

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
IN THE MATTER OF THE INSOLVENCY ACT, 2011
AND INSOLVENCY REGULATIONS, 2013
AND
IN THE MATTER OF PAYMENT CLAIM FROM M/S SPENCON
SERVICES LIMITED
AND
IN THE MATTER OF AN APPLICATION FOR COURT DIRECTIONS
MISCELLANEOUS CAUSE NO. 219 OF 2020
SIRAJE NDUGGA.....APPLICANT
VERSUS
KABITO KARAMAGI AND DONALD NYAKAIRU,
THE RECIEVERS/MANAGERS OF SPENCON
SERVICES LTD IN RECIEVERSHIP.....RESPONDENTS

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

Sirajje Ndugga, the Applicant brought this application under **Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act, Cap 71 and Order 52 Rule 1 and 3 of the Civil Procedure Rules SI 71-1 and Regulation 203 of the Insolvency Regulations 2013**, against Kabiito Karamagi and Donald Nyakairu the Receivers/Managers of Spencon Services Ltd a Company under receivership (Respondents), seeking for orders of this Court that: -

- 1. The Respondents pay the Applicant his claim arising from services offered to Spencon Services Ltd as verified by the Statutory Declaration dated 10th November, 2017.**
- 2. Costs of this application be provided for.**

The grounds of this application are contained in the affidavit of the Applicant but briefly are that: -

- i. The Respondents are the official receivers of Spencon Services Limited, a Company under receivership.**
- ii. The Applicant has provided services totaling to 61,320,000/= (Sixty-One Million Three Hundred and Twenty Thousand Shillings only) to the Insolvent Company prior to being put under receivership.**
- iii. During the performance of the subcontract, the Applicant sustained injuries on his two middle fingers which affected his health.**
- iv. The Applicant has sought for payment of his money so that he undergoes medical treatment but to no avail.**
- v. The Applicant is currently in hospital but he is unable to pay his medical bills.**
- vi. The Applicant can't be paid his money due to the legal process requiring the Respondent to follow legal priorities of payment of creditors.**
- vii. The delay and or refusal to pay the Applicant continues to endanger his health**
- viii. The Respondent has no other limitation apart from the legal procedural hindrance setting up the priorities of payment of creditors.**
- ix. It is just, equitable and in the interest of substantive justice that the application be granted.**

The Respondents oppose this application on grounds that the Applicant is an unsecured claimant and therefore, settlement of his claim comes after settlement of the secured creditors.

The brief background to this claim is that the Respondents are the duly appointed Receivers/Managers of Spencon Services Limited, a Company under receivership. Prior to going under receivership, the Applicant provided services to the Company to a tune of 61,320,000/= (Sixty - one million three hundred and twenty thousand shillings only). In the course of his duties with the company he sustained injuries on his fingers. He is currently hospitalized and is financially constrained. The Applicant has sought for payment of his money from the Respondents to enable him undergo effective medical treatment but the Respondents have declined on grounds that the Applicant being an unsecured creditor, he can only be paid after the preferred and secured creditors have been cleared. The Applicant is aggrieved by this development, hence this application.

Chandia Advocates and Legal Consultants represent the Applicant while the Respondents are represented by Ligomarc Advocates. Written submissions have been filed for both parties.

The Application raises the following issues for determination;

- 1. Whether the Applicant is entitled to the orders sought**
- 2. Remedies available to the parties.**

Issue No. 1: Whether the Applicant is entitled to the orders sought

Submissions

It is the submission of Counsel for the Applicant that the Respondents owe the Applicant money to a tune of 61,320,000/= (Sixty - One Million Three Hundred Twenty Thousand Shillings only). The Applicant sustained injury in the course of his duty for the Company. Currently, the Applicant is hospitalized, he has reached out to the Respondents for payment of his claim so that he meets his medical bills, but the Respondents have advised him to wait until the secured creditors are cleared. Counsel has referred this court to paragraphs 4, 5, 6 and 7 of the Respondents' affidavit in reply detailing the various claims and priorities they have to pay out before coming to the Applicant. Counsel submits that unlike the majority of the claimants listed by the Respondents who are legal persons with perpetual succession and may not easily die, the Applicant is a human being and is likely to lose his life if medical attention is not urgently availed to him.

Relying on Article 126 (2) (a) & (b) of the Constitution of Uganda, Counsel submits that the existing legal frame work governing corporate insolvency is not cast in stone and should not be construed or portrayed as insensitive to real life situation. Counsel relied on Regulation 203 of the Insolvency Regulations, 2013 which gives room to an aggrieved party to raise concerns before this Court and S. 254 (1) and S. 2 of the Insolvency Act, 2011 and prayed that this Court be pleased to exercise its discretionary powers under Section 33 of the Judicature Act to grant this application.

In reply, Counsel for the Respondents contended that there is no entitlement of remedy enjoyed by the Applicant whether in law or in equity. He relied on S. 192 of the Insolvency Act, 2011 and explained that the Respondents cannot be compelled to satisfy the Applicant's claim in the manner prayed for in the application as the

Respondents do not have express or implied duty to review the statutory distribution scheme. That the powers and duties of the Respondents are clearly stipulated under Section 180 and 181 of the Insolvency Act and no reservation is made as to the manner in which claims are paid out except in accordance with Section 192 and 12 of the Act and the provisions apply notwithstanding any law. Counsel submitted that the use of the word "shall" in S.12 of the Insolvency Act is directory meaning that the Respondents are directed to apply the proceeds in the manner stipulated by the law. That there is no express grant of powers to the Respondents to alter the statutory scheme of distribution of the proceeds.

