



Nthiwa & 3 others (Suing as the Administrators of the Estate of the Late Grace Mumbua Nthiwa) v Mastermind Tobacco (K)Ltd (Under Administration) (Environment and Land Miscellaneous Application E041 of 2024) [2024] KEELC 5104 (KLR) (3 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E041 OF 2024**

**J OMANGE, J
JULY 3, 2024**

BETWEEN

**FAITH MBINYA NTHIWA 1ST APPLICANT
JUDITH MBATHA NTHIWA 2ND APPLICANT
MIKE NTHIWA MUSILA 3RD APPLICANT
MUTHEU MUSILA 4TH APPLICANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE GRACE
MUMBUA NTHIWA**

AND

**MASTERMIND TOBACCO (K) LTD (UNDER
ADMINISTRATION) RESPONDENT**

RULING

1. *Vide ex parte* Notice of Motion application dated 24th February 2024, the Applicant seeks the following Orders: -
 - a. Spent.
 - b. That the honourable court be pleased to grant leave to the applicants to file a suit against the respondent herein a company under administration for the purposes of recovery of Ksh 16, 458,397/= being the outstanding rent arrears and accrued interest of Ksh 11, 848,286/.
 - c. The costs of this Application be awarded to the applicants.



2. The application was supported by an affidavit sworn by Faith Mbinya Nthiwa on behalf of the other applicants in which she deponed that the Applicants entered into a lease of 5 years with the Respondent over land parcel no. LR 12715/605 Syokimau.

The terms of the lease were that in the 1st term rent would increase by 10% annually. At the end of the term the Respondent had arrears of Ksh. 9,081,314/=.

The applicant avers that the lease was renewed for a second term on the 1st February 2018 and at the expiry of the term the Respondent had accumulated rent arrears of Ksh 7,377,083/=.

3. She avers that the Respondent was placed under administration on 14th December 2023 and hence leave of the court is required before instituting legal proceedings.
4. On 5th March 2024 the court ordered that the application be served upon the Respondent. The Respondent who was served via email on 5th March, 2024 did not file a response.
5. The only issue for determination is whether leave should be granted for the Applicant to institute proceedings against the Respondent while under administration.

Section 560(1) of the [Insolvency Act](#) provides that:-

While a company is under administration-

- a) A person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;
 - b) A person may take steps to repossess goods in the company's. of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;
 - c) A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and-
 - 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."
6. The court expounded on the rationale for these provisions in the case of [Hoggers Limited \(in administration\)v John Lee Halamandres and 11 others](#) [2021] eKLR, where the court quoted with approval [Cook v Mortgage Debenture Ltd](#) [2016] EWCA thus;

“In the case of liquidation and bankruptcy, the purpose of these provisions is essentially two-fold. First, given that the property of the company or individual stands under the statute to be realized and distributed, subject to any existing interests, among the creditors on a pari passu basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the pari passu basis of distribution. Second, given that both a liquidation and bankruptcy contain provisions for the adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation. In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injury claim, the court will give permission for proceedings to



be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate.”

7. From the above-mentioned Section and cited case law, it is clear that while a Company is under Administration, Consent of the Administrator or approval of the court is required before a suit can be filed. The question that is left for the court to answer is which court is to give this approval.

Section 2 of the *Insolvency Act* defines a court to be the High Court and if there is an insolvency division of that court means that Division.

This was given interpretation in the case of *Nakumatt Holdings Limited & another v Ideal Locations Limited* [2019] eKLR in which the court stated: -

“There is good reason, in our view, why Section 2 of that *Act* specifies the court to grant approval should be the court seized of the insolvency matter, namely the High Court. The administration of an insolvent company is for the benefit all creditors of such company and a situation where creditors separately attack or take assets of a company would defeat the overall objective of the administration.”

8. I find that the appropriate court to consider this application is the Commercial Division of the High Court. As such the application is struck out with no orders as to costs.

RULING, DATED, SIGNED AND DELIVERED ON 3RD DAY OF JULY, 2024 VIA MICROSOFT TEAMS.

JUDY OMANGE

JUDGE

In the Presence of: -

Ms. Chamia for the Applicant

Court Assistant: Steve Musyoki

