



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 496 OF 2017

VEHICLE AND EQUIPMENT LEASING LIMITED.....PLAINTIFF

VERSUS

ATHI RIVER MINING LIMITED.....1ST DEFENDANT

MAWENI LIMESTONE LIMITED.....2ND DEFENDANT

RULING

1. For determination is the Notice of Motion dated 5th July 2019. It is filed by the plaintiff. The plaintiff seeks leave of this court to continue and proceed with this case against the 1st defendant which is now under administration as provided under the Insolvency Act 2015.
2. The plaintiff filed its plaint against the defendant on 7th December 2017. The plaintiff seeks judgment against defendant for breach of a lease agreement, for unpaid rental fees and interest.
3. Susan Muthoni, the plaintiff's legal officer stated that the defendant is under administration. She referred to the public notice which brought to attention of the public the fact that the defendant was placed under administration with effect from 17th August 2018. The plaintiff became aware of that notice after November 2018 when it responded to the 1st defendant's application to strike out this suit. The plaintiff has invoked sections 560 and 560A of the Insolvency Act 2015.
4. The application is opposed by the 1st defendants. The 1st defendant in opposition submitted that the court ought not to exercise its discretion in granting the prayers the plaintiff seeks. Further that the plaintiff had not demonstrated exceptional circumstances that warrant granting of the prayer sought. That to grant the orders will lead to distraction, interference, interruption and frustration to the administration.

ANALYSIS

5. In the case **In re NAKUMATT HOLDINGS LIMITED (2017) eKLR** the court set out what administration is intended to achieve for a company. It was stated therein:

“33. Administration, though, is now a tool intended to offer breathing space for insolvent companies whilst also putting better returns and packages for creditors, not ordinarily available in liquidation. And, unlike compromises, administration as an alternative rescue process leads to a stay of past and future legal proceedings as per ss.560 & 561 of the Act hence making it cheaper for the company.”

6. In another case **Midland Emergency Limited v George Muiruri t/a Leakey Auctioneers & another [2019] eKLR** the court stated:

“12. The design of our current Insolvency Laws is to give a second chance to financially distressed Companies. A break from the past where the fate of an ailing Company would invariably be a Winding up or liquidation order. Administration is one of the alternatives to liquidation and is provided for in part VIII of the Act. The objectives of administration are set out in Section 522 of the Act

13. So as to achieve that objective, the Company must be insulated from aggressive Creditors who could cause a run of the Company assets. The statute contemplates that upon such protection a Company will not be distracted from precipitate action

and so the Administrator will be able to perform his function in the interest of all of the Company's Creditors. The insulation of the Company is provided by way of a moratorium from other legal processes."

7. Administration therefore is intended to give a breathing space to a company and also to some extent a break from its past.

8. For action to be undertaken against a company under administration there need be approval from the administrator or the court. This is what section 560 of the Insolvency Act provide. It states:

560. (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.

(2) In giving approval for a transaction under subsection (1), the Court may impose a condition on, or a requirement in connection with, the transaction.

(l) While a company is under administration-

Moratorium on insolvency proceedings while administration order has effect.

9. The plaintiff also relied on Section 560A of the Insolvency Act which came into force on 23rd July 2019. Before I refer to it I wish to state that I reject the 1st defendant's submissions that the court cannot rely on that section because it came into effect after the application was filed. In my view section 560A did not repeal any other section rather it is an additional section to assist the court when considering an application for approval for action to be taken against a company under administration. Section 560A is available to the court to consider.

10. That section provides:

"560A when considering whether to grant approval under section 560, the court may in particular take into consideration-

a) The statutory purpose of administration;

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

c) The legitimate interest of the applicant and the legitimate interest of the creditor of the company, giving the right of priority to the proprietary interest of the applicant; and

d) The conduct of the parties."

11. I have already discussed, above, the purpose of administration. Section 560A also requires consideration whether the applicant, such as the plaintiff, will suffer significant loss, consideration of the legitimate interest of the applicant, and consideration of the conduct of the parties.

12. The plaintiff is seeking judgment for debt owed in respect to unpaid rental fees under the lease agreement. The plaintiff, through its submissions, stated as follows:

"11.The plaintiff and the 1st Defendant and its subsidiaries entered into a leasing agreement on the basis of which the Defendants subsequently leased various equipment from the plaintiff.

12.Despite taking possession of the equipment, the Defendants neglected to make rental payments towards the same as agreed thereby occasioning arrears to the tune of USD 3,829,061 as at the time of filing the suit; which sum continues to attract interest at the contract rate.

13.The plaintiff obtained several financing facilities in order to purchase the equipment leased to the Defendants and continues to service the loans to date thus incurring heavy losses due to the Defendants' breach of contract.

14. *The plaintiff therefore filled the present suit seeking to recover its debt from the Defendant's breach of contract and by filing the instant application the plaintiff seeks to regularize and create orderliness in the proceedings against the 1st Defendant in line with the mandatory provisions of section 560 (d) of the Insolvency Act.*"

13. There is no doubt in my mind, in view of and bearing in mind what is stated by the plaintiff, that the plaintiff stands to suffer greater harm, than the 1st defendant, if approval as sought is not given. The giving of approval will enable the plaintiff to progress with this case.

14. Further, it is of importance to note that 1st defendant, even after it was under administration filed two applications, one dated 19th September 2018 and another dated 21st September 2018. In filing those applications the 1st defendant did not disclose to the plaintiff of it being under administration, when it must have known the plaintiff was oblivious of that fact. In filing the application it failed to place after its name, "**under administration**" as it is required under the Insolvency Act. Such a party is not deserving of exercise of the court's discretion in its favour. 1st defendant's conduct is very telling and is noted by the court.

15. The application will be allowed with costs.

CONCLUSION

16. The Notice of Motion dated 5th July 2018 is granted in that leave/consent of the court is granted to the plaintiff to continue this case against the 1st defendant which is under administration. The plaintiff is granted costs of that Notice of Motion.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15th March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

MARY KASANGO

JUDGE