



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 375 OF 2017**

**ISMAIL RAHIMTULLA TRUSTEES REGISTERED.....1ST PLAINTIFF**

**SONY HOLDINGS LIMITED.....2ND PLAINTIFF**

**=VERSUS=**

**THE JOINT ADMINISTRATORS - SPENCON**

**KENYA LIMITED (UNDER ADMINISTRATION. ).....1ST DEFENDANT**

**PRAGNESH JITENDRA PATEL.....2ND DEFENDANT**

**ASHUTOSH SHARMA.....3RD DEFENDANT**

**RULING**

1. The plaintiffs brought this suit against the Joint Administrators of Spencon Kenya Limited (**the company**) through a plaint dated 7/6/2017. Their case was that they leased to the company office space and further granted the company car parking licences on Land Reference Number 209/11458 (**Rahimtulla Towers**). The 2nd and 3rd defendants were guarantors of the company under the lease. Despite the term of the lease and licence agreement coming to an end by the effluxion of time on 31/10/2016, the company had continued to illegally occupy the premises. Further, the company had failed to pay rent, service charge, interest and utility charges, together totaling Kshs 15,471,512 as at the time of initiating the suit.

2. Consequently, the plaintiff sought the following reliefs against the defendants:

- a) *An order that the 1st defendant delivers vacant possession of the leased premises and parking bays forthwith;*
- b) *An order that the 2nd and 3rd defendants are jointly and severally liable to pay special damages in the sum of Kshs 15,471,512.06;*
- c) *An order that the 2nd and 3rd defendants are jointly and severally liable for mesne profits for every month occupied after the expiry of the lease from 31/10/2016 until the date of handing over of the premises in vacant possession;*
- d) *Interest at the rate stipulated under the Lease Agreements;*
- e) *Costs;*
- f) *Such other and/or further remedies as this honourable court deems fit.*

3. Together with the plaint, the plaintiffs filed a notice of motion dated 7/6/2017 in which they sought a mandatory injunctive order in terms of prayer 1 of the plaint, among other prayers.

4. Despite service, the 1st and 3rd defendants neither entered appearance nor filed defence in the suit. The claim against the 1st and 3rd defendants remain undefended to-date.

5. The 2nd defendant entered appearance on 2/11/2017 through M/s Gikera & Vadgama Advocates but did not file a defence within the prescribed time. Similarly, although the 2nd defendant attended the hearing of the application dated 7/6/2017, he neither filed a response nor made submissions in relation to the application. Consequently, the application dated 7/6/2017 was on 29/3/2018 disposed as an undefended

motion and the plea for vacant possession was granted.

6. Subsequent to the grant of the above orders, the 2nd defendant filed a statement of defence dated 30/4/2018 in which he averred that the suit herein was bad in law, fatally defective and incurable. He further averred that the plaintiffs had failed to comply with the mandatory provisions of the Insolvency Act. He added that his joinder to the suit was unnecessary because he was only a guarantor under the lease. He further averred that he was not privy to the car parking licence agreement. He added that the company vacated the demised premises in 2015. He denied the plaintiff's claim against him.

7. On 18/7/2019, the 2nd defendant filed a notice of preliminary objection dated 18/7/2019 seeking the striking out of this suit on the following grounds:

**1) That this honourable court lacks jurisdiction to hear and determine this suit as the plaintiff herein has not sought approval from the High Court against the mandatory provisions of Section 432 and 560 of the Insolvency Act (No 18 of 2015).**

**2) That this honourable court lacks jurisdiction to hear and determine this suit as the court envisioned in the Insolvency Act is the High Court under Section 2 of the said Act and not the Environment and Land Court**

**3) That the suit is fatally and incurably defective and the same should be dismissed with costs to the 2nd defendant.**

8. The above preliminary objection is the subject of this ruling. The objection was canvassed through brief written submissions.

9. Counsel for the 2nd defendant (the objector) argued that the plaintiffs had not sought consent of the administrators or leave of the court to commence the present suit as required under Section 560 of the Insolvency Act. Counsel added that the Environment and Land Court lacked jurisdiction to hear and determine this suit because the court envisioned under Section 2 of this Act is the High Court. Counsel urged the Court to strike out the suit and award the 2nd defendant costs of the suit. Reliance was placed on the decisions in (i) *Mukisa Biscuits Manufacturing Company Ltd v West End Distribution (1969)EA 696*; (ii) *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others [2015]eKLR*; (iii) *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others [2012] eKLR*; (iv) *Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd (1989) eKLR*; (v) *Republic v Karisa Chengo & others [2017] eKLR*; (vi) *Suraya Holdings & 4 Others v ICIC Bank & another (2018] eKLR*; and (vii) *Foxcroft v the Ink Group Pty Ltd [1994] 12 ACLC 1063, SC(NSW)*.

10. Opposing the preliminary objection, counsel for the plaintiff submitted that Section 560 of the Insolvency Act makes provisions for moratorium in legal proceedings while an administration order is in force. He added that the said section deals with four mutually exclusive legal processes. Counsel submitted that Section 560(1) (c) provides for circumstances under which a landlord may exercise its right of re-entry, namely: (i) with the approval of the court: or (ii) with the consent of the administrator. Counsel argued that Section 560 of the Insolvency Act does not provide for a prescribed form for seeking the approval of the court. Counsel contended that the plaintiffs had properly obtained approval for peaceable re-entry into the demised premises through this court's order of 28/3/2018. Counsel added that this court's ruling fully disposed the plaintiffs' claim against the 1st defendant, leaving the claim against the 2nd and 3rd defendants which arise from the use and occupation of the suit premises.

