



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE 751 OF 2015

JULIUS M. MULUMBI.....CLAIMANT

VERSUS

ARVID ENGINEERING LIMITED.....RESPONDENT

RULING

1. The Claimant filed an application expressed to be brought pursuant to Sections 2 and 560(1) of the Insolvency Act and all enabling provisions of the law. The Notice of Motion seeks for the Claimant to be heard upon an application for Orders: that this Honourable Court be pleased to grant him leave to proceed with the suit against the Respondent and further enjoin the Administrator as a Respondent in the proceedings. He also seeks for orders that the costs of this Application be bore by the Respondent. The Application is based on the grounds that the suit herein has been continuing from 6th May 2015 until on 11th November 2019 when the Respondent's Advocates, Kimondo Gachoka & Co. Advocates, served the Claimant/Applicant's Advocates with a letter indicating their intention to seek an adjournment in the matter on 5th December 2019 when it was scheduled for hearing, for reasons that the Respondent company had been under administration on 31st January 2019 by NIC Bank Kenya PLC. That it is for this reason that on the said scheduled hearing date the case was therefore taken out of the day's cause list and that the Applicant now files the application herein seeking approval to proceed and enjoin the Administrator as a Respondent in the suit. It is the Applicant's assertion that the Respondent will not suffer any prejudice should the Honourable Court award the orders sought herein and that it is in the interest of justice that his application be allowed.

2. The Application is supported by the Affidavit sworn by the Claimant/Applicant who avers that enjoining the Administrator will not alter the suit as the facts of the case will remain the same as claimed in the claim. That he seeks to enjoin the Administrator to the suit in compliance with the provisions of Section 560(1)(d) of the Insolvency Act and that the orders sought in his application ought to be granted for the ends of justice to be met.

3. The Interested Party, K.V.S.K Sastry, The Administrator of the Respondent Company filed his Replying Affidavit sworn on 28th September 2021. He depones that after the Respondent was placed under Administration on 31st January 2019, there was subsequently an automatic moratorium on all Court proceedings against the Respondent Company. That apart from his Advocates seeking an adjournment in the matter when it came up for hearing on 5th December 2019, they also sought to have the proceedings stayed pending the outcome of the Administration of the Respondent Company. That therefore the Claimant's instant application is misconceived, an abuse of the Court process and maliciously drawn to mislead the Court to interrupt the moratorium placed over all legal proceedings against the Respondent who is still under Administration. Further, whereas it is true that the Administration of the Respondent can be disrupted only clear and special circumstances, the Claimant/Applicant has not demonstrated any exceptional circumstances to warrant grant of leave to enjoin the interested party as a party to the suit or to continue with the suit against the Respondent. He further avers that an application for leave pursuant to Section 560 of the Insolvency Act amounts to an Insolvency dispute which is a substantive, separate and distinct legal process from the employment dispute pending before this court between the Claimant and the Respondent. That this Court thus lacks the requisite jurisdiction to grant the orders sought by virtue of the provisions of the Insolvency Act, 2015 and further, the prayer to enjoin his as a Respondent in the suit is misplaced since an Administrator can only be joined to a suit for actions arising from his duties and capacity as an Administrator. That he is not a necessary party to the suit because the Claimant's cause of action pre-dates his appointment, has no nexus to his tenure as the Administrator of the Respondent and the Claimant has not demonstrated any lawful cause why he should be enjoined as a party to the suit. He asserts that the Application herein is intended to frustrate the exercise of his statutory duties, increase the costs of Administration and therefore ought to be dismissed with costs and that it has also not met the threshold for grant of the orders sought.

