



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. E 1073 OF 2020

UCHUMI SUPERMARKETS PLC.....APPLICANT/TENANTS

VERSUS

UNITED HOUSING ESTATE LTD.....RESPONDENT/LANDLORD

PRELIMINARY OBJECTION

RULING

BACKGROUND

1. The Applicant filed a Notice of Motion application dated 21st September 2020 for orders that;

- a. The Court be please to grant stay of execution of the proclamation notices issued by the Respondent herein pending hearing and determination of this application.
- b. Pursuant to the High Court order issued on 1st July 2020, in *Insolvency Petition No. 25 of 2018*, this Court reinforces the orders therewith and proceed to set aside the proclamation notices and/or any other proceedings to levy distress for rent as against the Applicant.
- c. The court issues an order restraining the Respondent from further issuing proclamation of attachment, sequestrations, statutory power of sale, distress for rent, or eviction from premises occupied by the company.

REPLYING AFFIDAVIT

2. The Respondent responded to the above-mentioned application through the Replying Affidavit of **Zahid Nanji** dated 13th October 2020. The Respondent opposes the Applicant's Application by stating that;

Pursuant to two separate leases both dated 28th March 2018, the Respondent let the premises to the Applicant and since the commencement of the landlord/tenant relationship, the Applicant has to date been in continuous breach of the terms of the leases.

3. Since the filing of *Insolvency Petition No. 25 of 2018*, on 3rd September 2018, the applicant, merely stopped paying its monthly rent in respect of the leased premises despite regular reminders to do so leading to the cumulative arrears of **Ksh 33,744,001.10**.

However, owing to the moratorium in force, the Respondent did not exercise its remedies under the lease and any attempts to communicate with the Applicant to settle the rent arrears were futile.

4. The Applicant formulated its CVA and pursuant to an Application dated 27th March 2020, the same was approved vide a ruling delivered on 1st July 2020. Upon perusal, neither the foregoing ruling nor the Applicant's approved CVA invalidated the leases between the parties herein and as such the same remained valid and enforceable.

5. The CVA only affects the mode and quantum of payment of the Applicant's accrued rent arrears up to 2nd March 2020. As such the repayment of the Applicant's rental arrears accrued from April 2020 to date is governed solely by the terms of the leases.

6. The Applicant neglected, failed and/or refused to honor the demand notice dated 28th July and after expiry of 30 days the Respondent instructed Messer's Upstate Kenya Auctioneers who proclaimed the Applicant's movable assets that can be sold to settle the new debt vide a proclamation notice dated 16th September 2020. The Respondent issued proper notices and the Applicant's movable assets were properly proclaimed pursuant to **section 3 (1) and Section 5 of the Distress for Rent Act**.

7. If the Respondent is not allowed to proceed with the distress for rent in respect to the new debt it will be irreparably prejudiced.

PRELIMINARY OBJECTION

8. The Respondent/Landlord raised a Preliminary Objection on 22nd October 2021, to the Applicant's Notice of Motion dated 20th September 2020 on the following point of law;

a. That there is no existing suit to merit the Applicant/Tenant's Application dated 21st September 2020 contrary to the provisions of **Section 19 of the Civil Procedure Act, Order 3 and Order 37 of the Civil Procedure Rules, 2010**.

b. The application is an abuse of court process.

c. That in the premises, this court has no jurisdiction to determine the Applicant/Tenant's application dated 21st September 2020.

APPLICANT'S SUBMISSIONS

9. The Applicant submits that it has been a subject of liquidation proceedings which was marked as settled by the Ruling of the Lady Justice Mary Kasango. The Liquidation of a company has been described as a draconian step. In the case of **Re African Safari Club Ltd [2006] eKLR**, the court made the following remarks;

"Before I consider these points I wish to state winding up a company is a draconian step. It is a most drastic step with the retired Justice Kwach, in Matic General Construction Limited vs The Kenya Power and Lighting Company Limited. Civil Appeal No. 26 of 2001 (C.A) said amounts to "corporate execution". in Kenya Cashewnuts Limited vs National Cereals & Produce Board [2002] 1 KLR 652 Ringera J. (as he then was) likened it to passing a death sentence on an individual". I agree with those views and add that winding up a company is a serious matter which should be treated with the seriousness it deserves. Before a court makes a winding up order therefore, it must be satisfied that all the prerequisite procedural steps have been taken."

