



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 148 OF 2018

SOUTHCOAST HOLDINGS LIMITED.....PLAINTIFF

- VERSUS -

NAKUMATT HOLDINGS LIMITED.....DEFENDANT

RULING

1. It is not in dispute that **NAKUMATT HOLDINGS LIMITED**, the defendant was a tenant of **SOUTHCOAST HOLDINGS LIMITED**, the plaintiff. This was in respect of the plaintiff's property Title No. **KWALE/DIANI BEACH BLOCK/818 (CENTREPOINT)** (hereafter the premises). It is also not in dispute that the plaintiff gained re-entry of the premises before this action was commenced and before the term of the lease was determined.

2. The plaintiff commenced this case on 13th April 2018. By this action the plaintiff alleges the defendant breached the lease covenant by failing to pay rent and service charge and, failing to quietly yield up the premises duly repaired, re-decorated and with fixtures and fittings replaced in accordance with the covenants in the lease agreement. That following the aforesaid default the plaintiff exercised its rights under clause 10 of the lease agreement which provides for the plaintiff/landlord the right of re-entry of the premises. The plaintiff's prayer in this action is for judgment for Ksh 9,314,260 being rent and service charge, Ksh 14,600,000 being assessed repair redecoration and reinstatement costs plus interest at commercial rate and Ksh 5,613,890 being loss of rent from the date of determination of the lease.

3. Before me is a Notice of Motion application filed by the defendant. The prayers that are subsisting, because others become spent, are as follows:

a. THAT the Honourable court be pleased to set aside ex debito justitiae the entirety of the proceedings taken on and resultant judgment and/or Decree entered/given herein on 23/5/2018, as well as the other given herein on 26/7/2018 in their entirety.

b. THAT an order do issue compelling the plaintiff to serve upon the defendant, through her Administrator, within fourteen (14) Days of such order, summons to enter appearance herein and all attendant process, and in default thereof, the suit to stand dismissed with costs.

c. THAT consequently, the defendant be granted unconditional leave to file and serve her defence and counter-claim as prescribed by law, and the annexed defence and counter-claim be deemed as properly filed upon payment of the requisite fee.

d. THAT the honourable court be pleased to strike out the plaintiff, dismiss the plaintiff's suit and enter judgment for the defendant against the plaintiff as prayed in the defendant's counter-claim.

e. THAT alternatively and without prejudice to the foregoing, the Honourable court be pleased to order the transfer of the plaintiff's suit as filed to the Environment and Land court of Kenya at Mombasa, for Hearing and Determination alongside MOMBASA ELC CASE NO 171/2018; NAKUMATT HOLDINGS LIMITED (UNDER ADMINISTRATION) VERSUS SOUTHCOAST HOLDINGS LIMITED.

f. THAT costs of this application be provided for.

4. It should be noted that the plaintiff obtained interlocutory judgment on 23rd May 2018, in this case, in default of appearance by the defendant. The claim for Ksh 14,600,000 and Ksh 5,613,890 were ordered to be heard by way of formal proof. It is that interlocutory judgment that the defendant seeks to set aside by the application before me.

5. The application is opposed by the plaintiff through the replying affidavit of Sultan Khimji.

ANALYSIS

6. I have considered the application and the parties affidavits in support and in opposition of it. Although Mr. Ngonje informed me when appeared before me representing the defendant, that both parties had filed their written submissions, those submissions are not before me.

7. I understand the defendant to seek the prayers in its application based on the grounds that it was not served with the plaint and the summons, but that only a supplementary affidavit of the plaintiff was served upon the defendant; that the plaintiff filed this case with the full knowledge of the Insolvency Cause No. 10 of 2017, filed against the defendant and; while having knowledge that the court in Insolvency No 10 of 2017 appointed on 22nd January 2018 Peter Obondo Kahi the Administrator of the defendant after placing the defendant under Administration.

