



Malplast Industries Limited v NCBA Bank Kenya PLC; Harveen Gadhoke (Suing as Administrator of Malpast Industries Limited) (Administrator) (Civil Case 425 of 2018) [2022] KEHC 626 (KLR) (Commercial and Tax) (13 June 2022) (Ruling)

Neutral citation: [2022] KEHC 626 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 425 OF 2018

DAS MAJANJA, J

JUNE 13, 2022

BETWEEN

MALPLAST INDUSTRIES LIMITED PLAINTIFF

AND

NCBA BANK KENYA PLC DEFENDANT

AND

HARVEEN GADHOKE (SUING AS ADMINISTRATOR OF MALPAST INDUSTRIES LIMITED) ADMINISTRATOR

RULING

1. The Plaintiff has filed a Notice of Motion dated 22nd March 2022 under section 560(1)(d) of the *Insolvency Act*, 2015 application seeking an order that it be granted leave to proceed and continue this suit. The application is supported by an affidavit sworn on 22nd March 2022 by Dilesh Bid, a director of WWW Bid Investments Limited, an assignee of the claim pursuant to an Assignment dated 3rd December 2018. It is opposed by the Administrator by way of a Notice of Preliminary Objection dated 27th April 2022 seeking that the application be struck out with costs.
2. Section 560(1)(d) of the *Insolvency Act*, 2015 provides that once a company is under administration, 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.
3. The Applicant submits that section 560A of the *Insolvency Act*, 2015 sets out the considerations to be made by courts of law in deciding whether or not to grant such leave. It cites the case of *Owiti, Otieno*



and Ragot Advocates v Mumias Sugar Co. Limited (Under Administration) [2020] eKLR where it was held that;

When considering whether to grant approval under section 560, the court may in particular take into consideration – (a) the statutory purpose of the administration: (b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss; (c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and (d) the conduct of the parties.

4. The Applicant further submits that as an assignee, it has a legitimate interest in the suit and should therefore be granted leave to continue with the suit. It points out that pursuant to a board resolution dated 13th December 2018, Malplast Industries Limited assigned its interests in the suit to WWW Bid Investments Ltd in exchange for consideration. Following the assignment, WWW Bid Investments Ltd then proceeded to file the suit on 20th December 2018. However, on 6th May 2021, the Plaintiff was placed under administration by Victoria Commercial Bank and Harveen Gadhoke appointed as the Administrator. The Plaintiff therefore had to seek either the leave of court or the consent of the Administrator to continue with the prosecution of the suit.
5. The Applicant states that it sought and was granted leave to proceed with the suit by the Administrator by a letter dated 9th February 2022 on condition that, amongst others, that in the event of a favourable judgment, all the proceeds are to be paid out to the Administrator. It states the Administrator did not consider the import of the assignment and that the condition imposed by him are untenable. The Applicant therefore seeks the leave of this court to continue the prosecution of the suit.
6. The Applicant submits that unless leave is granted, it stands to suffer significant loss considering it has demonstrated having paid consideration to Malplast Industries Limited for the assignment of the case to WWW Bid Investment Limited. With the execution of the resolution to assign the case to WWW Bid Investment Limited, the burden of prosecuting the case fell on its shoulders. It contends that it is crucial for leave to be granted as the suit relates to the recovery of interest overcharged on various facilities taken out with the Defendant and if successful, the sums recovered will help pay the debts owed by the Plaintiff under the assignment and maintain it as a going concern. It urges that no prejudice will be occasioned to any party with the leave being granted.
7. In response to the application, the Administrator states that as admitted by the Applicant, the Administrator granted it consent to proceed with the suit by the letter dated 9th February 2022 hence there is no basis for the application. The Administrator further states that though the application is brought in the name of the Plaintiff, it is in fact agitated by a third party who is neither director or shareholder of the Plaintiff hence it is a non-starter.
8. The second ground of objection to the application is that this court lacks jurisdiction as the court contemplated under section 2 of the *Insolvency Act* is, "...The High Court and if there is an insolvency division of the Court, meant that Division." The Administrator argues that the court in terms of our decisional law means the court handling the insolvency cause relating to the company. It cites several decisions; *Mark Properties Limited v Coulson Harney LLP Advocates; Le Mac Management Company Ltd and Another* [2021] eKLR, *Lambert Lwanga ogochi and 4 others v Ponangipalli Venkata Ramana Rao and 9 Others*, ML HC COMM No. E004 of 2022 and *Nakumatt Holdings Limited and Another v Ideal Locations Limited* [2019] eKLR where the Court of Appeal held that, "There is a good reason, in our view, why Section 2 of that Act specifies the court to grant approval should be the court seized of the insolvency matter..." The reason being that it is the insolvency court that has a bird eye view of



the state of the company in administration and is best placed make decision taking into account the knowledge it has on the company and the interests of the company, creditors and the applicant before it.

9. I have considered the arguments by the parties and the key issue is whether the application falls within section 560 of the *Insolvency Act* which provides for a moratorium while a company is under administration. Section 560(1)(d) which has been invoked by the Applicant states as follows:

560(1) While a company is under administration -

- (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. [Emphasis mine]

10. A close reading of the aforesaid provision shows that approval of the court is in relation to a person who wishes to begin or continue legal proceedings against the company in administration. In this case, it is the Plaintiff and not the Defendant which is under administration. The provision contemplates a situation where a defendant is under administration and the plaintiff wishes to proceed with the suit. The Defendant, NCBA Bank PLC, is not under administration and the Plaintiff under administration does not require any approval of the court to proceed with the suit against the Defendant.
11. What the Applicant seeks is outside the purview of section 560(1)(d) of the *Insolvency Act*. The substance of the application is that through its Advocates, WWW Bid Investments Limited, seeks to prosecute for its own benefit. It has been granted permission to do so by the Administrator by the letter dated 9th February 2022. Whether or not to prosecute the suit and who to appoint as Advocates is within the power of the Administrator and this court cannot intervene at least not in this case. To allow the application would be tantamount to the court taking over the Administrator's powers to control the company including the power to determine whether and under what conditions it should conduct litigation.
12. Having reached the conclusion that this court lacks jurisdiction to intervene in this case, I strike out the Notice of Motion dated 22nd March 2022. The Applicant shall pay the Administrator costs of the application assessed at KES. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Issa instructed by Issa and Company Advocates for the Plaintiff.

Ms Barako instructed by Anjarwalla and Khanna Advocates LLP for the Administrator..