10. It is their further submission that alternatives to insolvency under the **Insolvency Act No. 18 of 2015** were introduced so as to give companies facing liquidation a chance to recognize their affairs and keep companies as going concerns. The options available include voluntary arrangements and administrations. Both are procedures which are sanctioned by the court and have similar objectives, which is to keep the company as a going concern.

11. It is the Applicant's submissions that the prayers sought do not only affect the Applicant but also affect the interests of all creditors and the public at large. It is in the public domain that Uchumi Supermarkets PLC is a renowned company which has made immense contributions to the economy of this country.

12. The eviction of the Applicant from its business premises is such a draconian step which if sanctioned by the Court, shall have the effect of crippling the entire company together with the hopes and interest of all other creditors. **Section 633 of the Insolvency Act** gives the supervisor the mandate to implement the CVA. The failure of the Respondent to engage court or the supervisor so as to evict the Applicant is in itself an illegal and flagrant arrogation of rights.

RESPONDENT'S SUBMISSIONS

13. The Respondent submits that the Applicant commenced its instant proceedings by way of Notice of Motion seeking inter alia injunctive orders as against the Respondent. This is an incurable flaw to the said proceedings owing to the following;

Under **Order 3 Rule 1 of the Civil Procedure Rules**, a suit has to be instituted by plaintiff. In **Edna Cheronno Bore- vs Spire Bank Limited & Another [2018]eKLR**, the Applicant filed a Miscellaneous Application seeking injunctive orders as against the Respondent. In striking out the same, the Court held as follows;

"I would wish to address the first limb of the Preliminary Objection. When the issue was raised, it was up to the Applicant to satisfy the court that she had brought a competent suit before the court which failed to do. Nevertheless, the contents of this record speak for themselves. There was no Plaintiff filed in accordance with Order 3 Rule 1 of the Civil Procedure Rules. There was no any other pleading by whatever manner so authorized by the Civil Procedure Rules which the Applicant could premise her application on."

ANALYSIS AND DETERMINATION

14. The Respondent raised a Preliminary Objection and argued that the Applicant commenced its instant proceedings by way of Notice of Motion seeking inter alia injunctive orders as against the Respondent. This is an incurable flaw to the said proceedings and that under **Order 3 Rule 1 of the Civil Procedure Rules**, a suit has to be instituted by Plaintiff.

The definition of a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969]E.A 696* in which it was held thus:-

“A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

15. In light of the above, a preliminary Objection can only be raised on a pure point of law and where a party will be required to prove the facts then that cannot be said to be a Preliminary Objection.

16. The Applicant submits that it has been a subject of liquidation proceedings which was marked as settled by the Ruling of the Lady Justice Mary Kasango. Whereas a suit can only be instituted by Plaint, Petition or Originating Summons and not Notice of Motion, there is evidence of a matter determined by LJ Kasango. Secondly, on 14th December 2020, this Court noted with concern that there was /is **Petition 25 of 2018** related to this matter. Therefore, in the absence of presentation and perusal of the said matter to confirm if it relates or that this application is from that matter, the full determination of the Preliminary Objection cannot be undertaken at this stage.

17. A preliminary Objection is a pure point of law, if it entails facts especially not agreed by parties it is a matter to be heard and determined at the Hearing of the application or suit.

18. The Preliminary Objection is dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MOHAMED MADHANI & CO. ADVOCATES FOR RESPONDENT – N/A

KIBET ROP & CO. ADVOCATES FOR APPLICANT- N/A

COURT ASSISTANT - TUPET