedings in this suit, pending completion of an ongoing statutory administration process.
2. The Motion is supported by an affidavit sworn by the Receiver and Manager of the Respondent, Ponangipalli Venakata Ramana Rao and is based on the following grounds:
 - a) By various letters of offer, I & M Bank Limited advanced to the Respondent Term Loan and Overdraft Credit Facilities for the maximum principal amount of USD 2,300,000,000 or the equivalent thereof in any currency. The Respondent executed the said letters of offer and duly accepted the terms and conditions therein;
 - b) In consideration of advancing the said amount of USD 2,300,000,000 the Respondent executed an All Asset Debenture dated 22nd August 2013 and a Further All Asset Debenture dated 23rd June 2015, with the Bank for its indebtedness;
 - c) The Respondent breached and dishonoured the terms of the various agreements entered into between the parties thereby necessitating the Bank to exercise its rights under the Debenture;
 - d) On 25th February 2020, the Bank appointed Ponangipalli Venakata Ramana Rao as the Receiver & Manager of the Respondent;
 - e) The said Receiver & Manager was appointed as such in view of the fact that the Debenture, the subject matter of the appointment was executed on 22nd August 2013, prior to the coming into effect of the Insolvency Act, 2015;
 - f) The said Receiver & Manager is for all intents and purposes, the Administrator of the Respondent under Sections 534 and 546 of the Insolvency Act, 2015 as read together with Sections 103 and 351 of the repealed Companies Act, Cap 486, Laws of Kenya;
 - g) Under Sections 560 [d], 561 [3], [4], and [f] of the Insolvency Act, 2015 once an Administrator has been appointed as is the case herein, there ought to be a moratorium on all legal processes, pending completion of the administration process.
3. The Claimant's response to the Respondent's Motion is contained in his replying affidavit sworn on 11th January 2021.
4. In his affidavit, the Claimant challenges the capacity of Ponangipalli Venakata Ramana Rao and his Legal Counsel to bring the present application on the ground that Rao's appointment was not published in the Kenya Gazette nor was it advertised in local daily newspapers.
5. The Claimant states that whereas Rao's appointment was made on 25th February 2020, the present application has been brought after nine (9) months. The Claimant points out that the suit having been filed in 2017, there was inordinate and unexplained delay in bringing the application.
6. The Claimant asks the Court to balance his interests and those of the Respondent on equal footing.
7. The Claimant takes the view that because there is no threat of execution as yet, then the Respondent's property, whose wastage the law seeks to protect, is not at risk.

8. The sole issue calling for determination in this application is whether the Respondent has made out a case for stay of proceedings, on account of an ongoing statutory administration process.
9. It was submitted on behalf of the Respondent that the Receiver & Manager herein, was appointed in line with Section 534 of the Insolvency Act, which provides that the holder of a qualifying floating charge in respect of a company's property, may appoint an administrator of the company.
10. In this regard, reference was made to the decision in **Re Arvin Engineering Limited [2019] eKLR** where in determining whether Section 534 of the Insolvency Act applies to debentures executed before enactment of the Act, **Tuiyott J** stated the following:

“Any debenture or charge instrument that predates the Act would certainly not save the application of section 534 as is contemplated by section 534(2) (a) of the Act as the makers of the instruments could not foretell the provisions of a yet to be enacted statute.....In addition, it has to be accepted that the concept of Administration as designed in the Act did not exist prior to the Act. For that reason the construction to be given to the provisions of subsection 2(b) is critically important to holders of pre 2015 instruments.....

To be emphasised is the role of a Receiver and Manager in superintending and managing the Company as a going concern not only in the best interest of the debenture holder but also the Company. This is also one of the central objectives of Administration.....There lies some commonality between the past concept of Receiver-manager and the contemporary concept of Administration. So as not to disadvantage debenture holders that predate the Act, there is need to give a purposive interpretation to the provisions of section 534(2)(b). This Court does hold that as the debenture instruments held by the Bank empowered the Bank to appoint a Receiver-manager whose many powers and functions are akin to that of an administrator then the Bank is deemed to have power to appoint an administrator.”

11. This, I think, is the correct interpretation of Section 534 of the Insolvency Act and I do not need to say more. It follows therefore that in the present case, Ponangipalli Venakata Ramana Rao, is for all intents and purposes, an Administrator of the Respondent under the Insolvency Act.

12. The Court was further referred to Section 561 of the Insolvency Act, which provides that once an Administrator has been appointed, legal proceedings may either be initiated or continued against the Company, only with the consent of the Administrator or approval of the Court.

13. The question as to which court is competent to give an approval under Section 561 has also settled. In **Fredrick Okoth Owino v T.S.S Grain Millers [2017] eKLR O.N Makau J** stated thus:

“It is my considered view that the Insolvency Act intends (sic) to create a central forum with all insolvency disputes that may have been filed against the company. It does not matter whether the suits are pending before senior courts, the only court with the original jurisdiction to grant leave to continue suits against companies under administration, in my opinion is the High Court.”

14. This position has been affirmed in subsequent decisions (see **Nakumatt Holdings Limited & another v Ideal Locations Limited [2019] eKLR** and **John Munyao Musiki v Athi River Mining Limited [2020] eKLR**).

15. The Claimant attacks the Respondent's application on three fronts; first is that the process of appointing the Receiver and Manager was flawed because the necessary notices were not published in the Kenya Gazette and local daily newspapers. However, this averment of fact was not supported by any evidence nor did it, in my view, vitiate the appointment of the Receiver and Manager.

16. Secondly, the Claimant accuses the Respondent of delay in bringing the application for stay of proceedings. In this regard, the Claimant submits that the Receiver and Manager, having been appointed on 25th February 2020, the current application brought after nine months, was way too late. The Claimant further submits that the suit having been filed in 2017, there was inordinate and unexplained delay in bringing the application.

17. I think these are arguments to be made before the insolvency court should the Claimant choose to file an application for leave to continue with these proceedings. As it is, being satisfied that the Respondent is under statutory administration, this Court is required by law to stay the proceedings.

18. The proceedings herein are therefore stayed pending agreement between the parties or further orders from the insolvency court.

19. The costs of this application will be in the cause.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyange for the Claimant

Mr. Wawire for the Respondent