



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1636 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSHUA MUEKE KITHUKU.....CLAIMANT/RESPONDENT**

**VERSUS**

**ARM CEMENT LIMITED..... 1<sup>ST</sup> RESPONDENT/APPLICANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

Pending for determination before me is the Notice of Motion Application dated 17<sup>th</sup> December, 2019. The Application is filed by the 1<sup>st</sup> Respondent/Applicant under Certificate of Urgency seeking the following orders that:

1. The Court be pleased to grant an Order that the proceedings of the matter herein be stayed pending the hearing and determination of this Application.
2. This Court be pleased to stay proceedings in the matter herein pending compliance by the Claimant/Respondent with Section 560 of the Insolvency Act.
3. This Court be pleased to declare the proceedings post 17<sup>th</sup> August, 2018 null and void.
4. Costs be provided for.

The Application is premised on the grounds set out the face of the Notice of Motion Application, in which the 1<sup>st</sup> Respondent/Applicant contends that it has been under Administration from 17<sup>th</sup> August, 2018 and is therefore seeking to have this matter stayed pursuant to a moratorium being placed pursuant to the provisions of Section 560 of the Insolvency Act.

The Applicant further seeks to have all the proceedings post 17<sup>th</sup> August, 2018 declared null and void for the reason that they were conducted without leave of the Court or the consent of the Administrators.

The Application is further supported by the Affidavit of **GEORGE WERU**, one of the Joint Administrators of the Applicant herein sworn on 17<sup>th</sup> December, 2019 in which he reiterates the grounds on the face of the motion.

The Application is filed under Section 1A and 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, Section 560 of the Insolvency Act and all enabling other provisions of the law.

The Claimant/Respondent opposes the Application and filed a Replying Affidavit deponed by **JOSHUA MUEKE KITHUKU**, the Claimant herein filed in Court on 21<sup>st</sup> February 2020, in which he avers that the Application as filed is incompetent, vexatious, scandalous and an abuse to the Court process. That on this basis this Court should proceed and dismiss the same with costs to the Claimant.

He admits that the 1<sup>st</sup> Respondent appointed Administrators as from 17<sup>th</sup> August, 2018 but maintained that this came long after this suit was instituted in the year 2014.

He further avers that Section 560 of the Insolvency Act that the Applicant relies on is only meant to secure functions of the Administrators and further to protect the property of the Company under Administration from wastage.

The Claimant contends that the Applicant ought to have properly instructed its Advocates on record on the changes when the matter came up for hearing on 7<sup>th</sup> October, 2019 when the Applicant's case was marked closed and instructions on filing of submissions issued by this Court.

He further contends that the Applicant has failed to meet the threshold for grant of the orders sought in its Application and therefore urges this Court to dismiss the Application with costs to the Claimant.

In its brief rejoinder the Applicant filed a Supplementary Affidavit deponed by **GEORGE WERU** on 12<sup>th</sup> June, 2020 in which he contends that the Replying Affidavit as filed by the Claimant is misconceived and only meant to mislead this Court to interrupt the Moratorium under Section 560 of the Insolvency Act over all legal proceedings against the 1<sup>st</sup> Respondent who has been under Administration since 17<sup>th</sup> August, 2018.

The affiant deposes that the 1<sup>st</sup> Respondent/Applicant did inform this court on 17<sup>th</sup> October, 2018 of the fact that it was under Administration and therefore the Claimant cannot rely on the assertion that the suit commenced in 2014 as a ground to disregard the Moratorium under Section 560 of the Insolvency Act and purport to proceed with this matter despite being under administration.

He contends that the Administrators only found out about the status of this suit when its' then Advocates on Record M/S Mohammed Muigai LLP Advocates furnished them with its Application to cease acting prompting them to peruse the Court file.

He further deposes that the 1<sup>st</sup> Respondent stands to suffer great prejudice if the orders sought in the instant Application are not granted as the proceedings herein will only serve to disrupt and frustrate the Administrators from exercising their statutory mandate and attaining their objectives as mandated in the Insolvency Act.

Parties agreed to dispose of the Application by way of written submissions.

### **Submissions by the Parties**

The 1<sup>st</sup> Respondent/Applicant submits that it is not contested that it was placed under Administration on 17<sup>th</sup> August 2018 and that by operation of law, the Insolvency Act places a moratorium on all legal proceedings against it during the pendency of such Administration. The 1<sup>st</sup> Respondent relied on the case of **George Mureithi & Others v Kenatco Taxis Limited (In Receivership) (2016) eKLR** where the Court held that no proceedings shall be commenced against a company in receivership unless the leave of the Court has been sought.

The Applicant invited this Court to take Judicial Notice of its' financial crisis and placement under Administration being an issue of public notoriety with notices being run in national dailies with country wide circulation and in the Kenya Gazette.

It is further contended that this position was made known to the Claimant and the Court as well in open Court and therefore the Claimant cannot now plead that notice has not been served expeditiously.

