



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1362 OF 2016

BETWEEN

1. DANIEL NJUGUNA CHEGE

2. CHARLES AKWAYA ANDREW

3. TIMOTHY MUTEGI

4. PETER THUVI

5. VICTOR K. KODOGUE.....CLAIMANTS

VERSUS

TUSKER MATTRESSES.....RESPONDENT

RULING

1. There is a Judgement on record in these proceedings, in favour of the Claimants, in the sum of Kshs. 3,957,348.
2. Judgment was delivered on 29th April 2020.
3. Proclamation Notice issued on 15th October 2020.
4. Notification of Sale issued on 12th November 2020.
5. In the meantime, the Respondent states, there was an Insolvency Suit filed at the High Court Nairobi by one of the Respondent's Creditors, where orders issued staying any attachment, sequestration, distress or execution against the property of the Respondent. The orders were publicized in the Daily Nation Newspaper on 30th October 2020, and it is therefore Respondent's contention, that the orders are a matter of public knowledge.
6. The orders above were extended to 28th January 2021.
7. The Respondent therefore applies, through an Application dated 23rd November 2020, for orders *inter alia*, that: the Law Firm, O & M Law LLP is granted leave to represent the Respondent; temporary injunction restraining the Claimants from further proclamation, attachment and sale of Respondent's assets; release of the Respondent's attached motor vehicles; and stay of further proceedings herein.
8. The Application is based on the Affidavit of Respondent's General Manager Francis Kimani, sworn on 20th November 2020. It is submitted for the Respondent that Section 430 of the Insolvency Act deems liquidation of a Company to have commenced when the Application for liquidation is made; Section 225 of the Companies Act [and Section 430 of the Insolvency Act], voids any attachment, distress or execution put in force against the estate of effects of the Company after commencement of the winding up; assets of the relevant Company need to be protected ; and actions that destabilize equality among Creditors are not to be allowed. The Respondent relies on decisions from the High Court, to underscore the submission above, *in Ndane Construction Company Limited v. Spencon Kenya Limited*

9. The Application is opposed through the Affidavit of the 1st Claimant, sworn on 15th December 2020. The Claimants submit that: Judgment was delivered in their favour as set out hereinabove; they commenced execution and have attached for sale, Respondent's motor vehicles; they were not Parties to the insolvency claim elsewhere; they were not aware of any insolvency proceedings at the time they commenced execution; execution preceded alleged insolvency proceedings; there was an agreement on the mode of payment of the decretal sum between the Parties to this Claim; cheques dated 10th November 2020 and 12th November 2020 were drawn in favour of the Claimants which bounced upon presentation; and the Respondent has approached the Court with unclean hands, failing to make full disclosure of material facts. Lastly, it is the position of the Claimants that the Law Firm O & M, is not properly on record for the Respondent, the Respondent having been represented by the Law Firm Kanchory & Company at the time of Judgment.

10. Parties agreed that the Application is considered and determined based on their respective Affidavits and Submissions on record.

The Court Finds: -

11. Representation of the Respondent by the Law Firm O & M is contested. The Claimants state that the Respondent was previously represented by Kanchory & Company, and no leave has been obtained by O & M to come on record for the Respondent.

12. In response to this, the Respondent states at paragraph 8 of its Replying Affidavit, that it has sought leave, and the prayer has not been opposed.

13. In the view of the Court, this response does not establish that the Respondent has met the requirement of the law, on representation by an Advocate, post-Judgment.

14. The Law Firm O & M, has not engaged Kanchory & Company, on change in representation. The Court has not been told if Kanchory & Company have been served with the Application by O & M, seeking to come on record. There is no consent signed by Kanchory & Company, conceding on change.

15. O & M are not properly on record. The prayer for leave has not been considered with the participation of all the necessary Parties.

16. Consequently, the Submissions presented by O & M on the main prayers, cannot be properly on record.

17. That aside, Judgment as stated by both Parties was delivered in favour of the Claimants. Execution commenced and certain assets of the Respondent were attached. The Parties agreed on the mode of payment of the decretal sum, and the Respondent issued cheques, which were dishonoured.

18. Unknown to the Claimants, insolvency proceedings had been initiated at the High Court, by one of the Respondent's Creditors.

19. Orders preserving assets of the Respondent issued. The Respondent argues that those orders are *in rem*, and have the effect of staying execution proceedings herein.

20. The Court does not agree that the Insolvency Act and the Companies Act, upon which this position by the Respondent is predicated, are intended to halt proceedings in other Courts, which are at the tail end of execution. The attached assets are not to be recalled, and placed in the pool of assets belonging to the Respondent, for redistribution among other Creditors. The assets have already been attached, earmarked for sale, to satisfy decree, following a separate judicial process, and are to be dealt with to the conclusion of the existing judicial process. The assets are under the jurisdiction of the E&LRC. They have already been designated for sale. There are orders attaching those assets, issued by the E&LRC. The assets are not available for redistribution at any other forum.

21. The primary law, governing insolvency of Employers, relevant to this Court, is Part III of the Employment Act. If an Employer becomes insolvent, existing disputes between such an Employer and an Employee, ought to be dealt with under this law. Section 67 of the Employment Act states that an Employer is insolvent for purposes of this Part, if the Employer: is a person who has been adjudged a bankrupt, or has made a composition or arrangement with his Creditors; or, has died and his estate is to be administered in accordance with the Law of Succession Act. And if the Employer is a Company such as the Respondent herein, insolvency in employment lexicon, exists only if a winding up order or an administration order has been made, or a resolution for voluntary winding up has been passed with regard to the Company; or a Receiver or Manager of the Company's undertaking has been duly appointed, or possession has been taken by or on behalf of the holders of any debentures, secured by a floating charge, of any property of the Company comprised in or subject to the charge.

22. Part VIII applies to debts which include arrears of wages of up to 6 months; notice pay; annual leave pay; basic award for dismissal for unfair termination; and reasonable reimbursement on fee or premium paid by an apprentice.

23. The Respondent has not considered the law of insolvency under the Employment Act, in bringing this Application. It would have to demonstrate its insolvency under Section 67 of the Employment Act. Once it is demonstrated that there is insolvency, the door would be open for the Claimants to forego execution by way of attachment, and seek the aid of Section 67 of the Employment Act, in enforcing their Judgment.

24. This law does not stipulate that when an Employer is insolvent, there is a change of jurisdiction, from the E&LRC to the High Court. The attached assets are not in the jurisdiction of the Insolvency Court. They remain attached and available for sale through the orders of the issuing Court. The Respondent needs to demonstrate it is insolvent within the meaning given to the term, under the Employment Act. The Claimants must be availed their constitutional right to fair and expeditious administration of justice. The Court does not think that attached

properties, more so, with the attachment seen against the Parties' agreement on settlement of the decree, are available for satisfaction of other orders or decrees issued in other Courts.

IT IS ORDERED: -

a. The Application by the Respondent dated 23rd November 2020, is declined.

b. Costs to the Claimants.

Dated and delivered at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 11th day of June 2021.

James Rika

Judge