



**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.....1<sup>ST</sup> APPLICANT  
SUNMATT LIMITED.....2<sup>ND</sup> APPLICANT  
COMPULYNX LIMITED.....3<sup>RD</sup> APPLICANT  
JADE CONCEPTS LIMITED.....4<sup>TH</sup> APPLICANT  
  
**AND**  
  
NAKUMATT HOLDINGS LIMITED.....1<sup>ST</sup> RESPONDENT  
G.C. RETAIL LIMITED.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The application dated 18<sup>th</sup> December 2017 was brought by four companies, namely;
  - i. **PRIMROSE MANAGEMENT LIMITED;**
  - ii. **SUNMATT LIMITED;**
  - iii. **COMPULYNX LIMITED; and**
  - iv. **JADE CONCEPTS LIMITED.**

2. The applicants main prayer is that this Court should grant an Administration Order in respect to **NAKUMATT HOLDINGS LIMITED**.

3. They ask the Court to appoint **PETER OBONDO KAH**I as the Administrator. In the alternative, they ask the Court to appoint any other Qualified Insolvency Practitioner in Kenya, as the Administrator.

4. The further order sought by the applicants is that the Directors of Nakumatt Holdings Limited be directed to assist the Administrator to achieve the objectives of the administration, for as long as the Administration Order remains in force.

5. It was the applicants' request that the Court would supervise the process of Administration. Such supervision by the court, if undertaken, would be in accordance with the provisions of the Insolvency Act and also in terms of such orders as the court would determine.

6. The Company, Nakumatt Holdings Limited operates a chain of supermarkets in Kenya and within the East African Region.

7. The applicants described the Company as an entity which served to connect Suppliers to Consumers, through outlets which the Company had leased from Landlords who owned premises which were strategically located.

8. In many of the premises which it leased, the Company was an Anchor Tenant.

9. The Court was told that the Company had, at its peak, employed about 6,500 members of staff, and it was paying substantial sums of money as taxes.

10. However, due to a host of reasons, the Company started experiencing serious cash-flow difficulties in the year 2016. The Company was therefore unable to meet its financial obligations to the Landlords, the Suppliers, and the employees.

11. The applicants are some of the creditors of the Company. The said Company had acknowledged owing the following sums to the applicants;

**a. Primrose Management Limited - Kshs.142,424,000/-**

**b. Sunmatt Limited - Kshs. 335,950,522/-**

**c. Compulynx Limited - Kshs. 31,833,861/-**

**d. Jade Concepts Limited - Kshs. 2,459,905/-.**

12. It is common ground that none of the applicants holds any security in respect of the money which they are owed. All of them are unsecured creditors.

13. Meanwhile, due to the escalation of creditors, the Company was in a position in which it had insufficient funds and assets, to meet its liabilities.

14. Due to the Company's inability to pay its debts as they fall due, the suppliers had stopped making available further supplies; the employees were not receiving their remuneration; and the landlords were threatening to evict the Company from their respective premises.

15. The continued inability of the Company to pay its debts has resulted in a situation in which some of its creditors have threatened to have the Company liquidated.

16. The applicants have expressed the view that if the Company were to be liquidated, the creditors who were unsecured, would suffer a total loss.

17. On the other hand, the applicants believe that if the Court were to grant an order for the Administration of the Company, that would give rise to the possibility that the Company would be revived, thus giving hope to the creditors. It was for that reason that the applicants have called upon the Court to appoint an Administrator over the Company, **NAKUMATT HOLDINGS LIMITED**.

18. Pursuant to the provisions of Section 520 of the Insolvency Act;

**“An “Administrator, in relation to a company, means a person appointed under this part (VIII) to manage the company’s affairs and property, and, if the context requires, includes a former administrator”.**

19. Pursuant to Section 522 (1) of the Insolvency Act, the Objectives of the administration of a company are as follows;

**“a) to maintain the company as a going concern;**

**b) to achieve a better outcome for the company’s creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);**

**c) to realize the property of the company in order to make a distribution to one or more secured or preferential creditors”.**

20. In this case, the applicants expressed the view that the appointment of an administrator would achieve a better outcome for the company’s creditors as a whole, than would likely be achieved through liquidation of the company.