4. Claimant/Applicant's Submissions

The Claimant/Applicant submits 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 under administration or the company's property only with the consent of the administrator or with the approval of the court.*" (emphasis his)

The Claimant submits that prior to the Respondent Company being placed under administration he had given it an opportunity to settle the matter out of court but his proposal was ignored and that he had thus exhausted the available channels available to settle the matter. He submits that it is under such special condition that this Honourable Court should grant him leave to proceed against the Administrator. He relies on the case of **Bakery Confectionery Food Manufacturers & Allied Workers Union (K) v Tahir Sheikh Grain Millers Limited [2020] eKLR** where the Court in dealing with a similar application granted the applicant leave to proceed against the administrator and held as hereunder:

“27. From the submissions before this court, I find no ground to deny the Applicant Leave to institute suit against the Respondent, the applicant having exhausted the conciliation process. If the Respondent failed to cooperate and was reluctant to participate in the conciliation process, it is less likely that he would consent to having suit filed against the applicant.

28. Article 50 (1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided upon in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In the circumstances, since the dispute between the parties was not resolved through conciliation, it will be a clog to justice in denying the parties a day in court. All other issues can be addressed once the suit is filed.”

5. The Claimant/Applicant further submits that the Respondent Company has assets even while under administration and this being a diminutive claim, the suit ought to continue as prayed and the case heard and determined to completion to ensure that the Claimant/Applicant who believes he unfairly lost his employment is not prejudiced. It is the Applicant's submission that the Respondent Company herein has been under administration since 2019 and the terms of administration are being extended after expiry, probably for an uncertain period and hence prejudice him and that he is willing to prove the same on a balance of probability.

6. Interested Party's Submissions

The Interested Party submits that a Court's jurisdiction flows from either the Constitution or legislation or both and therefore a Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law nor can it expand its jurisdiction beyond that provided by Statute. The Interested Party submits that Section 2 of the Insolvency Act describes the Court as "the High Court" whereas under Article 162(2)(a) of the Constitution, the Employment and Labour Relations Court (ELRC) was established separate and distinct from the High Court. The Interested Party submits that therefore the ELRC does not have jurisdiction to hear or determine Insolvency disputes and since the instant Application is one seeking leave to continue with the suit against a Company that is under Administration and for joinder of an Administrator appointed pursuant to the provisions of the Insolvency Act, it cannot be entertained by this Court. In so submitting, the Interested Party relies on the finding in the case of **Fredrick Okoth Owino v T.S.S Grain Millers Ltd [2017] eKLR** where the Court found that the Employment Court lacks the jurisdiction to grant orders seeking leave to continue with a suit where the Company is under Administration. The Interested Party submits that under the provisions of Order 1 of the Civil Procedure Rules, a party may seek joinder either as a plaintiff or defendant and that Order 1 Rule 10(2) allows the Court to order the addition of the name of any person whether as plaintiff or defendant or whose presence is necessary, to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. The Interested Party submits that as spelt out under the Insolvency Act 2015, an Administrator can only be joined to a suit for actions arising from his duties and capacity as an Administrator and that an employment claim is not such an action. The Respondent urges Your Lordship to find that this Court lacks the jurisdiction to hear the instant Application and to dismiss the same.

7. The Application seeks the joinder of the Administrator of the Respondent. It is incumbent upon the Court to determine whether it can substitute the parties herein as proposed by the Applicant. Where insolvency is initiated, the debtors of the company under liquidation have an obligation to pursue their claim within the purview of the liquidation as the proceedings relating to ranking of debts are matters for the Court dealing with the liquidation. Under the Insolvency Act, Section 560(1) provides as follows:-

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.

8. The Court under the Insolvency Act is the High Court which is a different Court from the Employment and Labour Relations Court. This is not to say that the Employment and Labour Relations Court does not have some jurisdiction in respect of matters before it that have gone to administration, it merely means where there is a claim to press against an Administrator, this is not the correct forum. What the Claimant would require to pursue is the ranking of nay debt that may have accrued herein in the correct forum. If there is no accrual then the position is a moratorium would be in place pending the action in the proper forum. As the application is devoid of merit it is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021

NZIOKI WA MAKAU

JUDGE