



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO.10 OF 2017

IN THE MATTER OF NAKUMATT HOLDINGS LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

AND

IN THE MATTER OF AN APPLICATION FOR AN ADMINISTRATION ORDER

BY

PRIMROSE MANAGEMENT LIMITED.....1ST APPLICANT

SUNMATT LIMITED.....2ND APPLICANT

COMPULYNX LIMITED.....3RD APPLICANT

JADE CONCEPTS LIMITED.....4TH APPLICANT

AND

NAKUMATT HOLDINGS LIMITED.....1ST RESPONDENT

G.C. RETAIL LIMITED.....2ND RESPONDENT

RULING NO.2

1. This Ruling is in relation to the applications by several entities, who are the Lessors of some premises which have been leased by **NAKUMATT HOLDINGS LIMITED**.
2. The applicants are **NYALI PLAZA LIMITED; SOUTHCOAST HOLDINGS LIMITED; SABAKI RIVER HOLDINGS LIMITED and HOLDEN INVESTMENTS LIMITED**.
3. At the premises rented by Nakumatt Holdings Limited, the leasee operates a chain of supermarkets.
4. It is common ground that in the last 2 years, the Company had faced a difficult time, in terms of cash-flow, resulting in it being unable to meet its obligations to the landlords.

5. As a consequence of the Company's failure to remit payments of rent when they fell due, the Company had accumulated substantial rental arrears.
6. It is the applicants' case that due to the inability of the Company to pay rents, each of them was suffering substantial losses.
7. For instance, **SABAKI RIVER HOLDINGS LIMITED** stated that unless it was permitted by the Court, to re-enter its premises at the **OASIS MALL, MALINDI**, the said premises might be sold off by the **DIAMOND TRUST BANK LIMITED**, to recover the financial facility which the bank had advanced to the Landlord. The premises in question could risk the possibility of sale because the said premises was charged to the bank.
8. According to the Landlords, the rental arrears were in the sum of Kshs. 20,152,588.10, as at 27th July 2017.
9. Meanwhile, **SOUTHCOAST HOLDINGS LIMITED** has leased to Nakumatt, the premises at **CENTRE POINT**. That property was charged to **FIDELITY COMMERCIAL BANK LIMITED**.
10. As at 24th July 2017, Nakumatt owed rental arrears of Kshs. 6,612,121.14/-
11. The continued default by Nakumatt puts to risk the property of Southcoast Holdings Limited, as the chargee may well decide to realize the said property, if the Landlord did not service the loan.
12. In respect to High Park Investments Limited, Nakumatt owed rental arrears amounting to Kshs. 12,000,000/-, as at 24th May 2017.
13. On the other hand, Nakumatt owed rental arrears amounting to Kshs. 8,000,000/-, to High port Properties Limited.
14. Pursuant to the Lease Agreements executed between Nakumatt, (*on the one hand*) and High Park Investments, and with High Port Properties Limited, respectively, the Landlords had a contractual right to re-enter the premises leased to Nakumatt, if the tenant entered into liquidation or if the tenant was in arrears of rent.
15. It is the request of the landlords that this Court grant them leave to re-enter their respective premises, which each of them had leased to Nakumatt.
16. Another Landlord who wishes to reclaim the space it had leased to Nakumatt is **HOLDEN INVESTMENTS LIMITED**. As at 1st October 2017, it was owed Kshs. 28,023,609/-.
17. As the leased premises were located within a property which the landlord had given to Bank of Baroda, as a security for credit facilities accorded by the Bank, the landlord said that the property was at the risk of being disposed of by the Bank.
18. The risk arose from the fact that the landlord was unable to service the credit facilities, because Nakumatt was not meeting its obligations under the lease.
19. The continued default by Nakumatt also exposed the landlord from being listed by the Credit Reference Bureau, as a defaulter.
20. In an endeavour to address the attendant risks, the landlord sought the authority of the Court to peaceably re-enter the premises, which as situated on **KAKAMEGA/MUNICIPALITY BLOCK 1/823**.
21. Meanwhile, Nyali Plaza Limited are the Landlords of Nakumatt at the premises where Nakumatt trades in Mombasa, under the name and style of "Nakumatt Cinemax".