21. Implicit in the provisions of Section 522 (1) (b) is the acknowledgement that an order for Administration of an Insolvent Company is not a permanent bar to the liquidation of the company. In other words, even when an Administrator is appointed, the company may still be liquidated later, if the Administration was not successful in meeting its objectives.

22. The applicants have drawn the Court’s attention to the Audit which was conducted by **K P M G**. The applicants contention was that **K P M G** had come to the conclusion that the Company’s Business was viable.

23. The court was invited to weigh the benefits of liquidation vis-a-vis the appointment of an Administrator. That exercise of weighing the benefits against each other was to be conducted within the context of the following facts;

**a) The company’s fixed Assets are worth Kshs. 4.9 Billion**

**b) The company’s Nett Working assets are worth Kshs. 4.2 Billion.**

**c) The Liability of the Company is worth Kshs. 40 Billion.**

24. According to the applicants, if the company were to be liquidated when the liabilities exceeded the assets by Kshs. 30 Billion, the unsecured creditors would walk away empty-handed.

25. On the other hand, the applicants believe that if an Administrator were to be appointed, there was a possibility that a Scheme of Arrangement would give to the unsecured creditors, a chance to recover some of the money they are owed.

26. Whilst canvassing the application, Mr. Ouma, the learned advocate for the applicants, submitted that the “Cure” for the ailing Company rests in the appointment of an Administrator, rather than allowing it to be sent to the “morgue”, where the company would certainly die. I understood the applicants to equate liquidation to a process through which the sick company would suffer death.

27. On his part, Mr. Taibjee, the learned advocate for the Company, drew the attention of the Court to the fact that the Company had filed 4 affidavits to respond to the application.
28. He pointed out that there had been a Pilot Project which was carried out by the Company in four (4) of the outlets where the landlords had given an assurance to the Company that the landlords would not shut out the Company.
29. At the said outlets, the Company carried out re-stocking, through the assistance of **TUSKYS**.
30. According to the Company, it made profits in each of the 4 outlets where the pilot project was conducted.
31. The Company had, reportedly, paid for all the Supplies which had been provided to it during the said pilot project.
32. Secondly, the Company said that it paid the rents for the month of January 2018, for all its current 27 branches.
33. In the light of the “*success story*” of the pilot project, the Company expressed the view that if its branches were kept open for trading for a period of 3 months, it would be able to start paying-off the arrears, whilst sustaining payments of current debts.
34. However, the Company also believes that the only way it could actually achieve continued viability of its business would be, if the landlords allowed it to remain at the various outlets.
35. The Company’s view was that an Administrator, if appointed, would soon come up with plans to pay the landlords.
36. Meanwhile, as a gesture of its commitment, the Company procured a Guarantee from **TUSKER MATTRESS LIMITED**, in favour 27 specified landlords.
37. Through the said Deed of Guarantee and Indemnity dated 11<sup>th</sup> January 2018, the guarantor undertook to pay rents for the next three (3) months, commencing 1<sup>st</sup> February 2018.
38. Meanwhile, the Company believes that, apart from the rents, (*which are guaranteed by Tusker Mattress Limited*), the branches would be self-sustaining.
39. Apart from **K P M G**, the Company submitted that the management of Tusker Mattress Limited also demonstrated its faith in the viability of the Company’s business. They did so by agreeing to inject into the business, the sum of Kshs. 650 Million.
40. Therefore, as the monthly rents for the 27 branches totalled Kshs. 116 Million, the Company said that the balance of the money which Tusker Mattress Limited (*hereinafter “Tuskys”*) were offering, would go towards the payments of salaries for staff.
41. Furthermore, Tuskys is said to be ready and willing to utilize the sum of between Kshs. 1.5 Billion and Kshs. 3.0 Billion, to re-stock all the branches.
42. In the circumstances, the Company was convinced that within 3 months, after an Administrator was appointed, the company’s business would get back to normal.
43. In concrete terms, the Company told the court that it had paid to the landlords a sum of Kshs. 239,444,687/- between October 2017 and January 2018.
44. Therefore the Company was supportive of the application for the appointment of an Administrator.

