



REPUBLIC OF KENYA



KENYA LAW

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**In re Royal Swiss Bakery Limited (Insolvency Petition E046 of 2022)
[2023] KEHC 21919 (KLR) (Commercial and Tax) (22 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E046 OF 2022**

DAS MAJANJA, J

AUGUST 22, 2023

BETWEEN

ORLANDO MARIO DA COSTA LUIS (LIQUIDATOR) APPLICANT

AND

PANDHAL INDUSTRIES LIMITED RESPONDENT

RULING

1. The liquidator has moved the court by the motion dated 27.07.2023 seeking an order to compel the former landlord of the Company, Pandhal Industries Limited of Kisumu (“the Landlord”) to release certain assets belonging to the Company namely; seven motor vehicles registration numbers KDD 268G, KDD 269G, KCU 935S, KCZ 347T, KCQ 571Q, KCZ 342T and KDB 046N, a AKSA 530Kva power generator, two water tanks with capacity of 5,000L and 10,000L respectively, 2 sets of flood lights and assorted electric wires/cables used to connect electric equipment (“the subject property”). The application is supported by the affidavit of the liquidator, Orlando Mario Costa-Luis sworn on 27.07.2023. It opposed by the Landlord through the affidavit of its director, Balvinder Singh Pandal sworn on 11.08.2023.
2. The liquidator states that it vacated the premises on 21 and 22.06.2023 but the Landlord has refused to release the subject property claiming that it should be paid Kshs. 3,690,894.00 as a condition of release of the said properties. The liquidator avers that this action is contrary to Insolvency laws since a substantial part of the debt is an unsecured debt and that it has made a fair offer for the preferential debt accrued during the liquidation period.
3. The Landlord opposes the application and denies that it is forcefully holding the subject property. It avers that it is ready and willing to surrender the subject property upon full payment of the rental storage charges and upon full disclosure by the liquidator on how it intends to settle the amount due to it. It contends that the Company abandoned the warehouse in October 2022 before the Liquidation



Order was issued. It avers that during this time it has to keep the subject properties in good condition at its own costs by providing electricity and ensuring security which was not its obligation under the lease between it and the Company. It further avers that its debt is not disputed and that the liquidator has failed to include the true debt owed to it and that the liquidator intends to give preferential treatment to other creditors in asset distribution.

4. The Landlord points out that since his appointment in 2022, the liquidator has only visited the premises on 22.03.2023, three months after his appointment and in June 2023 after the Landlord had issued the notice to vacate. The Landlord complains that the liquidator has failed to take note of the damage to the warehouse that has resulted in additional costs. The Landlord contends that it has negotiated with the liquidator in good faith to pay a sum of Kshs. 200 per unit for storage which the liquidator has accepted but the liquidator has failed to pay the agreed amount.
5. The issue for resolution is whether the Landlord may continue detain the property of the Company pending settlement of rent and other expenses incurred in storage of the Company's property.
6. The court issued the Liquidation order on 22.12.2022. Under section 444 of the [Insolvency Act](#), once a liquidation order is made, the provisional liquidator or liquidator assumes control of all the property to which the company is or appears to be entitled. Thus the subject property in this case is under the control of the liquidator. Further and under section 430 of the [Insolvency Act](#), any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void. It is thus clear that any interference by the Landlord absent any statutory authority to take control of the Company's property in light of the provisions I have outlined is null and void and cannot be condoned by the court.
7. The general rule of Insolvency law is that creditors of the same class must be treated equally. I therefore agree with the liquidator that by holding the subject goods on condition that it is paid is an attempt by the Landlord to gain preferential treatment yet under section 471(1) of the [Insolvency Act](#), the liquidator, "shall distribute the assets of a company available for the payment of creditors in accordance with the second schedule." The second schedule sets out the manner in which debts of the Company in liquidation are to be paid and the priority of the debts. The Landlord cannot demand to be paid in any other way other than in accordance with the second schedule and it cannot impose any condition for such payment. On the other hand, the Landlord is at liberty to lodge its claim with the liquidator for consideration under the powers conferred under the third schedule.
8. In a liquidation by the court, the liquidator is subject to the control of the court and in such circumstances, it may seek such directions as are necessary to carry out its duties in accordance with section 464 of the [Insolvency Act](#) as read with Third Schedule to the Act. Likewise, any creditor dissatisfied with the decisions of the liquidator may move the court for such orders and directions as are necessary.
9. Having found that that Landlord's act of holding the subject property lacks any legal basis, I therefore allow that liquidator's application dated 27.07.2023 and order as follows:
 - a. Pandhal Industries Limited is directed to release to the Liquidator forthwith the following property properties in its possession; seven motor vehicles registration numbers KDD 268G, KDD 269G, KCU 935S, KCZ 347T, KCQ 571Q, KCZ 342T and KDB 046N, an AKSA 530Kva power generator, two water tanks with capacity of 5,000L and 10,000L respectively, 2 sets of flood lights and assorted electric wires/cables used to connect electric equipment.



b. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

