



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 337 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOHN MUNYAO MUSIKU..... CLAIMANT/RESPONDENT

VERSUS

ATHI RIVER MINING LIMITED..... RESPONDENT/APPLICANT

RULING

Judgment herein was delivered on 30th November 2018 against the respondent. The claimant thereafter commenced execution proceedings against the respondent.

By notice of motion dated 28th October 2019, and filed under certificate of urgency, the respondent/applicant seeks the following orders –

1. Spent.
2. Pending the inter partes hearing of this Application, the Respondent be restrained whether by himself, his employees, servants, agents or any of them or otherwise howsoever from proclaiming, attaching, executing, disposing off by way of sale, lease, auction or otherwise interfering with any assets of the Applicant.
3. Pending the hearing and final determination of this Application, the Respondent be restrained whether by himself, his employees, servants, agents or any of them or otherwise howsoever from proclaiming, attaching, executing, disposing off by way of sale, lease, auction or otherwise interfering with any assets of the Applicant.
4. The firm of Walker Kontos Advocates be granted leave to come on record for the Respondent after judgment.
5. Any further orders that may be made in the interest of justice.
6. The costs of this application.

The grounds in support of the application are set out on the face thereof and in the supporting affidavit of GEORGE WERE, a certified Insolvency Practitioner and Joint Administrator of ARM Cement PLC (under administration), the respondent herein. The grounds are that –

1. The Applicant is under administration.
2. There is a moratorium in terms of section 560 (1) of the Insolvency Act in effect restraining any legal proceedings (including execution and distress) against any and all assets of the Applicant without the Court's or the Administrators' sanction.
3. On 2nd October 2019, the Respondent's agents Messers Legacy Auctioneering Services proclaimed assets of the Applicant at its headquarters in Nairobi in purported execution of a decree issued herein on 30th November 2018 in blatant disregard of the law. The notice in the Proclamations lapsed on 9th October 2019.
4. No consent from the Administrators or the Court had been sought or obtained. Consequently, the aforesaid proclamation of the Applicant's assets is unlawful illegal and contra-statute.

5. Further, neither the consent of the Administrators or the court was sought for the continuation of the proceedings herein post placement of the Applicant under administration on 17th August 2018 rendering the decree and the entire proceedings herein unlawful, null and void.

6. Despite service of notice of the existence of the aforesaid statutory moratorium, the Respondent is still keen on executing against the Applicant's assets in total disregard of the law.

7. There is a real and imminent danger of the Respondent executing against the Applicant's assets at any time as the notice period in the Proclamations has since lapsed making this application extremely urgent.

8. Further, it is important to note that the assets that the said proclamation sought to attach do not belong to ARM. This is because the Administrators entered into an agreement with the National Cement Company Limited ("NCCL") for the acquisition of all cement and non-cement assets and business of ARM Cement PLC in Kenya as a going concern on 20 May 2019. This sale included the said movable assets. Further to that, effective 15 October 2019, the Joint Administrators handed over the Kenyan assets, operations and business to NCCL.

9. There is reasonable fear that it will be impractical for tire objectives of administration (to wit: to maintain the Applicant as going concern; and to achieve a better outcome of the Applicant's creditors than would otherwise be the case in liquidation) to be met if the Respondent is not restrained from attaching and disposing off the assets of the Applicant.

10. Unless stopped by an order of this Court, the Respondent shall persist in his unlawful conduct to the detriment of the entire body of the Applicant's creditors and subvert the objectives of administration.

11. It is in the interest of justice and for the benefit of all unsecured and secured creditors of the Applicant that the Respondent be restrained from attaching and disposing off the assets of the Applicant.

The claimant who is the respondent in the application opposed the application and filed grounds of opposition as follows –

1. That the application is misconceived, bad in law and abuse of the Court process.
2. That the applicant does not come to Court with clean hands and given the history of this matter.
3. That the application is made mala fides and to defeat the cause of justice.
4. That the issues raised in the application were always in the possession of the applicant and were never raised even as the matter proceeded.
5. That the applicant has no intention of having the matter concluded and to the prejudice of the Claimant/Respondent.
6. That the applicant makes no offer for settlement of the claimant's claim and the Respondent will invoke at the hearing of this motion the provisions of Rule 19 of the Court Rules to summon the alleged administrators of the Respondent/Applicant for cross examination on the affidavit in support of the application.

The application was argued orally in court on 28th January 2020.

