



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO.09 OF 2019.

MAGANA HOLDINGS LIMITED.....CREDITOR

VERSUS

WAMBUGU MUTHUI KIGIRA.....1ST DEBTOR

MARY MADUMADU.....2ND DEBTOR

RULING

1. This ruling is in respect to two identical applications dated 5th April 2019 in which the Applicants/Debtors seek orders to set aside the statutory demand dated 22nd February 2019 on the basis that the debt, if any, was incurred by a limited liability company and not the applicants herein. The applicants also state that no deed or contract of Personal Guarantee was executed by them in favour of the Creditor upon which a claim for the amounts specified in the Statutory Demand or any other amount could be maintained. It is the applicants' case that at no time did they undertake to bear responsibility for the alleged debt on behalf of the principal Debtor.
2. The application is supported by the applicant's respective identical affidavits wherein they reiterate the grounds stated on the face of the application. They concede that they signed the letter of offer of lease on 20th August 2015 as the Directors and on behalf of the tenant, one Nairobi Outpatient Centre Limited.
3. They maintain that the Creditor's tenant is Nairobi Outpatient Centre Limited, a limited liability company which is a corporate personality that is separate and distinct from its Directors and ought to settle its own debts without the Directors' involvement.
4. Through the supplementary affidavits dated 30th August 2019 the applicants aver that Nairobi Outpatient Centre was initially registered under Registration of Business Names Act but that according to an online search on the said business name conducted on 31st July 2019, the particulars of the proprietor of Nairobi Outpatient Centre is shown as Healthcare Solutions International Limited.
5. They state that the tenant described in the lease/letter of offer dated 1st April 2015 as Nairobi Outpatient Centre is not the applicants but Healthcare Solutions International Limited who trades as Nairobi Outpatient Centre. They aver that the respondent was notified of the change in ownership of the business long before the creation of the lease that is represented in the letter of offer of 15th April 2015 and that the respondent was always in possession of the said certificate of Registration of Business.
6. At the hearing of the application, counsel for the applicants submitted that the applicants are not the tenants of the Creditor and are therefore not liable for the debt owed. Counsel argued that even though the letter of offer dated 1st April 2015 is addressed to the applicants and Nairobi Outpatient Centre as the tenants, the Certificate of Registration of Change of Particulars (exhibit 14) dated 20th March 2013, shows that there was change of proprietorship of Nairobi Outpatient Centre to a company known as **Healthcare Solutions Limited** as the new owner of the business on the suit premises.
7. Counsel contended that as at 1st April 2015 when the lease over the suit property was signed, the applicants were not the real owners of the said business. Counsel also contested the admissibility of the lease agreement on the basis that:

a) The Creditor was by reason of the provisions of Section 34(1) of the Advocates Act an unqualified person not capable of drawing a lease agreement.

b) That the lease agreement does not bear any endorsement as is required by Section 35 of the Advocates Act.

c) That the lease was signed by one **Faith W. Maina** whose position within the Creditors organization is not revealed.

d) The lease agreement did not satisfy the mandatory provisions of Section 3(3) of the Law of Contract as the tenant was placed in possession when the said section was not complied with.

e) The lease agreement did not comply with Section 55 of the Stamp Duty Act.

8. The applicants argued that there was no privity of contract between them and the Creditor and that the creditor cannot sue them on the basis of the lease. It was the applicant's case that the Creditor did not establish that they are indebted to it.

The Respondent's/Creditor's case.

9. The Creditor opposed the application through the replying affidavit of its Chief Executive Officer **Soila Mungai** who avers that it is not in dispute that the applicants executed the letter of offer dated 1st February 2015 and that they entered into a tenancy agreement to conduct business as Nairobi Outpatient Centre. He states that from the relationship and history that existed between the applicants and the respondent, it was clear that the applicant's occupation of the suit premises was under a Business Name, Nairobi Outpatient Centre, and not as a company.

10. He further states that the lease dated 1st April 2015 was executed by the applicants in their individual capacity on behalf of their business and not as the purported company Nairobi Outpatient Centre Limited. He maintains that the applicants have all along occupied and operated their clinic as a Business Name and not as a limited liability company. He further avers that the applicants admitted owing the debt and made several proposals to pay the rent arrears which proposals they never fulfilled but have continued to breach the terms of the tenancy agreement with impunity.

