



REPUBLIC OF KENYA



**John Mugambi t/a Mugambi & Company Advocates & another
v KCB Bank Kenya Limited (Insolvency Petition E172 of 2019)
[2022] KEHC 15115 (KLR) (Commercial and Tax) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E172 OF 2019**

**DAS MAJANJA, J
NOVEMBER 9, 2022**

BETWEEN

**JOHN MUGAMBI T/A MUGAMBI & COMPANY ADVOCATES 1ST
PETITIONER**

**BEATRICE KARIUKI T/A BEATRICE KARIUKI & ASSOCIATES 2ND
PETITIONER**

AND

KCB BANK KENYA LIMITED RESPONDENT

(The petitioners brought this liquidation petition against the Company on the basis of a judgment and decree in their favour for Kshs. 28,063,325.00 in Milimani HC COMM No. 436 of 2017; John Mugambi T/A Mugambi & Company Advocates and Beatrice Kariuki T/A Beatrice Kariuki & Company Advocates v Showcase Properties Limited)

RULING

1. This is a formal ruling setting out the full reasons for striking out of the petitioners' application *ex-tempore* this morning, November 9, 2022.
2. The petitioners brought this liquidation petition against the Company on the basis of a judgment and decree in their favour for Kshs 28,063,325.00 in Milimani HC COMM No 436 of 2017; John Mugambi T/A Mugambi & Company Advocates and Beatrice Kariuki T/A Beatrice Kariuki & Company Advocates v Showcase Properties Limited.
3. The petitioners have now filed an application dated 7th November 2022 seeking, inter alia, to restrain the respondent ("the bank") from exercising its statutory power of sale in respect of a property, LR No



- 2/61 (REG VOL N88 FOLIO 31 FILE 1821) (“the property”) which belongs to the company but is charged to the Bank to secure certain facilities.
4. It is not in dispute that in HC COMM No 436 of 2017, the petitioners, as plaintiffs’ in that case, applied for and the court granted charging orders under section 52 of the *Advocates Act* (chapter 16 of the laws of Kenya) in respect of the surplus proceeds in the event the property is sold by the bank. It is this interest in the surplus that the petitioners now seek to protect by seeking to restrain the bank from selling the property at an undervalue.
 5. When the matter came up for directions, I directed the petitioners to show cause why I should not strike out the application because it was not an insolvency matter and that in any case, the matter concerned a secured property which is outside the purview of insolvency proceedings. I heard oral arguments from the parties.
 6. Counsel for the petitioners, Mr Mbobu, called in aid the provisions of section 3(1) of the *Insolvency Act*, 2015 which sets out the policy framework under which the High Court exercises its jurisdiction to supervise insolvency proceedings to ensure an orderly, efficient and effective realization of the assets of the insolvent company for the benefit of creditors. Counsel submits that the *Insolvency Act* provides for equitable treatment of all creditors and in this instance the court must address the problem of undervaluation of the property arising in the context of financial distress.
 7. Because of the charging order, the petitioners state they are creditors and are seeking to ensure that the bank, as a secured creditor, exercises its statutory power of sale in accordance with the law and without prejudicing the rights of the other creditors. It cites *In re Hi-Plast Limited* ML HC IP No E001 of 2019 [2019] eKLR to urge that a secured creditor undertaking its statutory power of sale has a duty of care owed to the chargor, any guarantor of the whole or part of the sums advanced to the chargor, or any chargee under a subsequent charge or under a lien to obtain the best price possible. It is their view, the court has a duty to protect and balance the claims by the various stakeholders and make appropriate orders to meet the ends of justice. It cites the case of *Kimeto and Associates Advocates v KCB Bank Kenya Limited and 2 others* [2021] KEHC 242 (KLR) to support this proposition.
 8. The petitioners point out that the court has power to intervene and call upon the secured creditor to act in good faith in accordance with the provisions of the *Land Act*, 2012. That under section 423 of the *Insolvency Act* the court has power to supervise the liquidation of companies and that under section 427(2) of the *Insolvency Act* it is not restrained from making a liquidation order on the ground that the Company’s assets have been mortgaged.
 9. The company supports the application to the extent that it seeks to stop the sale of the property by the bank.
 10. Mr Angwenyi, counsel for the bank, urges the court to strike out the application. He submits that the petitioners had sought similar orders which the court declined hence the application before the court is an abuse of the court process. He submits that the petitioners lack *locus standi* to restrain the Bank from exercising its statutory power of sale as it is not party to the loan agreement between it and the company. Conversely, he also urges that the petitioners’ right is to the surplus in the event of a successful sale and that apart from the charging order, the bank is not privy to the business between the petitioners and the company.
 11. I have considered the arguments and I take the following view of the matter. This case is an insolvency cause where the petitioners seek to liquidate the company. The position of the secured creditor was explained in *In Re High-Plast Limited* (supra), the question before the court was whether a secured