The Applicant maintains that all proceedings in this matter after 17<sup>th</sup> October 2018 are illegal and that this Court ought to declare the same a nullity as no leave of Court or consent of the Administrators was obtained.

The Applicant maintains that it is protected under Section 560 of the Insolvency Act and that failure by the Claimant to follow the mandatory provisions as provided therein was unlawful and therefore its application ought to be allowed as prayed. For emphasis the Applicant relied on the case of **George Ngure Kariuki v Charles Osoro Makone (2014) eKLR**.

The Applicant further maintains that it is likely to suffer great prejudice if the Orders sought in the instant Application are not granted and thus the need to stay the proceedings herein. The Applicant relied on the findings in the case of **Midland Energy Limited v George Muiruri T/A Leakeys Auctioneers & Another (2019) eKLR** where the Court held that for Administrators to achieve their objectives as contained in Section 522 of the Insolvency Act, such a company must be insulated from aggressive creditors by way of a moratorium from other legal processes.

The Applicant argued that stay of proceedings is therefore necessary for the above reasons and therefore urged this Court to stay the proceedings pending compliance by the Claimant to the provisions of the Insolvency Act.

It is also on this basis that the Applicant argues that all proceedings in this matter post 17<sup>th</sup> August 2018 are a nullity by dint of Section 560 of the Insolvency Act.

In conclusion the Applicant urged this Court to exercise its discretionary power and allow its Application as prayed with costs to the Applicant. For emphasis the Applicant relied on the provisions of Section 27(1) of the Civil Procedure Act and the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another (2016) eKLR** where the Court held that the basic rule on payment of costs remains discretionary and that the same follow the event.

### **Claimant's Submissions**

The Claimant on the other hand submitted that the Applicant herein has failed to demonstrate sufficient grounds for the grant of the stay of proceedings herein and therefore urged this Court to dismiss the same accordingly.

The Claimant further submitted that the Applicant has always been a willing participant in this matter through its Advocates on record who

did inform the Court of the appointment of the Administrators and with instructions did proceed with the hearing of the main claim to conclusion.

The Claimant maintains that the instant Application has been brought in bad faith and is only aimed at delaying this matter which is at the final stage.

In conclusion the Claimant urged this Court to dismiss the instant Application as the same is void of merit.

### **Analysis and Determination**

It is not in dispute that the 1<sup>st</sup> Respondent herein was placed under receivership on 17<sup>th</sup> August 2018. It is also an undeniable fact that 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.

From the record of the proceedings in this matter it is true that the firm of Merssus Mohammed Muigai LLP then Advocates on record for the 1<sup>st</sup> Respondent did inform this Court of the placement of the Applicant under Administration on 17<sup>th</sup> October 2018 when the matter was scheduled for hearing.

The matter was taken out on this basis and another hearing date fixed for 22<sup>nd</sup> July 2019. On the said date Mr. Mwangi appeared for the 1<sup>st</sup> Respondent alongside Mr. Nyabena on record for the Claimant herein and informed this Court that he was ready to proceed with the hearing.

The matter did proceed to conclusion and the 1<sup>st</sup> Respondent proceeded to close its case without calling any witnesses. Directions on filing of submissions to the Claim were thereafter given.

The Applicant now seeks to stay the proceedings in this matter pending compliance with Section 560 of the Insolvency Act and further a declaration that all proceedings post 17<sup>th</sup> August 2018 are null and void.

The fact that the Mr. Mwangi on record for the 1<sup>st</sup> respondent/Applicant opted to proceed with the hearing on 22<sup>nd</sup> July 2019 is a clear indication that he had clear instructions from the Administrators to proceed. The applicant has not controverted this position. The Applicant is therefore estopped from claiming otherwise.

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 as from 17<sup>th</sup> August 2018 cannot therefore be deemed as a nullity. Given that the matter has proceeded and is pending for Judgment the 1<sup>st</sup> Respondent having closed its case on 7<sup>th</sup> October 2019, long after the Applicant was placed under administration and considering that it was represented by Counsel, I agree with the Claimant that the instant Application was filed with the sole intention of delaying conclusion of this matter.

#### **What is the threshold of Stay of Proceedings Orders?**

The principles for grant of stay of proceedings orders were set in the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi (2014) eKLR** where the Court held as follows:

*“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;*

- a) *Whether the applicant has established that he/she has a prima facie arguable case.*
- b) *Whether the application was filed expeditiously and*
- c) *Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.*

This court is thus clothed with inherent powers under Section 3A of the Civil Procedure Act to grant a stay of proceedings as was held in the case of **Symon Nyamu Muthigani v Charity Wangui Munene [2015] eKLR**.

It is my view that the application was not filed expeditiously and further, that it is not in the interest of justice to stay proceedings at this stage while the suit is pending for judgment, the hearing having been concluded with full participation of the Applicant during the pendency of the receivership. The Applicant is after all, protected from execution. From the foregoing I find that the 1<sup>st</sup> respondent has failed to meet the threshold for the grant of the stay orders it now seeks.

**In the circumstances the instant Application is dismissed in its entirety with costs to the Claimant.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**