11. The Creditor maintains that it served the requisite statutory demand notices on the applicants as the tenants in their premises when they failed to honour their various undertakings to pay the rent arrears.

12. The respondent's deponent also swore a further replying affidavit wherein he repeats the contents of the replying affidavit and avers that the applicants executed the letters of offer on behalf of the tenant Nairobi Outpatient Centre, which is registered as a Business Name as shown in the Certificate of Registration which contained the names of the applicants as trading as Nairobi Outpatient Centre.

13. He further states that all the correspondence that originated from the applicants bore the name Nairobi Outpatient Centre and not Nairobi Outpatient Centre Ltd. He adds that at no time did the applicants notify the respondent of the change in names of the ownership of the said Nairobi Outpatient Centre. He states that the alleged change in names of the tenant was made long after the letter of offer was issued to the applicants on 1st July 2003 when they were already in occupation of the suit premises.

14. He further states that several undertakings were made by the applicants, in person, to pay the rent arrears as shown in the email correspondence attached to the replying affidavit as annexures 14(a) to 14(i). He further avers that no lease or contract was signed between the respondent and the alleged Healthcare International Limited. It is the respondent's case that the applicants are truly indebted to it to the tune of Kshs 19,492,537.73 as shown in the statutory demand notices and that the instant application is a sham meant to scuttle the insolvency proceedings arising from their failure to honour the tenancy's contractual obligations.

15. At the hearing of the application, counsel for the Creditor submitted that the Creditor had satisfied the statutory requirements of Section 17(1) and (2) of the Insolvency Act and Regulation 15(3) of the Insolvency Rules. Counsel maintained that the statutory Demands were properly served upon the Debtors herein **Dr. Wambugu Kigiri** and **Dr. Mary Madumadu** in order to recover monies owed to the Creditor by the Debtors.

16. It was submitted that the letters of offer were addressed to Nairobi Outpatient Centre and were signed by the applicants herein for and on behalf of Nairobi Outpatient Centre which was registered under Registration of Business Names Act. It was submitted that at no time did the applicants advise the creditor that Nairobi Outpatient Centre had changed its status from a Business Name to a limited liability company. It was further submitted that the applicant made personal commitments to settle the debt and that the debtors and Nairobi Outpatient Centre are not separate and distinct entities.

Analysis and determination

17. I have carefully considered the two identical applications dated 5th April 2019, the Creditors response and the submissions made by the parties together with the authorities that they cited.

18. I note that the main issue for determination is whether the Applicants/Debtors have made out a case for the setting aside of the Statutory Demand Notices. Section 17 of the Insolvency Act stipulates as follows:-

(1) One or more creditors of a debtor may make an application to the Court for a bankruptcy order to be made in respect of the debtor in relation to a debt or debts owed by the debtor to the creditor or creditors.

(2) Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;

(b) the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the applicant creditors, either immediately or at some certain, future time, and is unsecured;

(c) the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and (d) there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts

3) For the purposes of subsection (2) (c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—

(a) the applicant creditor to whom the debt is owed has served on the debtor a demand requiring the debtor to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least twenty-one days have elapsed since the demand was served, and the demand has been neither complied with nor set aside in accordance with the insolvency regulations; or

(b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part.

4) For the purposes of subsection (2) (c), a debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable and—

(a) the applicant to whom it is owed has served on the debtor a demand requiring the debtor to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due;

(b) at least twenty-one days have elapsed since the demand was served; and

(c) the demand has been neither complied with nor set aside in accordance with the insolvency regulations.

5) This section is subject to sections 18 to 20.

(6) An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless—

(a) the debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing; and

(b) the debtor makes that notification within the period specified in the demand for the debtor to comply with it.

7) A debtor complies with a demand that overstates the amount owing by—

(a) taking steps that would have complied with the demand had it stated the correct amount owing, such as by paying the creditor the correct amount owing plus costs; and

(b) taking those steps within the period specified in the demand for the debtor to comply

19. In the present case, I note that it is not disputed that Nairobi Outpatient Centre entered into a tenancy agreement with the Creditor sometime in the year 2003 for a period of 6 years which agreement was, upon its expiry, renewed at different points of time with the last renewal having been made on 1st April 2015. It was also not disputed that the said Nairobi Outpatient Centre owes the Creditor rent arrears by arising from the said lease agreement even though the parties were not in agreement on the actual amount due.