In regard to Counsel for the Applicant's submission that this Court should consider Article 126(2) (a) & (b) of the Constitution while adjudicating this case, Counsel for the Respondents argued that the Applicant's Social or economic status is not at play in determining this application given the character of the orders sought by the Applicant. Counsel explained that the Applicant is not being denied justice because of his Social and economic status. Counsel emphasized that the Respondents are bound by law and cannot opt out of it. That while they may sympathise with the Applicant, the law clearly dictates the Applicant's treatment as an unsecured creditor of the company. Besides, the Respondents are answerable to the general body of creditors and failure to follow the priority list whether on their own violation or by Court Order, will cause their office to come under extreme and undeserved pressure and ridicule especially by creditors with similar claims. Counsel submitted that this application lacks merit and should be dismissed from court. He prayed that each party should bare its own costs.

Analysis

S. 12 of the Insolvency Act, 2011 provides as follows: -

(1) Subject to section 11, and subsection (2), the liquidator or trustee shall apply the assets to the preferential debts listed in subsections (4), (5) and (6), which debts shall be paid in priority to other debts.

(2) Preferential debts shall so far as the assets are insufficient to meet them, have priority over the claims of secured creditors in respect of assets—

(a) which are subject to a security interest; and

(b) become subject to that security interest by reason of its application to certain existing assets of the grantor and those of its future assets which were after-acquired property or proceeds, and shall be paid accordingly out of those assets.

(3) Preferential debts are as listed in subsections (4), (5) and (6) and shall be paid in the order of priority in which they are listed.

(4) First to be paid shall be—

(a) remuneration and expenses properly incurred by the liquidator or trustee;

(b) any receiver's or provisional administrator's indemnity under sections 159 or 187 and any remuneration and expenses properly incurred by any receiver, liquidator, provisional liquidator administrator, proposed supervisor or supervisor; and

(c) the reasonable costs of any person who petitioned court for a liquidation or bankruptcy order, including the reasonable costs of any person appearing on the petition whose costs are allowed by the court.

(5) After making the payments listed in subsection (4), next to be paid shall be—

(a) all wages or basic salary, wholly earned or earned in part by way of commission for four months;

(b) all amounts due in respect of any compensation or liability for compensation under the Worker’s Compensation Act, accrued before the commencement of the liquidation or bankruptcy, not exceeding the prescribed amount;

(c) all amounts that are preferential debts under section 33 or 105.

(6) After paying the sums referred to in subsection (5), the liquidator shall then pay—

(a) the amount of any tax withheld and not paid over to the Uganda Revenue Authority for twelve months prior to the commencement of insolvency; and

(b) contributions payable under the National Social Security Fund Act.

(7) This section shall apply notwithstanding any other law.

13. Non-preferential debts.

(1) After paying preferential debts in accordance with section 12, the liquidator or trustee shall apply the assets in satisfaction of all other claims.

Under paragraph 7 of the affidavit in reply, the Respondent states that the Applicant is an unsecured creditor.

Under paragraph 8 of the same affidavit it is stated by the Respondent that claims by Uganda Revenue Authority, National Social Security Fund and Employee claims have since been settled and yet to be settled are claims by secured creditors

because the realisation process has not yet recovered the money required to settle them.

The hierarchy laid down by the Insolvency Act determines which group of creditors is paid first and which group is paid last. Each class of creditors must be paid in full before the funds are allocated to the next group. The secured creditors are paid before the unsecured creditors according to the hierarchy. This is reflected in the Respondent's evidence above.

In *Kenya Court of Appeal in the case of Kenya National Capital Corporation Ltd vs Albert Mario Cordeiro & Anor [2014] KLR*, it was held that;

"the Appellant by virtue of being a debenture holder ranked him in priority to all other creditors claiming against the 2nd Respondent and this included the 1st Respondent... subsequently, and in light of the privileged position of a secured creditor, this Court cannot interfere with the suit property by upholding the decision to grant specific performance against the Appellant in favour of the 1st Respondent, an unsecured creditor in this case (emphasis is mine)

The above case authority involved competing interests of the secured and unsecured creditors. The Court emphasized the sovereignty or privileged position of the secured creditor over and above the unsecured creditor. It would be defeating the objectives of the Insolvency Act, to attend to the interests of an unsecured creditor over and above those of a secured creditor.

Counsel for the Applicant sought to rely on Article 126(2) (a) & (b) of the Constitution of Uganda.

In the case of *Kasirye, Byaruhanga and Co Advocates –v- Uganda Development Bank SCCA No. 2 of 1997*, Counsel for the Appellant sought in aid Article 126(2) (e) of the constitution contending that no injustice had been occasioned to the

Respondent. The Supreme Court in upholding the preliminary objection and after quoting Article 126(2)(e) of the constitution and underlining the words *“subject to the law”*, stated that: -

“We have underlined the words subject to the law. This means that clause (2) is no license for ignoring existing law...”

Basing on the above holding of the Supreme Court, it is important to note the applicable law must be taken into account it should not be ignored. In this case, justice has to be done to all irrespective of their social or economic status without delay, subject to the applicable law. The law in this case requires that the priority list of creditors under the Insolvency Act must be followed. This court cannot disregard the existing law to favor the Applicant. The discretion that Counsel urged this Court to exercise under S. 33 of the Judicature Act must be exercised judicially with a sound mind and not arbitrarily. It must be based on what is right and equitable under the circumstances.

It is my finding that this application seeks to circumvent the applicable law. It is devoid of merit and it is hereby dismissed.

Counsel for the Respondent prayed that each party bares its own costs. It is so ordered.

I so order.

Dated, signed and delivered at Kampala this 4th day of February, 2021

Esta Nambayo

JUDGE

4th /02/2021