



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY PETITION NO.E019 OF 2020

IN THE MATTER OF KENYON LIMITED (UNDER LIQUIDATION)

IN THE MATTER OF MEMBERS VOLUNTARY LIQUIDATION SECTION 399(1) OF THE INSOLVENCY ACT 2015

AND

IN THE MATTER OF AN APPLICATION BY KATKO INVESTMENTS LIMITED

R U L I N G

1. Before Court is a Motion on notice dated 28/10/2020 brought under **Section 456 and 473 of the Insolvency Act**.
2. The applicant sought *inter - alia*: that pending the hearing and determination of these proceedings or such other orders of the court, the liquidator be ordered to pay the monthly rent on the premises known as **Godown Number 27-28** erected on **LR No. 14977** (hereinafter 'the suit premises') from the date of his appointment being 13/5/2020 until further orders of the court; an order to the Liquidator to pay the monthly rent on the suit premises from the date of his appointment being 13/5/2020, failure to which, the Landlord be at liberty to evict the Liquidator; an order that the directors and shareholders of Kenyon Limited have committed an offence pursuant to **section 398 of the Insolvency Act**.
3. The application was supported by an affidavit of **Vijay Vekaria** sworn on even date. He averred that the applicant is the landlord of the Company on the premises known as **Godown No. 27-28** erected on **LR No. 14977** ("the suit premises") pursuant to a lease dated 9/5/2016. That the liquidator was appointed by the directors of the company on 13/5/2020 pursuant to **section 399 of the Insolvency Act**. The liquidation had indicated to the applicant that all invoices for rent should be forwarded to him for payment.
4. The applicant contended that this is a voluntary liquidation pursuant to **section 399 of the Insolvency Act**. It is therefore deemed in law that the company was and can make payment of all its debts to its creditors. That the liquidator has not paid the monthly rent, service charge, waste disposal, upkeep and cleaning since his date of appointment. That the company and its officers have acted contrary to **section 398 of the Insolvency Act**.
5. The applicant avers that the amount due as at the filing of this application was Kshs. 4,972,870.49 and that it continues to be irreparably prejudiced since it cannot evict the Liquidator or attach any of the assets of the company. On the other hand, it continues to pay the Value Added Tax on the expected but unpaid rent since the date of appointment of the Liquidator despite not receiving any rent and that there is no justifiable legal reason why the Liquidator cannot pay the rent and service charge due on the premises the Company occupies.
6. That it is unjust for the liquidator to continue to occupy the premises without payment of the post—liquidation rent which ought to constitute liquidation costs and there is no justification for the liquidator to use the premises to carry out his functions.
7. The Liquidator filed a preliminary objection dated 24/11/2020 in opposition to the application. It was contended that the matters raised in the application had directly and substantially been raised and addressed by the Court in the ruling of Kasango J dated 2/10/2020. In the premises, the application was *res judicata*.
8. That pursuant to the said ruling, there is a moratorium for a period of 12 months from 13/5/2020 and the current application is premature and incapable of being granted and the Court does not have any jurisdiction to grant the orders sought.
9. Further, that the Liquidator by law has a period of 12 months within which to liquidate and appropriate proceedings thereof to the various classes of creditors as by law provided and by virtue of which the Court does not have jurisdiction to hear and determine this application.

10. The Liquidator contends that liquidation is everything and the court cannot make even one step without it.

11. The court has considered the application and the submissions on record. The first objection was that the matter was *res judicata*. The doctrine of *res judicata* is elucidated in **section 7 of the Civil Procedure Act**. It bars litigating a matter which has been directly and substantially in issue in a former suit or proceeding between the same parties in a competent court.

12. The Court notes that the Liquidator had filed an application dated 5/6/2020 to stop the applicant from levying distress or evicting the Company from the premises. That application was opposed by the applicant. In allowing that application vide the ruling of 2/10/2020, the Court held: -

“It follows that the second issue is found in favour of the liquidator because section 481 of the Insolvency Act stops any execution or attachment against goods or land of a company undergoing liquidation.

...

“The Notice of Motion dated 5/6/2020 succeeds. Accordingly, the court does issue an injunction restraining Katko Investment Limited, its servants and agents from distressing for rent against Kenyon Limited (under liquidation) over Godown Number 27 and 28 on L.R. No.14977 for twelve (12) months from 13/5/2020. Further an injunction is granted restraining Katko Investment Limited from re-entering into Godown Number 27 and 28 on L.R. No.14977 for twelve (12) months from 13/5/2020... ”

13. It is clear that what was before the Court was the issue of rent for the premises occupied by the Company and/or eviction therefrom. Under explanation 4 to **section 7 of the Civil Procedure Act**, the issue of future rent should have been raised by the applicant. The issue cannot be raised now on the disguise that what the Court dealt with was arrears of rent and not post – liquidation rent. Clearly, what was before Court was the issue of occupation by the Company of the demised premises.

14. In view of the foregoing, the Court agrees with the Liquidator that the issue can only be re-visited after the period set by the Court in the said ruling. The rent post liquidation is liquidation expenses under schedule 2 of the Insolvency Act. It will be paid in accordance with law.

15. Being of that view, the preliminary objection is meritorious and is hereby upheld. The application is hereby struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2021.

A. MABEYA, FCI Arb

JUDGE