45. The Company also supported the proposal that the Court ought to supervise the Administrator.
46. In answer to the application, Mr. Esmail, the learned advocate for **G.C. RETAIL LIMITED**, put up a spirited opposition.
47. First, he pointed out that the Company had previously brought its own application for the appointment of an Administrator.
48. On 16<sup>th</sup> November 2017 Onguto J. dismissed the Company's application.
49. Thereafter, the company lodged an appeal at the Court of Appeal, being **CIVIL APPEAL No. 400 of 2017**. That appeal, which was filed on 30<sup>th</sup> November 2017, was withdrawn in its entirety on 11<sup>th</sup> January 2018.
50. Notwithstanding that withdrawal, the respondent, G.C Retail Limited, submitted that the current application constituted a direct and a collateral attack on the decision Justice Onguto.
51. The respondent pointed out that one of the applicants, being **PRIMROSE MANAGEMENT LIMITED**, was one of the parties in the case which **NAKUMATT HOLDINGS LIMITED** had filed, when seeking an Administration Order.
52. More significantly, this court was informed of the following facts;
- The application herein and the earlier application were largely the same. This is because;**
- a. The present application seeks to rely on the Business Review Report dated August 2017: That Report was available by the time Onguto J. heard the Company's application, but the Company never presented it to the learned Judge.**
- b. The applicants have made reference to the Management Services & Loan Agreement dated 2<sup>nd</sup> October 2017.**
- That document was also available when the Company canvassed its application, but the company did not present it to the court.**
- Instead, the Company presented the salient features of the Report.**
53. In particular, the respondent highlighted the fact that the sums cited by the Company, (*at the hearing before Onguto J.*) were actually extracted from the Management Services & Loans Agreement dated 2<sup>nd</sup> October 2017.
54. Following from the sums and figures that were presented to the court, the learned Judge noted that the debts exceeded the assets of the Company.
55. The Judge did fault the Company for failing to make full disclosure, stating that the conduct of the said Company appeared to have been intended to only benefit the company.
56. As the Company had now abandoned its appeal, the respondent submitted that the findings by Onguto J. were binding.
57. In my considered opinion, when a party chooses to withdraw its appeal, it must be deemed to have made a conscious decision to discontinue any challenge that it may have intended to raise against the decision which it had been appealing against.
58. Therefore, I do reiterate that Onguto J. was right to have disregarded evidence which the Company

had declined to release the creditors, but which the said Company had invited the court to take into account.

59. As the learned Judge held;

**“All parties are entitled to the information availed to the court, even if it means binding them to confidentiality or redacting any material”.**

60. The applicants and the Company have now provided the information which the Company had previously withheld from the creditors.

61. The respondent believes that the only proper route through which the information could now have come to court is through Rule 29 of the Court of Appeal Rules.

62. Perhaps, if the Company was still pursuing its appeal, it could possibly have sought leave of that Court to make available the evidence which the High Court had earlier rejected. However, it must be noted that the Company had already withdrawn the appeal. Therefore, it was no longer possible for the Company to invoke the Court of Appeal Rules, in order to enable it make available the evidence in issue.

63. Secondly, the application before me is not by the Company. It is an application by 4 creditors.

64. Of those 4 creditors, one was a party to the application which the Company had filed earlier.

65. As the Company and Primrose Management Limited were both parties to the earlier application, it means that they could have provided the court with the material which was already in existence when the Company canvassed its application.

66. In the circumstances, if the Company and Primrose Management Limited (*henceforth “Primrose”*) had been the only applicants before me, I would have told them that they cannot be permitted to have a second bite at the cherry. They had already had an opportunity to provide evidence in the earlier application. If they made a choice not to make available the said evidence, and because the court’s decision to disallow the application was premised on the failure to provide the evidence to the creditors, it would be wrong to allow the same parties to bring a similar application, and then bring forward the evidence which they had previously withheld.

67. In this case, however, none of the applicants had canvassed any application earlier. The first application was brought by the Company alone.

68. The fact that the application brought by the Company had been rejected by Onguto J. was not a bar to one or more creditors bringing an application for the appointment of an Administrator.

69. Although the Company had originally declined to make a full disclosure, that fact cannot be blamed on the creditors.

70. On his part Mr. Muoka, the learned advocate for **SABATI LIMITED** and **SOUTH COAST LIMITED**, opposed the application. He termed it an abuse of the court process.

71. He explained that his client had already re-entered the premises which had been leased to the company.

72. The landlord re-entered the premises in an effort to protect itself against the companies which had provided it with the funding used for the construction of the said premises.

73. Thereafter, Mr. Ogola, the learned advocate for **PARKSIDE DEVELOPERS LIMITED**, opposed the application.

74. As far as he was concerned, the current application failed to raise any new facts, which were not previously available when the Company canvassed its application before Onguto J.
75. Meanwhile, as regards the Guarantee offered by **TUSKER MATTRESS LIMITED**, it was asserted by Parkside Developers Limited that most creditors had rejected it.
76. I must point out at this stage that there was no express demonstration of the alleged rejection by most of the creditors.
77. However, I find that it is a reasonable factor raised by Parkside Developers Limited concerning the fact that the Guarantee had been issued by a rival of Nakumatt Holdings Limited.
78. It was therefore possible that the Guarantee could be found to offend the law on competition.
79. Nonetheless, the issue is to be determined by the Competition Authority of Kenya. This court has no jurisdiction to determine whether or not the said Authority would sanction the Guarantee or any such other support as Tusker Mattress Limited was ready and willing to provide to the Company.
80. I also agree with the concerns about the Guarantee being limited to only 3 months' rent.
81. The fact that the proposed Guarantee instrument incorporates a provision for arbitration, in the event of disputes, might pose a challenge if it later had to be enforced.
82. Having given the consideration to the application, the submissions made and the authorities provided by the parties, I reiterate that the applicants were not barred from bringing the present application.
83. There is a possibility that the Company was working with the applicants, who are creditors, in an endeavour to have a second chance at having an Administrator appointed. However, there is no evidence to show that the applicants were merely stooges of the company.
84. I find that the Company is already unable to pay its debts. In that situation, it is possible that some creditors who have run out of patience could seek the liquidation of the Company.
85. As the debts far exceed the value of the Company's assets, it would not be unfair for a creditor to commence the process of the liquidation of the company.
86. Given the ratio of the assets to the liabilities, it is more probable than not that the liquidation of the Company would lead to a situation in which most, if not all the unsecured creditors would walk away empty-handed.
87. In my considered opinion, the unsecured creditors, in particular, and all the other creditors would be better off if the Company was put under Administration in the first instance, than they would be in if the company was to be liquidated straightaway.
88. In so holding, I am not overlooking the fact that currently the Company is insolvent. In fact, I have taken note of the sub-heading of Part VIII of the Insolvency Act which deals with the;

#### **“ADMINISTRATION OF INSOLVENT COMPANIES”.**

89. Therefore, I recognize that a company which was solvent cannot be placed under administration.
90. I have also taken note of the positive results of the Pilot Project which the Company undertook in December 2017. Those results, tentative though they may be, led me to believe that there is a possibility that the Company can turn around. In other words, it would appear that the company's business may still be a viable concern.

91. But it cannot be denied that the Company is ailing very seriously.
92. Secondly, I acknowledge that the creditors have suffered and continue to suffer when the Company was unable to pay what it owes them.
93. Administration is not intended to simply come to the rescue of companies which were insolvent. The interests of the creditors must be a matter of paramount importance. If there was no likelihood of turning around an insolvent company, there would be no justification of appointing an administrator over such a company.
94. In this case, the secured creditors did not actively take a position on the application. But I believe that that is an indication that they did not object to the appointment of an administrator.
95. For now I find that the Guarantee and Indemnity offered to the landlords is perhaps insufficient in substance and scope. If the applicants and the company were to expect the court to grant more authority to the administrator, the issue of security, especially to the landlords is key.
96. I am alive to the fact that at this stage there should be no creation of a class of preferential creditors, from amongst the unsecured creditors. Therefore, the need for some security being provided to the landlords arises from the fact that unless the Company first secures the premises where it will carry on its business, nothing else will work.
97. I am also alive to the fact that **K P M G** has expressly stated that without the injection of funds, the company's business may not be sustainable.
98. So far, the Company has made reference to the promise by Tuskys to provide some funds for buying stocks.
99. However, that plan appears to have run into some head-winds, as the **COMPETITION AUTHORITY of KENYA** had apparently rejected the proposed merger between Tuskys and Nakumatt.
100. But the Company has shown that it had now made a formal application to the Competition Authority of Kenya, with the hope that the said Authority will give its greenlight to a plan which would facilitate the proposed Administration.
101. The effect is that although there is a possibility of turning around the Company's business, there also remain some grey areas which place hurdles in the path of realizing the objectives of Administration.
102. In those circumstances, I find and hold that whilst an Administration Order would more probably than not give rise to results which were more beneficial to all creditors than a liquidation of the company could achieve, justice demands that the Administration be closely supervised by the court.
103. As to the choice of the person to be appointed as the Administrator, the respondents did not make any suggestions, and I find no reason to reject the applicant's proposal.
104. Accordingly, I now order that **PETER OBONDO KAH**I be appointed as the Administrator of **NAKUMATT HOLDINGS LIMITED** forthwith.
105. The said Administrator will assume his responsibilities as soon he formally accepts the said appointment.
106. The Administrator shall comply with the provisions of Section 563 of the Insolvency Act.
107. Within 60 days of his appointment, the Administrator will ensure that a Creditors Meeting was held.
108. At the first Creditors Meeting, the Administrator shall address all the concerns of the creditors,

including those specifically mentioned earlier in this Ruling.

**109.** Within 7 days of the Creditors Meeting the Administrator will provide all the known creditors and also the Court with his Report, together with Minutes of the meeting.

**110.** The Court will, after the reading of this Ruling, set a date when it will give further Directions and Orders.

**111.** Meanwhile, as regards the costs of the application dated 18<sup>th</sup> December 2017, each party will bear his or her own costs. I so order because although the applicants have been successful, I find no reason in law or in fact for requiring the respondents or the Company to pay the costs of the application.

**112.** It is hoped and expected that the Administration Order, if properly executed, will be beneficial to all the creditors. Therefore, I choose not to penalize or to reward any party, through an order which would see one or another party pay costs to others.

**DATED, SIGNED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of January 2018.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Taibjee & Aduda for Nakumatt

Ogola for Parkside Ltd

Miss Amayo for Esmail for G C Retail Ltd

Ngatia for Ouma for Primrose Ltd

Ngatia for Ouma for Sunmatt Ltd

Ngatia for Ouma for Compulynx Ltd

Ngatia for Ouma for Jade Ltd

Otaga for Inamdar for Nyali Plaza Ltd

Mailu for African Cotton Ltd

Ogola for Chandaria Industries

Mrs. McAsila for Holder Investment Ltd

Miss Cheruiyot for Kabaiko for Brookside Diaries Ltd

Manda for McCourt for Tri dimensional Ltd

Manda for McCourt for Comole Ltd

Manda for McCourt for Winner Pure Health

Muoka for Sabaki Ltd

Muoka for South Coast Ltd

Mutua for Guaranteed Trust Bank Ltd

Mutua for Nanyuki Mall Ltd

Oyoo for Kenchic Ltd

No appearance for Salim Wazara Ltd

No appearance for Kenindia Insurance Ltd

No Okoth for Bowip Agenices Ltd

Mailu for Gold Crown

Collins Odhiambo – Court clerk.