11. Counsel for the plaintiffs submitted that the preliminary objection was an invitation to the court to sit in appeal against its ruling of 29/3/2018. Lastly, counsel submitted that, should the court find that it did not have jurisdiction, it should transfer the suit to the High Court.

12. I have considered the preliminary objection. The first limb of the 2nd defendant's objection is that the plaintiffs' suit is fatally defective because the plaintiff's did not obtain approval from the High Court or consent of the administrators as required under Sections 432 and 560 of the Insolvency Act. The second limb of the objection is that this court or consent of the administrators does not have jurisdiction to adjudicate this dispute because the court envisaged under Section 2 of the Insolvency Act is the High Court. I will make brief pronouncements on the two limbs in the above order.

13. Sections 432 and 560 of the Insolvency Act have distinct provisions dealing with distinct scenarios. Section 432 provides as follows:

**432. (1) Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver.**

**(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.**

**(3) An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them**

14. The framework in Section 432 of the Insolvency Act relates to liquidation of companies. It provides that whenever a liquidation order has been made or a provisional liquidator has been appointed in relation to a company, leave of the court ought to be obtained before commencing or continuing with legal proceedings against the company.

15. Section 560 of the Act on the other hand provides as follows:

**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.**

16. The framework in Section 560 of the Insolvency Act relates to administration of companies. It provides for a moratorium on legal processes when an administration order is in force. It provides that a person may begin or continue legal proceedings against the company only with the consent of the administrator or with the approval of the court.

17. There is nothing in the pleadings before court to suggest that Spenco Kenya Limited is in liquidation. In any event, orders of liquidation and administration cannot both be in force simultaneously. There is therefore nothing to support the contention that the framework in Section 432 is applicable to this suit.

18. In so far as Section 560 is concerned, the present suit was initiated against the joint administrators of Spenco Kenya Limited. The said administrators were duly served but elected not to defend the claim. The only substantive claim against them relates to prayer (a) of the plaint which reads as follows:-

***“(a) A order that the 1st defendant delivers vacant possession of the leased premises and parking bays forthwith”***

19. Because there was no defence by the joint administrators, the claim against the 1st defendant was granted through this court's ruling dated 29/3/2018. The said ruling has not been challenged. What substantively remains are the reliefs sought against the 2nd and 3rd defendants.

20. Section 560 of the Insolvency Act permits commencement or continuation of suits against a company either with the consent of the administrators or with the leave of the court. The Act does not prescribe the form in which the consent should be given. In the present suit, the joint administrators elected not to oppose the suit. They have not come to court to contest the claim against them on the ground of lack of consent. Whether or not they gave consent is a factual matter to be proved by the party alleging that consent was not given. It is not a point of law to be canvassed by way of a preliminary objection in the manner contemplated by the 2nd defendant.

21. Last on the issue of consent/approval, the 2nd and 3rd defendants are natural persons. The claim against them is not subject to the consent and or approval contemplated under the Insolvency Act. Even if the applicant had demonstrated that there was no consent of the joint administrators, that alone would not be a basis for striking out the suit against the 2nd and 3rd defendants. I take this view because the claim against the 1st defendant is severable from the claim made against the 2nd and 3rd defendants. The claim against the 2nd and 3rd defendant is not subject to the consent or approval contemplated under Section 560 of the Insolvency Act.

22. In summary, my finding on the first limb of the preliminary objection is that, the framework in Section 432 of the Insolvency Act does not apply to a company under administration. Secondly, whether or not the joint administrators gave consent is a factual matter which has not been evidentially proved by the applicant. Thirdly, even if it had been proved, the claim against the 2nd and 3rd defendants would remain to be adjudicated by this court because the 2nd and 3rd defendants are natural persons. Fourthly, the claim against the 1st defendant is severable from the claim against the 2nd and 3rd defendants. Consequently, failure to obtain the administrators' consent or the approval of the Insolvency Court does not in any way affect the suit against the 2nd and 3rd defendants.

23. I now turn to the 2nd limb of the preliminary objection in which the 2nd defendant contends that this court lacks jurisdiction to hear and determine this suit because the court envisaged under Section 2 of the Insolvency Act is the High Court. This point was recently canvassed in the same fashion before the **Court of Appeal in Nakumatt Holdings Limited & another v Ideal Locations Limited [2019] eKLR**. The facts in the said case were largely the same as the facts in the present case. The Court of Appeal examined the jurisdictional framework in Article 162(2) (b) of the Constitution and Section 13 (2) (a) of the Environment and Land Court Act and rendered itself thus:

***“31. Given those provisions, we are fully in agreement with the learned Judge that the dispute between the parties, stemming as it did, from the sublease over the leased premises over LR No 14407 and 16088, is a matter falling within the jurisdiction of the ELC”***

24. I would on my part add that, the broad jurisdictions of the three third tier Superior Courts of Kenya is granted by the Constitution. The Insolvency Act does not amend the Constitution to alter the broad jurisdictional framework set out in the Constitution; the Insolvency Act does not confer on the High Court jurisdiction over disputes constitutionally vested in the other two courts of equal status. Whereas the Act empowers the High Court to preside over liquidation and administration proceedings relating to companies, it does not confer in the High Court jurisdiction over disputes vested in the other superior courts.

25. The dispute in this suit stems from a lease and a car parking licence agreement. It falls within the constitutional and statutory mandate of the Environment and Land Court as set out in Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Act. The outstanding claim in this suit is therefore properly before this court.

26. In light of the foregoing, it is my finding that the Preliminary Objection dated 18/7/2019 lacks merit and the same is rejected. The 2nd defendant shall bear costs of the Preliminary Objection.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF SEPTEMBER 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Court Clerk - June Nafula