



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 293 OF 2018

PBM NOMINEES LIMITEDPLAINTIFF

VERSUS

UCHUMI SUPERMARKETS LIMITED.....DEFENDANT

RULING

1. The plaintiff brought this suit on 25/6/2018 claiming against the defendant rent arrears, service charge, and interest, together totaling Kshs 147,610,693.20 as at the time of initiating the suit. The plaintiff subsequently filed a notice of motion dated 18/7/2018 seeking summary judgment for the claimed sum, or in the alternative, judgment for the admitted sum of Kshs 61,304,565.60.
2. The defendant entered appearance on 11/7/2018 and filed a statement of defence dated 23/7/2018. In addition, the defendant filed a Notice of Preliminary Objection dated 12/7/2018, objecting to this court's jurisdiction to adjudicate the dispute in this suit.
3. The court heard both the plaintiff's application and the defendant's preliminary objection, and reserved the matter for ruling on 5/2/2020. While the matter was pending ruling, the defendant brought a notice of motion dated 18/11/2019 seeking stay of all proceedings, rulings, judgments and/or orders in this suit, pending the hearing and determination of **Nairobi High Court Insolvency Petition No 25 of 2018**. That application is the subject of this ruling.
4. The application was supported by an affidavit sworn on 18/11/2019 by Mr Emmanuel Eredi. The application was canvassed through brief written submissions dated 20/2/2020. The case of the defendant was that there subsisted in the **Commercial Division of the High Court, Insolvency Petition Number 25/2018**, seeking among other orders, winding up orders against the defendant company herein. The defendant contended that on 26/9/2019, Kasango J rendered a ruling in the same petition through which she stayed all legal proceedings, orders, judgments, rulings, decrees, attachments, proclamations and distress against the defendant, pending the hearing and determination of the Insolvency Petition.
5. Urging the court to grant the stay order, counsel for the defendant cited the decision in **Anthony Obidulu v Sanju Park [2010] eKLR** and argued that the administration of an insolvent company is for the benefit of all creditors of the company and a situation where creditors separately attack or take assets of the company would defeat the overall objective of the administration.
6. The plaintiff opposed the application for stay through an undated replying affidavit by Mr Atul Shah, filed on 27/1/2020. The deponent contended that the plaintiff was not a party to the defendant's Company Voluntary Arrangement (CVA) leading to the filing of the insolvency Petition. The plaintiff added that the defendant owed it a colossal sum of Kshs 147,610,693.20 and unless the proceedings in this court continued, the plaintiff would not have another forum where to ventilate its claim. It was further contended that it was in the interest of justice that the pending ruling be rendered by this court.
7. Urging the court to disallow the application, counsel for the plaintiff argued that Section 560(1) of the Insolvency Act granted liberty to this court to hear and determine this suit notwithstanding the pendency of the Insolvency Petition. Counsel urged the court to be guided by the **Court of Appeal** decision in **Nakumatt Holdings Limited & Another v Ideal Locations Limited [2019] eKLR**.
8. I have considered the application together with the response thereto and the rival submissions. The single question falling for determination in this application is whether the applicant has made out a case for an order of stay pending the hearing and determination of **Nairobi High Court Insolvency Petition No 25 of 2018; In the Matter of Uchumi Supermarkets PLC**. I will be brief in my pronouncements on that single issue.
9. Because the application under consideration was entirely premised on the stay orders issued by Kasango J in **Nairobi High Court Insolvency Petition Number 25 of 2018**, the court found it imperative to appraise itself on the court record and status relating to the said petition before making a pronouncement on the present application.
10. It does emerge from the court record relating to **Nairobi High Court Insolvency Petition Number 25 of 2018** that on 1/7/2020,

Kasango J rendered a ruling in which she made the following verbatim orders;

“25. In view of the above findings I grant the following orders:

1. The Notice of Motion dated 19th March 2020 is dismissed with no order as to costs.

2. This court does hereby approve the Company’s Voluntary arrangement (CVA) passed at the creditors meeting of 2nd March 2020 in the following terms:

a. All monetary decrees, debt recovery claims, outstanding loan facilities, and rent claims including interest and penalties against the Company as at 2nd March 2020 (“the old debt”) be paid in accordance with the CVA;

b. All pending execution proceedings inter alia proclamations of attachment, sequestrations, statutory power of sale, distress for rent, or eviction from premises occupied by the Company and any other form of execution proceedings in respect of the old debt be set aside;

c. All pending debt recovery cases, outstanding loans and rent claims before the court of appeal, high court, magistrates courts or tribunals be henceforth marked as settled with the costs of the respective suits to be agreed upon or taxed and paid together with the old debt as per the terms of the CVA;

d. All other contingent liabilities including damages for torts allegedly committed by the company on or before 2nd March 2020 be settled as per the terms of the CVA upon determination of the liabilities thereof by a court or such other competent tribunal;

e. The CVA be subject to review after every six (6) months through a meeting of the creditors from the date the CVA is approved herein;

3. That in the event the company defaults on clause 2 above, six (6) months from the date a CVA order is made herein:

i. A person may take steps to enforce a security over the Company’s property only with the consent of the Supervisor or with the approval of this Honourable Court;

ii. A person may take steps to repossess goods in the company’s possession under a credit purchase transaction only with the consent of the Supervisor or with the approval of this Honourable Court;

iii. The company’s landlords may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with consent of the Supervisor or with the approval of this Honourable court.

4. That the winding up petition herein be and is hereby marked as settled with costs to the petitioner to be agreed upon or taxed and paid together with the old debt as per the terms of the CVA.

5. There shall be no order as to costs to the Notice of Motion dated 27th March 2020.

11. The tenor and import of order 4 in the above ruling, in my view, is that, **Nairobi High Court Insolvency Petition No 25 of 2018** was marked settled and is no longer pending hearing and determination. That being the case, there is no basis for granting the stay order sought by the applicant in the notice of motion dated 18/11/2019.

12. The net result is that the notice of motion dated 18/11/2019 is rejected for lack of merit. The defendant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Mr Kimani for the Plaintiff

Mr Eredi Emmanuel for the Defendant

Court Clerk - June Nafula