8. In opposition the plaintiff, through the affidavit of Sultan Khimji opposed the application premised on the argument that the defendant's affidavit in support of the application was defective because it was not sworn in the presence of a commissioner of oaths; that the defendant was served with summons and plaint which service is evidenced by an affidavit of service; that accordingly the interlocutory judgment entered herein was regular judgment and; that the Insolvency Act does not prevent a party to exercise its right to peaceable re-entry of a property.

9. The plaintiff when it filed its plaint hereof simultaneously filed a Notice of Motion application dated 13th April 2018. The plaintiff sought prayer for leave to commence proceedings against the defendant; for prayer that the plaint be deemed as duly filed upon payment of applicable fees and; for temporary injunction be issued restraining the defendant from transferring or interfering with the fixtures at the premises.

10. That application was before court on 26th July 2018 and on the plaintiff proving service on the defendant the court granted the injunction sought. No other prayer in that plaintiff's application was granted. It follows that the plaintiff did not get leave to commence this suit as required under the Insolvency Act (hereafter the Act) under section 560 (1). That section provides:

While a company is under administration-

(a).....;

(b)

(c).....;

(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.

11. It is unfortunate that the plaintiff, in opposing the defendant's application trivialized the above section yet it is the position in law. The plaintiff should not have commenced this action, at all, without the consent of the Administrator or the approval of the court. No consent or approval was granted before this action was filed by the plaintiff. The purpose of obtaining that consent or approval was an issue in the case **In re Hi-Plast Limited (2020) eKLR** thus:

AIB Capital Markets PLC & Anor vs Atlantic Computer Systems PLC & Others (1990) EWCA CIV 20 it was held;

“The making of an administration order triggers the prohibition on proceedings being brought or continued against the Company... the owners of property, and of charges over property are disabled from exercising their proprietary rights unless the Administrator consents or court gives leave.

.....The Prohibition in Section 11(3) (c) & (d) is intended to assist the Company, under management of the administrator, to achieve the purpose for which administration was made.... The Court has to carry out a balancing exercise, balancing the legitimate interest of the lessor and the legitimate interest of other Creditors of the Company.....”

12. Undoubtedly the plaintiff filed this action before obtaining the Administrator's consent or the court's approval. What is the effect of this suit which was filed contrary to section 560 (1) (d) of the Act? I dare say that the absence of that consent of the Administrator or approval of the court renders this case nullity. That is the effect of failing to abide by provisions of section 560 (1) (d). The Supreme Court in the case **County Executive of Kisumu v County Government of Kisumu & 8 Others (2017)** considered an application for prayer for leave to file an appeal out of time and for prayer that on granting that leave the court do validate an appeal that had already been filed. This is what the Supreme Court had to say:

“[35] We are in total agreement with the respondent that an appeal filed in this Court out of time without leave of this Court is irregular and this Court will not invoke such ‘novel’ principles as urged by applicant so as to validate that petition and deem it as properly filed. We buttress this Court's position in *Nicholas Salat* when this Court stated thus:

“...In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of

time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence."

13. By analogy with the case in the Supreme Court the plaintiff hereof which was filed herewith by the plaintiff, before consent by the Administrator or approval of the court were given, is irregular a nullity and having no legal consequence.

14. The plaintiff's plaint, in view of what is stated above is struck out with costs to the defendant. It will follow therefore that the interlocutory judgment entered herein in favour of the plaintiff will be set aside. The plaint is a nullity even if the defendant's affidavit was a copy and not an original, as alleged by the plaintiff.

15. The defendant had sought, as one of its prayers for the transfer of this case for consolidation with Mombasa ELC No 171 of 2018. Having found the plaintiff's plaint is a nullity this suit is incapable of being consolidated with another suit.

CONCLUSION

16. In the end the orders of the court are:

a. This suit is hereby struck out with costs to the defendant.

b. The interlocutory judgment entered herein on 23rd May 2018 is set aside ex debito justitiae.

c. The defendant is awarded the costs of the Notice of Motion dated 15th August 2018.

DATED, SIGNED and DELIVERED at NAIROBI this 25th day of JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendant:

ORDER

This decision is hereby virtually delivered this 25th day of June, 2020.

MARY KASANGO

JUDGE