Cheyne Row Investments Limited v Malde Holdings Ltd (Under Administration) (Insolvency Cause E030 of 2021) [2024] KEHC 8703 (KLR) (Commercial and Tax) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8703 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E030 OF 2021

A MABEYA, J

JULY 22, 2024

BETWEEN

CHEYNE ROW INVESTMENTS LIMITED ..... APPLICANT

AND

MALDE HOLDINGS LTD (UNDER ADMINISTRATION) ..... RESPONDENT

RULING

1. Before Court is an application dated 26/9/2022. The same was brought under Article 159 of *the constitution* of Kenya 2010, sections 522,524,525,530, 560, 586,591,592 of the *Insolvency Act*, Rule 10 95A of the *Insolvency regulations* section 1A, 1B, 3,3A of the *Civil Procedure Act*.

2. The application sought leave to commence legal proceedings as well as arbitral proceedings pursuant to clause 6 of the lease agreement against the respondent. It also seeks a declaration that the actions of the administrators are prejudicial to the applicant as a creditor and the orders to issue prohibiting the respondents and its agents from denying the applicant access to the premises. In the alternative, that the respondent be allowed to enter the premises to remove its stock, computers, servers and other stationery.

3. In support of the application, the applicant relied on the grounds on the face of it and the supporting affidavit of DHRUPUN SUDHIR SHAH sworn on 26/9/2022. It was the applicant's case that the respondent had leased the premises to the applicant vide a Lease dated 10/06/2019 whereby the applicant had observed the terms of the lease.

4. That when the respondent was placed under administration, the administrator locked the applicant's employees from the premises contrary to the provisions of the Lease. That the respondent's actions were unjustified since the audited accounts for the year 2021, showed that the respondent was receiving rental income. That as a result of the respondent's actions, the applicant had suffered losses amounting

to Kshs 15,000,000/- monthly. That the administrator being an officer of the Court by virtue of section 525 of the *Insolvency Act* ("the Act") was answerable to court for his actions.

5. The administrator, HARVEEN GADHOKE, filed a replying affidavit sworn on 25/10/2022. He stated that the application offended section 560 of the Act as it sought substantive reliefs emanating from the lease agreement. That in a bid to defeat the creditors of Malde and Malplast, the directors of both companies deliberately transferred the businesses to the applicant.

6. That the Lease the applicant sought to rely on was not stamped or registered and did not contain a floor plan indicating the space rented by the applicant. He further contended that the issue being one of landlord and tenant, it was under the jurisdiction of the Environment and Land Court. Further that the applicant had not provided any documentation to show that it had been paying rent.

7. In opposition to the application, the respondent filed grounds of opposition dated 5/10/2022. It was contended that leave should be sought before commencing or continuing any suit as against the respondent which the applicant had failed to do. That the Court lacked jurisdiction to grant the applicant leave to commence the arbitration proceedings. It was further contended that the applicant had never complied with its rental payment obligations from the inception of the lease.

8. The respondent further raised a preliminary objection dated 5/10/2022. The grounds upon which the objection was founded were that the application offended section 560(1)(d) of the Act, 2015. That the Court did not have the jurisdiction to grant the applicant leave to commence arbitration proceedings pursuant to section 560 of the *Insolvency Act*.

9. The application was canvassed by way of written submissions which I have considered. The applicant submitted that the preliminary objection was unmerited since the court had the discretion to grant the orders sought as per section 591 of the Act. That a party who is aggrieved by the performance of the arbitrator may apply to the Court for reliefs. It was submitted that the company had paid rent to the company under administration but was evicted from the premises. Th applicant submitted that there were contentious issues between the parties concerning the termination of the lease agreement and therefore the issue ought to be referred to arbitration.

10. On its part, the respondent submitted that in terms of section 560 of the Act, the applicant ought to have approached the Court solely for leave to commence or continue legal proceedings against the company. That the arbitrator acted within his right to terminate the Lease since the applicant had not proved payment of rent.

11. I have considered the pleadings before Court and the submissions of Learned Counsel. The first issue is whether the preliminary objection is sustainable. In *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696, it was held that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

12. In *Independent Electoral & Boundaries Commission v Jane Cheperenger &2others* [2015] eKLR, the Supreme Court of Kenya observed: -

> " ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

13. The respondent raised the objection on the grounds that the application offends section 560 of the Act and as such the Court did not have the jurisdiction to entertain the application.

14. Section 560(1) of the *Insolvency Act*, provides as follows: -

(1) 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 possession under a credit purchase transaction only with the consent 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."

15. The effect of the above provision is that, on a company being placed under administration there is an automatic moratorium by the operation of law. Any dealings with the assets of the company is with the consent or permission of the administrator or court. This includes commencing or continuing with any proceedings against the company.

16. In the present case, one of the prayers in the Motion is leave to commence arbitral proceedings against the company due to the dispute that had ensued over the Lease signed by the applicant and the respondent company. The Lease had an arbitral clause which dictated that any dispute would be resolved through arbitration.

17. The Court's view is that, by filing the application seeking leave, the applicant was in compliant with section 560 of the Act. I find that the Court is clothed with the necessary jurisdiction to hear such an application. In this regard the preliminary objection fails.

18. The issue therefore remains whether the applicant has made a case for leave to commence the arbitral proceedings against the company. In Owiti, Otieno and Ragot Advocates –vs- Mumias Sugar Co. Limited (Under Administration) [2020] eKLR, it was held: -

" When considering whether to grant approval under section 560, the court may in particular take into consideration –

(a) the statutory purpose of the administration:

(b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;

(c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and

(d) the conduct of the parties."

19. And, in Hoggers Limited (In Administration) v John Lee Halamandres & 11 others [2021] eKLR, it was held that: -

> " Turning to the tenor and effect of a moratorium, the court in *Cook v Mortgage Debenture Ltd* [2016] EWCA Civ 103 outlined the purpose and effect of a moratorium under the *Insolvency Act* following the appointment of an Administrator as follows;
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> In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. 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.
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> 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 injuries' 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.
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> In the case of an administration, this is not a sufficient description of the purposes of the moratorium in paragraph 43(6). An administration may be a prelude to a liquidation or, once an administrator gives notice of an intention to make distributions to creditors, may become a substitute for a liquidation. In such circumstances, the purposes described above apply also to the moratorium in the case of an administration. But before that point is reached, the principal purpose of an administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. As Nicholls LJ put it in *In re Atlantic Computer Systems plc* [1992] Ch 505 at 528, the moratorium provides "a breathing space". Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so."

20. From the foregoing dictums, the purpose of a moratorium in legal proceedings is to allow the administrator some breathing space in order to carry out administration of the company in line with the objectives set out in the *Insolvency Act*.

21. The dispute herein concerns landlord and tenant relationship which is governed by the Lease signed by the parties. I find no ground to deny the applicant leave to institute the arbitral proceedings as sought. Article 50 of *the Constitution* grants every individual the right to have his dispute resolved in a manner recognized by law. In this regard, although it may lead to a distraction of the administrator and an expense, I find the applicant is deserving of the orders sought.

22. The upshot is that the applicant is hereby granted leave to commence arbitral proceedings against the respondent. However, I will make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE