



**Morgan Air & Seafreight Logistics Kenya Limited v Mara
EPZ Limited (In Liquidation) (Commercial Case 070 of 2021)
[2024] KEHC 2305 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 070 OF 2021
MN MWANGI, J
FEBRUARY 23, 2024**

BETWEEN

MORGAN AIR & SEAFREIGHT LOGISTICS KENYA LIMITED PLAINTIFF

AND

MARA EPZ LIMITED (IN LIQUIDATION) DEFENDANT

RULING

1. The Plaintiff commenced the proceedings herein by way of a plaint dated 26th February, 2021 in which it sued the defendant for the payment of the sum of Kshs.63,412,106.00 for goods delivered and not paid for. Summons to enter appearance and the plaint were served on Mara EPZ on 21st April, 2021. Mara EPZ entered appearance through the firm of MNO Advocates but failed to file a statement of defence. Judgment in default was entered on 21st December, 2021 and a decree was issued on 12th January, 2022. The plaintiff appointed the Moraa Auctioneers to execute the judgment. Failure to trace the defendant's property saw the plaintiff apply for the Court to compel the directors of Mara EPZ to explain whether the defendant has any assets as well as provide the books of accounts.
2. The directors of Mara EPZ did not adhere to the Court orders but instead filed the instant application dated 19th April, 2023. The instant application is brought under Sections 1A and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 51 Rule 1 and Order 22 Rule 22 of the *Civil Procedure Rules* 2010 and Sections 411, 415, 481 and 482 of the *Insolvency Act* No. 18 of 2015. In a nutshell, the applicant seeks an order for stay of execution of the decree dated 21 December, 2021 issued by Hon. Justice Emily Moraa Nyakundi and the orders issued by Hon. Justice D.S. Majanja on 21 February, 2023, pending the hearing and determination of the application. That prayer is by now spent. The applicant also seeks to set aside the orders issued by Hon Justice D.S. Majanja on 21st February, 2023. The applicant also prays for the costs of the application.



3. The application is premised on the grounds that the face of it, where it is alleged the applicant has entered into voluntary liquidation with the creditors by a meeting held on 28th April, 2022 and that Peter Kahi was appointed as the Liquidator. That according to the *Insolvency Act*, the Property of a company that has entered into liquidation is distributed by the Liquidator and the powers of directors cease. It was stated that the orders of 21st February, 2023 are null and void.
4. The application is supported by the annexed affidavit of Peter Kahi, the Liquidator of Mara EPZ sworn on 19th April, 2023 in which he reiterates the grounds of the application.
5. Opposing the application Morgan Air Sea and Freight Logistics Kenya filed a replying affidavit sworn by Jacques Botes, the Financial Manager on 9th June, 2023. He averred that the Liquidator's practicing certificate expired on 17th November, 2022 and therefore the Liquidator lacks the capacity to act as such, and has committed a felony as per Section 5(1) of the *Insolvency Act* by swearing the supporting affidavit dated 19th April, 2023.
6. It was averred that Morgan Air Sea and Freight Logistics Kenya was not notified of the creditors meeting, yet it is one of the creditors and the applicant has knowledge of the existence of the current suit. It was stated that the insolvency proceedings are aimed at frustrating the plaintiff's effort to execute the decree, and that applicant failed in its duty to inform the Court as the proceedings before this Court commenced before the insolvency proceedings. It was averred the directors of the applicant are in contempt of Court orders dated 23rd March, 2023 and the summons dated 28th March, 2023, thus the directors ought to be committed to civil jail.
7. By the Court's directions, the application was canvassed by way of written submissions. The defendant/applicant filed submissions dated 6th July, 2023, whereas the plaintiff/respondent filed submissions dated 24th July, 2023.

Applicant's submissions.

8. The applicant submitted that the execution of the decree dated 21st December, 2021 should be stayed on the strength of Section 481(1) of the *Insolvency Act*. It was argued that a Liquidator was appointed before the plaintiff completed the execution. Reliance was placed in the case of In *Re of Kenyon Limited (under liquidation)* [2020] eKLR, where the Court held that Section 481 of the Act stops any execution or attachment against goods or land of a company undergoing liquidation. The landlord instructed auctioneers to distress for rent after the liquidation of the company had commenced. That action of distress for rent must, as provided under section 481 stop at its tracks”
9. It was submitted that the powers of the directors of the defendant ceased immediately a Liquidator was appointed on 28th April, 2022 as per Section 411 of the *Insolvency Act*. Counsel placed reliance on the case of *Geoffrey Kipkoeh vs UAP Provincial Insurance Company Limited & another* [2020] eKLR.
10. Further, Counsel argued that the orders of 23rd February, 2023 summoning the directors of the applicant are null and void and inconsistent with the provisions of the *Insolvency Act*. Counsel submitted that the property of the applicant is not under the control of the directors but of the Liquidator. The applicant urged this Court to set aside the orders issued by Hon Justice D. S. Majanja on 23rd February, 2022.