creditor in a liquidation or administration of a company is entitled to exercise its statutory power of sale over a charged property. *Kasango, J*, held as follows:

Where the chargor fails to discharge the debt, the bank is forced to look to its security for repayment of the advance. The rights of the secured creditor are derived from the registered charge whose validity was/has not been contested. The secured creditor may exercise self help remedies to recover the facility. These remedies include an action against the chargor for the amount of debt, statutory power of sale of the charged property, appointment of administrator or liquidator; foreclosure and/or taking possession of the charged suit property.

In liquidation whose purpose is realization of debtor's assets to settle liabilities and dissolution of the company, the secured creditor is protected as the said creditor will rank in priority and exercise first the lien over the charged property before other Creditors.

Similarly in the process of administration, the administrator ought to prioritize the interest of the secured creditor(s) with regard to the charged property to realize the facility granted to the debtor.

The learned judge then concluded:

The rights of the secured creditor under the charge are intact. These rights are subject to the legal regime that regulates the processes of executing these rights. The secured Creditor is held accountable in the exercise of rights under the registered charge. In order to exercise statutory power of sale, the secured creditor does not require the court's intervention. In the circumstances this court cannot grant orders to impair the exercise such rights unless the court's jurisdiction is triggered by procedural non-compliance of mandatory statutory provisions of relevant legislation or if the validity of the registered charge that confers priority rights is challenged.

12. A secured creditor like the bank in this case occupies a special position in insolvency proceedings as it has rights over the property protected by the security agreement and statutory provisions where applicable. These rights take precedence over the administration and liquidation process in the sense that the holder of those rights is entitled to exercise them at any time. The position is summarized in *Halsbury's Laws of England* (3rd Ed, Vol. 6) at para 968 where the learned authors state as follows:

As a general rule, however, the holder of a debenture or debenture stock of a company has a charge or where the debenture stock is secured by a trust deed the trustees usually have a legal mortgage on specific assets of the company, and, if so, he or they can enforce the usual remedies of a legal or equitable mortgage against the company in the same manner as it were an individual. One of these rights is to have a sale of the property charged, either under the power given by the charge or by statute, or with the assistance of the court. If the company goes into liquidation, the rights of a secured creditor under his security are not prejudiced, and the liquidator cannot obtain an injunction to restrain a sale by the secured creditor except on the usual terms of paying the amount due, or, if it is not agreed, paying the amount claimed into court.

13. Since the bank is a secured creditor, it is entitled to exercise its statutory power of sale without recourse to the court exercising insolvency jurisdiction (see *East Africa Cables PLC v Ecobank Kenya Limited* HC COMM Misc E043 of 2020 [2020] eKLR). In any event, it is not even the Company seeking relief but a third party. This is not to say that petitioners do not have any recourse against the Bank for their grievances, it is that they cannot agitate their claim in insolvency proceedings.



14. Although the court has extensive powers under the *Insolvency Act*, these powers are incidental to the insolvency proceedings. They do not extend to the circumstances herein in view of the secured property. The court lacks jurisdiction to entertain the application restraining the Respondent from exercising its statutory power of sale.
15. The petitioners' application dated November 7, 2022 is struck out. The petitioners shall pay the Bank's costs which are assessed at Kshs 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER 2022.

DS MAJANJA

JUDGE

Court Assistant: Mr M Onyango.

Mr K Mbobu with him Mr Mwachofi instructed by Odhiambo, Talam and Company Advocates for the Petitioners.

Mr Masinde instructed by Mungai Kalande and Company Advocates for the Company

Mr Angwenyi instructed by Mohammed and Muigai Advocates for the Respondent.