Counsel Wafula instructed by Walker Kontos Advocates for the applicants reiterated the grounds on the face of the application and the affidavit in support thereof. He submitted that the assets distressed on secured assets of lenders and if distressed would go against the objects of putting a company under administration, which is to ensure that the body of creditors secure a better outcome than if the company went into liquidation. That the claim of the claimant is an unsecured debt which ranks inferior to the claims by the lenders. That levying distress is jumping the queue. That what is statutorily payable would be made available to the claimant at the time of distribution.

He urged the court to grant the orders sought.

Mr. Musembi, instructed by Wambua Musembi and Company Advocates for the claimant responded that the application is a non-starter as the grounds on the face of the application which are two, are already spent as framed. That the application is silent or whether or how they propose that the legal decree would be executed or satisfied. That there is judgment and a decree, and the auctioneer is an officer of the court and not an agent of the claimant.

He submitted that while this case was proceedings there was an advocate on record who participated in the hearing and filed submissions. That costs were taxed with the participation of applicant's counsel, and they approved the decree as drawn. That throughout the process Counsel for the respondent/applicant didnot mention that it had been placed under Administration.

Counsel submitted that Section 560 does not prohibit proceedings if there is consent of the Administrator. That there is no advocate who goes to court without instructions. That if the respondent was placed under Administration in August 2018, then 30th November 2018 when judgment was delivered was 3 months later and the court had not been told that there was supposed to be a stay of proceedings because the respondent had been placed under administration. That the inescapable conclusion is that the advocate had consent of the administrator to proceed with the matter. That as such the execution process now in progress is real and can only be stayed if there is proposed settlement. He urged the court to dismiss the application.

In a rejoinder, Counsel Wanyama submitted that the court is being called upon by the claimant to countenance a direct provision of a statute. That Section 560(1) apply to all proceedings including execution proceedings.

On the suggestion that Counsel for the respondent/applicant was granted consent by the Administrator, Counsel submitted that consent must be proved and cannot be implied. On the issue that prayers 1 and 2 are spent, Counsel submitted that prayer 5 can suffice. On settlement Counsel submitted that by virtue of Section 560(1) the proceedings of 17th August 2018 were a nullity and settlement would be in breach of the law. Counsel submitted that after placement of the respondent in administration there was a public advertisement in Kenya Gazette and daily newspaper of wide circulation, referring to annexures. She asked the court to take judicial notice of the same as matters of public notoriety. That everybody including the court is deemed by law to have knowledge and to abide by the law.

Determination

It is not in contest that the respondent herein was placed under receivership on 17th August 2018. Section 560 of the Insolvency Act places a moratorium over all proceedings including execution proceedings except with the consent of the administrator or with the approval of the court.

The judgment herein was delivered on 30th November 2018 after the respondent/applicant was placed on administration. It is apparent that although there was counsel on record for the respondent/applicant this information was not brought to the attention of the court. The proper procedure would have been for the respondent/applicant to apply for stay of proceedings which it did not.

Section 560 of the Insolvency Act provides as follows –

560. Moratorium on insolvency proceedings while administration order has effect.

(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.

From the wording of the Section, the proceedings and judgment herein are not a nullity nor is the decree which remain valid. What the claimant cannot do is to execute the same.

As was stated by Makau J. in the case of **Fredrick Okoth Owino v T. S. S Grain Millers (2017) eKLR**, and quoted with approval by the Court of Appeal in the object of **Nakumatt Holdings Limited and Another v Ideal Locations Limited (2019) eKLR** –

“It is my considered view that the Insolvency Act intends (sic) to create a central forum for dealing with all insolvency disputes that may have been filed against the company. It does not matter whether the suits are pending appeal before the 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. Consequently, I agree with the administrator that this court lacks jurisdiction to entertain the application for leave to continue the Suit pending the administration of the respondent or to enjoin the administrator as a defendant.”

As has been stated by the respondent/applicant, the decree of the claimant has been noted and will be paid together with all other debts.

For the foregoing reasons the application succeeds, I thus make the following orders –

That pending the hearing and final determination of this Application, the Respondent be and is hereby restrained whether by himself, his employees, servants, agents or any of them or otherwise howsoever from proclaiming, attaching, executing, disposing off by way of sale, lease, auction or otherwise interfering with any assets of the Applicant.

The applicant/respondent shall in any event pay the claimant's costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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 **Civil 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.

MAUREEN ONYANGO

JUDGE