22. As at 20th November 2017, Nakumatt owed Nyali Plaza Limited the sum of Kshs. 7,745,748/- on account of rental arrears.

23. This applicant seeks leave from the Court, to proceed with the process of the forfeiture and peaceable re-entry of the premises leased to Nakumatt.

24. When the applications by the Landlords came up for hearing, it was agreed that Mr. Samir Inamdar, the learned advocate for Nyali Plaza Limited would take the lead.

25. When canvassing the application, counsel pointed out that whereas Nakumatt owed Nyali Plaza Limited, the sum of Kshs. 7.7 Million, as at November 2017, Nakumatt did deposit into the landlord's account, the sum of Kshs. 2.2 Million. The said remittance was made on 2nd of January 2018.

26. However, as the rent for the January to March 2018 Quarter had become due, the arrears of rent had now increased to Kshs. 12.7 Million.

27. Ordinarily, when a landlord is owed money by his tenant, he could levy distress for rent, if the tenancy was not one which was "controlled".

28. The Landlord could also invoke the provisions of the Lease, to enable it regain possession from the defaulting tenant.

29. However, under the Insolvency Act, 2015 a moratorium issues automatically when an application has been made for the appointment of an Administrator of an Insolvent Company.

30. Pursuant to Section 561 (1) of the Insolvency Act;

"This section applies if an application for administration in respect of a company has been made and –

a) The application has not yet been granted or dismissed; or

b) The application has been granted but the administration order has not yet taken effect".

31. And Section 561 (4) provides as follows;

"When this section applies, the following provisions have effect:

a) A resolution may not be passed for the liquidation of the company;

b) The court may not make an order for the liquidation of the company;

c) A person may take steps to enforce security over the company's property only with the approval of the court;

d) A person may take steps to repossess goods in the company's possession under a hire purchase agreement only with the approval of the court;

e) A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the approval of the court;

....."

32. In this case, the landlords had given notices to Nakumatt, concerning the arrears of rent.

33. However, prior to the expiry of the Notice period, Nakumatt filed an application for the appointment of an Administrator, thus bringing into play the provisions of Section 561 (4) (e) of the Insolvency Act. In effect, the landlords of Nakumatt may now only exercise their respective rights of forfeiture by peaceable re-entry, if the Court gives its approval. It was because of that legal requirement that the landlords moved the court, hoping to get the requisite approval to take back the possession of the premises which each of them had leased to Nakumatt.

34. When canvassing the application, Mr. Inamdar stated that his client was not interested as to whether or not there was an Administration Order.

35. Secondly, he said that his client was not seeking to recover the arrears of rent.

36. The landlord's primary interest was that it be allowed to exercise its right to repossess the premises in issue.

37. Later, Mr. Ogola, the learned advocate for Parkside Limited spoke on behalf of both his client and also on behalf of the other Landlords. He told the court that the landlords would adopt the submissions made by Mr. Inamdar.

38. Meanwhile, Messrs C.K. Patel Limited had chosen to canvass their application after this court had delivered its Ruling on the application for the appointment of an Administrator.

39. Nonetheless, when Mr. Kagiri, the learned advocate for C.K. Patel Limited canvassed his clients application, his submissions were largely a mirror of the submissions made on behalf of the other landlords.

40. This Ruling will therefore also relate to the application by C.K. Patel Limited.

41. The landlords drew attention to the fact that Nakumatt had simply reiterated what it had said when canvassing its application for the appointment of an Administrator.

42. In brief, Nakumatt had said that it was pegging its recovery on a planned merger with Tuskys. However, the planned merger had been opposed by the Competition Authority of Kenya.

