



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

IN THE MATTER OF THE INSOLVENCY PETITION NO.E 019 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

RULING

1. The Company, **KENYON LIMITED** (Under Liquidation) resolved, at its members Extraordinary General meeting of 13th May 2020, to windup the company as a Members Voluntary Liquidation and that Mr Peter Kahii be appointed Liquidator of the company. The said liquidation was advertised in the Daily Nation Newspaper of 18th May 2020 and in the Standard newspaper on 20th May 2020. Prior to that the company's directors filed a Statutory Declaration on 30th April 2020 and thereby declared that the company's debts would be paid in full within 12 months.
2. The Company's Liquidator has filed a Notice of Motion application dated 5th June 2020. That application is directed to the actions by **KATKO INVESTMENTS LIMITED** (hereinafter the Landlord). The Landlord on or about 22nd May 2020 distressed for rent arrears owed by the company through Icon Auctioneers.
3. The company is a tenant of the Landlord at premises known as Godown Number 27-28 erected on L.R. No. 14977. It is not denied by the company that it is indeed in arrears of its rental payments thereof.
4. The company's liquidator has by the present application sought for an order to stop any attachment or sale of the assets of the company by distress for rent.
5. The landlord has opposed the application on the grounds that the application is fatally defective because no pleadings had been filed by the liquidator. In other words that the application is not grounded on either a plaint or an originating summons. The landlord cited the case of the Supreme Court, case **YUSUF GITAU ABDALLAH V BUILDING CENTRE (K) LTD & 4 OTHERS (2014) eKLR**. The Landlord also opposes the application on the ground that the prayers in the application are interlocutory in nature, and because the Landlord did not require leave of the court before distressing for rent.

ANALYSIS AND DETERMINATION

6. There are two issues that require the court's attention in respect to the application before court. They are:

a. Whether the application before court is defective

b. Whether the orders sought can be granted.

7. On the first issue the Landlord submitted that the application before court is interlocutory and will fail because it is not supported by a pleading. The Civil Procedure Act defines pleading as:

“Includes a petition or summons and statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant these to and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

8. It a pleading as set out in the above definition that the Landlord argued was lacking and hence the Landlord submitted that the liquidator's application, which is interlocutory, fails because it is not supported by a substantive pleading.

9. As stated before the company resolved for voluntary liquidation on 13th May 2020. Section 395 of the Act provides:

395. The voluntary liquidation of a company commences when the resolution for voluntary liquidation is passed.

10. It follows from the provisions of the above section that liquidation commenced on 13th May 2020. The provisions of the Insolvency Act applied from that date. The Landlord erred to argue that the liquidator should have commenced this action as though it was a normal civil action. Proceedings once liquidation commenced are subject to the Act. Section 692 of the Act is the relevant section to consider. It provides:

692. (l) The Official Receiver, or a person who claims to have been, to be or to be about to be adversely affected-

(a) by the past or continuing conduct of, or by a threat to engage in conduct made by, a person referred to in subsection (2);
or

(b) by the past or continuing refusal or failure, or by a threatened refusal or failure, of a person do an act or thing that the person is required by this Act to do, may apply to the court to grant an injunction under subsection (2) or (3). (Emphasis mine)

11. The company's liquidator alleges, by the present application, that the landlord by its action of distressing for rent when the liquidation is effective is adversely affecting the said liquidation. It follows that the liquidator by virtue of that statement has a standing under section 692 to bring this action to seek the court's intervention to check the conduct of the Landlord. Under section 692(2) the court may grant an injunction where it is satisfied that a person has inter alia engaged or is threatening to engage in conduct or in a conduct that would constitute contravention or a failure to comply with the Act.

12. In view of the above I reject the Landlords opposition to the application on the ground that the application is not supported by pleadings. The Insolvency Act does not require such an application to be supported by a pleading.

13. The second issue for consideration is whether the prayers in the application are self defeating, as submitted by the Landlord.

14. The prayer in the application seeks an injunction be granted "pending the hearing and determination of the application." The second prayer seeks an injunction to be granted pending the hearing and determination of these proceedings.

15. Section 692 provides that the court may grant interim injunction pending the determination of the application: see section 692 (4). In my view there is no prejudice that will be suffered by the Landlord by the fact that the Liquidator sought an injunction pending the hearing and determination of these proceedings. After all this Ruling will essentially determine these proceedings. It follows that the second issue is found in favour of the liquidator because section 481 of the Act stops any execution or attachment against goods or Land of a company undergoing liquidation. The landlord instructed auctioneers to distress for rent after the liquidation of the company had commenced. That action of distress for rent must, as provided under Section 481 stop at its tracks.

16. It is for the above reason that I find the application is merited. Since the period of resolving to wind up the company and the date when the Landlord instructed auctioneer to distress for rent was a short period, which suggests that the landlord was unaware that a resolution had been passed to wind-up the company, costs will not be awarded for the application. Each party will bear its own costs.

CONCLUSION

17. The Notice of Motion dated 5th June 2020 succeeds. Accordingly the court does issue an injunction restraining **KATKO INVESTMENT LIMITED**, its servant 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 13th May 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 12 months from 13th May 2020. Each party shall bear its own costs in respect to the application dated 5th June 2020.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd day of OCTOBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Creditor

ORDER

This decision is hereby virtually delivered this 2nd day of **October, 2020.**

MARY KASANGO

JUDGE