20. The Debtors herein also confirm that they signed the letter of offer of lease on 20th August 2015 on behalf of Nairobi Outpatient Centre. The main point of disagreement is the identity of Nairobi Outpatient Centre (NOC) as while the debtors contend that they are not personally liable for the debt as the said NOC is owned by a limited liability company known as **Healthcare Solutions International** which is separate and distinct from its directors, the Creditor maintains that NOC is registered as a Business Name for which the business owners, in this case the Debtors, are liable for the rent arrears.

21. The main issue that this court has to grapple with is whether the Creditor dealt with Nairobi Outpatient Centre as a Business Name or as a limited liability company. A determination of this issue will require a close examination of the documents and instruments that the parties herein signed or exchanged in the course of their dealings. The court will also closely examine the averments made by the parties in their pleadings.

22. I have perused all the letters of offer executed by the debtors herein from the inception of their tenancy agreement in 2003 to the last letter of offer of 2015. It is clear that the Tenant in all the letters of offer is Nairobi Outpatient Centre. All the correspondence that emanated from the tenant were also on the letter head of Nairobi Outpatient Centre.

23. The Certificate of Registration Number 375091 issued on 18th June 2003 under the Registration of Business Names Act indicates that Nairobi Outpatient Centre is a Business Name owned by **Wambugu Muthui Kigiri** and **Wallace Njenga Gicharo**. It is on the strength of this certificate of Registration of Business that the initial tenancy agreement was executed.

24. The Debtors' case was that the Nairobi Outpatient Centre changed hands on 20th March 2013 when its new proprietor, Healthcare Solutions International Limited, came into the scene and was to continue carrying on the said business on the Creditors plot No. 209/3838 at Muindi Mbingu Street.

25. My finding is that there is more than meets the eye in the alleged change of proprietorship of the Nairobi Outpatient Centre. I say so because if indeed there was change of particulars or ownership as alleged by the Debtors, then such change should have been immediately communicated to the Creditor so as to enable it enter into a fresh tenancy agreement with the alleged new owner of the business, Healthcare Solutions International Limited. This was not the case and as can be seen in the letter of offer signed by the debtors in 2015 after the alleged changes of Nairobi Outpatient Centre's particulars, the tenant is still listed as Nairobi Outpatient Centre and not Healthcare Solutions International Limited as would have been expected. No material was placed before this court to show that the Debtors informed the Creditor of the change of particulars. In other words, one can say that the Debtors, for reasons only known to them, kept the alleged changes to themselves and have only unleashed them in these proceedings after the service of the statutory Demand Notices.

26. My take is that the lease document speaks for itself and it clearly shows that the tenant is Nairobi Outpatient Centre and not any other entity as alleged by the Applicants. The Applicants conceded that they signed the lease agreement on behalf of the outfit known as NOC and as I understand it, one of the core functions of a signature is to indicate that the parties whose signatures are applied to the document have read, understood and agreed to the terms of the agreement. Needless to say, a court cannot rewrite the contract between the parties. See *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2002] EA 503.

27. I also find guidance in the parol evidence rule which is defined in *Chitty on Contract* 29th Edition Vol – General Principles 12.096 thus:

“It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract ... The rule is usually known as the “parol evidence” rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation. The rule has been justified on the ground that it upholds the value of written proof the finality intended by the parties in recording their contract in written form and eliminates great inconvenience and troublesome litigation in many instances.”

28. Having regard to the above text and cited authority, I find that the Applicants herein are bound by the terms of their agreement and cannot seek to introduce Healthcare Solutions International Limited, to the contract that it did not execute.

29. The Applicants also challenged the validity of the lease agreement on the basis that it was drawn by an unqualified person, did not bear an endorsement as required by Section 35 of the Advocates Act, did not comply with section 55 of the Stamp Duty Act among other alleged shortcomings. My finding on this issue is that the dispute before this court is not about the validity of the lease agreement but the payment of a debt that is for all intents and purposes not in dispute.

30. For the reasons that I have stated in this ruling, I am not satisfied that the applicants have made out a case for the setting aside of the demand notices that were properly served upon them after they executed the terms of lease of their individual capacities on behalf of the outfit known as Nairobi Outpatient Centre which they all along presented to the Creditor as a Business Name.

31. Consequently, I dismiss the applications dated 5th April 2019 with costs to the Creditor.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties

C/A- Silvia