43. The landlords also said that whereas Tuskys had indicated a desire to inject Kshs. 650 Million towards rent and Kshs. 1.5 Billion towards stocks, the said Tuskys had not given its commitment to inject funds into Nakumatt's business.

44. In any event, the landlords perceive the Guarantee which was offered by Tuskys as one which was only addressing itself to future rents.

45. Furthermore, the Guarantee had an Arbitration Clause within it, which meant that it was not a Guarantee on Demand.

46. As there was no dispute between Nakumatt and the landlords, it was the view of the landlords that there cannot arise any dispute, whether on the question of the amounts due or when the rents were payable.

47. In those circumstances, the landlords found themselves unable to accept the Guarantee.

48. Of an even greater concern to the landlords was the fact that the Guarantee states that it could be discontinued by Tuskys, upon the issuance of one month's notice.

49. In effect, the landlords view was that neither the rental arrears nor the future rents were guaranteed by Tuskys.

50. Considering that my learned brother, Onguto J. had earlier found Nakumatt to be hopelessly insolvent, the landlords submitted that they therefore ought to be allowed to re-enter their respective premises.

51. Once again, they emphasized that they were neither seeking to restrain for rent or to detain any of the assets belonging to Nakumatt.

52. In support of the applications, the landlord cited the case of **AIB CAPITAL MARKETS PLC & ANOTHER Vs. ATLANTIC COMPUTER SYSTEMS PLC & OTHERS [1990] E W C A CIV 20** as an authority for the proposition that in the absence of special circumstances, the court ought to automatically grant leave to the landlords to re-enter their premises.

53. In that case Nicholls L J noted that there were two broad categories of cases, in respect to which leave of the court was sought. He described the two classes thus; at page 482;

“1) where a person seeks leave in a liquidation to possess or repossess what in law is his own property and

2) where a person seeks leave in a liquidation to exercise a remedy over the company’s property.

.....

In the case of a lessor of land to a company, the appropriate category depends on the remedy the lessor is seeking to exercise in respect to the arrears of rent owing to him. If he is seeking to exercise ‘a right of re-entry, he falls in the first category. If he is seeking leave to distrain, he falls in the second category”.

54. Thereafter, at page 483 the learned Judge said;

“Two points are to be noted regarding cases of this first type, which we can call “*possession*” cases: (1) in the absence of special circumstances leave is given as of course, and (2) it is immaterial whether the arrears of rent under the lease.....accrued due before or after the commencement of the winding up”.

55. It is to be noted that that was the legal position as espoused in the year 1990.

56. The landlords next authority was the case of **LAZARI INVESTMENTS LIMITED Vs PETER MARK SAVILLE & OTHERS [2015] E W H C 2590.**

57. It is noteworthy that in that 2015 case, the court found guidance in the earlier case of **AIB CAPITAL MARKETS PLC & ANOTHER Vs ATLANTIC COMPUTER SYSTEMS PLC & OTHERS [1990] E W C A CIV 20.**

58. The landlords acknowledged that the court, when considering whether or not to authorize landlords to re-enter premises which had been leased to a tenant, would have to weigh the lessor’s interests against the interests of the other creditors. This is how the court stated the position;

“The guidance in Atlantic Computer Systems also states that the court, in seeking to give effect to the statutory purpose of the administration, has to conduct a balancing exercise of the legitimate interests of the lessor and the legitimate interests of other creditors of the Company. The court has to compare the financial loss suffered by the landlord, if permission to commence proceedings is refused and he is temporarily denied the relief sought, with the loss suffered by other creditors, if permission to issue proceedings is granted.

The court must take into account money paid by the administrators to compensate the landlord. The court also attaches great importance to the proprietary interests of the

landlord, who should not be prejudiced by the way in which the administration is conducted save to the extent that this may be unavoidable and even then this will usually be acceptable only to a strictly limited extent”.

59. Being guided by that authority, this court has conducted a balancing exercise as between the legitimate interests and rights of the landlords, and the legitimate interests and rights of the other creditors.

60. I appreciate that whilst the quantum of the debts owed to the landlords was much smaller if compared to the debts owed to the other creditors, it would not be possible for Nakumatt to carry on business if it did not have premises where such business would be carried out.

61. On the other hand, the court appreciates that the landlords cannot be expected to continue hosting Nakumatt when the tenant was not paying rents which were already owing.

62. It is Nakumatt’s position that when its supermarkets are re-stocked, they will generate funds which would enable it pay both current rents and salaries, together with the arrears.

63. The said position was premised on the pilot project which was run in December 2017. The pilot project was supported by Tuskys, and it enabled Nakumatt pay to the landlords a sum of Kshs. 239 Million.

64. In my considered opinion, the results of the pilot project was a demonstration that there is a real possibility that Nakumatt has not plummeted to irredeemable depths.

65. When Mr. Kagiri advocate was canvassing the application by C.K. Patel Limited, he said that Nakumatt could very well seek other premises, where it could carry on the business.

66. Of course, it is not curved out on a rock that the applicants must remain the landlords of Nakumatt regardless of the losses which the landlords were incurring.

67. However, the court takes note of the fact that if Nakumatt were to give up the premises where it is currently located, the company would require to do much more to get customers, as compared to a scenario in which the customers would visit the company’s supermarkets at the venues which customers are already familiar with.

68. As was noted in the **LAZARI** Case, at paragraph 78;

“...an administration is intended to be only an interim and temporary regime and to the following particular features of that guidance:

1) If granting leave to a lessor of land to exercise his proprietary rights and re-possess his land or goods is unlikely to impede the achievement of the purpose of the administration, leave should normally be given”.

69. In this case the court ordered that an Administrator be appointed: that order was made on 22nd January 2018.

70. The purpose of the administration is to give an opportunity to the Company to strive to raise money which would benefit the bulk of the unsecured creditors, who would otherwise suffer total losses if the company were to be liquidated immediately.

71. The administrator has just been appointed. The basis of the optimism expressed by the Company and the administrator was the reality as it exists currently.

72. A pilot project was conducted at the existing outlets, and the same yielded positive results.

73. If the landlords were to be authorized to immediately re-enter their premises and thus remove Nakumatt therefrom, that is likely to impede the achievement of the purpose of administration.

74. The Administrator has been given a period of sixty (60) days within which he must provide the Court and the Creditors with proof of what he will have achieved and what he planned to achieve thereafter.

75. In effect, although the court has not yet determined that the Administration will end in 60 days, it will be possible for all creditors and the court to have a much clearer picture concerning the viability of the company's business within that span of time.

76. In order to give the Administration Order a chance, I decline the landlords request to re-enter their respective premises.

77. Notwithstanding the rejection of the applications, I order that each party will pay his or her own costs of the applications by the landlords.

78. Finally, although the applications have been rejected I hold that that decision cannot be a bar to other applications, even by the same landlords, at a future date. I so hold because Administration, by its very nature, purpose and intent is supposed to be an interim or temporary regime.

79. In this case, the court will be closely supervising the Administration exercise, to verify whether or not it was moving in the right direction.

80. The landlords are also encouraged to take an active role in monitoring the administration. It is intended that when the Administrator gives his Report to the Court, a proper evaluation will be conducted, to enable the Court determine the most effective and beneficial route to take thereafter.

81. The conduct of the parties and of the Administrator shall be material when the court will be called upon to make further orders.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of January 2018.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ng'ang'a & Taibjee for Nakumatt

Ogola for Parkside Developers Ltd

Muoka for Sabaki & Southcoast

Omau for Abinja for Kenindia Assurance

Ms. Kariuki Owesi for Mitcom Ltd

Ms. Owesi for Wandabwa for Bobmil Ltd

Oyoo for Kenchic Ltd.

Sophia Kagendo – Court clerk.