Plaintiff/respondent's submissions

11. Mr. Otieno, learned Counsel for the Plaintiff submitted that the applicant was duly served with the plaint and summons to enter appearance. It filed a memorandum of appearance and failed to file a



statement of defence, and that prompted the entry of default judgment on 2nd December, 2021. The allegation that the defendant was unaware of the existence of this suit is untrue. It was submitted that the instant application fails to meet the threshold for stay of execution of a decree as set out in Wachira Karani vs Bildad Wachira [2016] eKLR.

12. The plaintiff submitted that no evidence has been presented before this Court to establish that a Notice of the creditors' meeting was published as required under Section 406 (c)(iii) of the Insolvency Act. It was pointed out that the directors of the applicant should produce the company's statement of financial position as per Section 407(3)(b) of the Insolvency Act.
13. Further, the plaintiff argued the action of the defendant/applicant in bringing the instant application under Section 481(1) of the Insolvency Act aims at frustrating the execution process by moving the property and assets to an unknown location.
14. The plaintiff submitted that despite the provisions of Section 411 of the Insolvency Act, the respondent ought to obey Court orders. Counsel placed reliance placed on the case of Sam Nyamweya & 3 others vs Kenya Premier League Limited & 3 others [2015] eKLR, referring to the case of Romer L. J. in Hadkinson vs Hadkinson (1952) All ER 567, where the Court held that it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged.
15. The plaintiff further stated that the instant application is meant to aid the applicant in avoiding to satisfy the decree of the Court. The plaintiff pleaded with the Court to consider substantive justice as opposed to the technicalities being propagated by the defendant. It urged the Court to find the application being bereft of merits.

Analysis and Determination.

16. I have considered the application for stay of execution, the grounds thereof and the affidavit in support of the said application, as well as the affidavit in opposition thereof. I have also considered the rival submissions by Counsel for the parties. The issues for determination are-
 - i. Whether the court should issue a stay of execution of the decree dated 21st December, 2021 and orders dated 21st February, 2023; and
 - ii. whether the court should set aside the orders issued on 21st February 2023

Whether the Court should issue a stay of execution of the decree dated 21st December, 2021 and orders dated 21st February, 2023.

17. This Court is vested with the discretionary power to set aside a default judgment, so as to enhance substantive justice for the parties. I place reliance in the case of Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal [2014] eKLR, where the Court stated that the purpose of clothing the Court with discretion to set aside ex parte judgment is:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”

18. In setting aside default judgment, the Court must be satisfied that the intended defence raises triable issues. In the instant case the applicant has not filed a statement of defence but seeks to set aside an order and stay the execution of the default judgment as well as the orders summoning the judgment



debtor's directors into Court on the basis that the applicant/judgment debtor is under liquidation. Service of the plaint and summons to enter appearance is not denied.

19. It is not in dispute that there is a decree of the Court in the sum of Kshs.63,412,106.00 plus interest against the defendant/applicant. It is also not disputed that execution by the decree holder has been futile as the the judgment debtor's property could not be traced. The issue in contention is how the applicant held the creditors' meeting without inviting the plaintiff despite knowing of the existence of the instant suit.
20. The plaintiff is entitled to the fruits of the judgment. It is trite that a party who walks through the justice system and obtains a Court order must be assured that the orders will be obeyed by those to whom it is directed. The purpose of stay of execution is to preserve the subject matter of a suit while balancing the interests of the parties. The default judgment herein was regularly obtained since summons to enter appearance with the plaint were duly served and the applicant entered appearance but failed to file a statement of defence.
21. In the circumstances, I find that the applicant has failed to furnish this Court with sufficient reasons to enable it to exercise its discretion and grant an order for stay of the judgment and the resultant decree dated 21st December, 2021.

Whether the Court should set aside the orders issued on 21st February, 2023.

22. Having issued Summons to the directors of the judgment debtor, they were supposed to comply with the said orders. I do reiterate the plaintiff's assertion that Court orders are not issued in vain. In the Court of Appeal in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the Court pronounced itself as follows-

“We reiterate here that Court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.....The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

23. I agree with the plaintiff that the applicant ought to have honoured the Summons and appeared before the Court and informed it that it was under liquidation. This was not done, the applicant proceeded to file the instant application seeking a stay of execution, in a clear breach of the Court orders. Whoever comes to equity must come with clean hands. The applicant's hands are tainted with inequity as there is no evidence presented before this Court to demonstrate that the creditor's meeting was properly convened, there are also no reasons advanced as to why the plaintiff being part of the applicant's creditors was not invited to attend the creditors' meeting. The assertion that the existence of the instant suit was unknown is untrue.
24. To the mind of this Court, the appointment of the Liquidator was aimed at defeating the execution of the decree in the hands of the plaintiff. The object of the *Insolvency Act* is to ensure that insolvent companies continue to operate as a going concern so that they can meet their financial obligations to the satisfaction of the creditors. This objective cannot be said to aid persons and companies to run away from their obligations by hiding behind insolvency proceedings. The move by the applicant is meant to defeat the execution of the judgment.



25. In the circumstances therefore, I disagree that the Liquidator was properly appointed. The upshot is that the application dated 19th April, 2023 is bereft of merits. The same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Chepkwony for the defendant/applicant

Mr. P. Otieno for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

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