



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 439 OF 2017**

**NOVA HOLDINGS LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**NAKUMATT HOLDINGS LTD.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/applicant has brought this Notice of Motion application dated 2<sup>nd</sup> November 2018 seeking to be granted the following orders;

**(a) Spent;**

**(b) The plaintiff be and is hereby granted leave to execute the decree passed in this case as against the Defendant.**

**(c) The decree issued on 18<sup>th</sup> July 2018 be and is hereby corrected so as to read as follows as item No. 2;**

**“The Defendant do clear the outstanding rents amounting to Kshs.107,000,000.00 as at 1<sup>st</sup> August 2018 when the Defendant was evicted from the suit premises.”**

2. The application is premised on the following amongst other grounds;

**(a) On 30<sup>th</sup> May 2018, this Honourable Court delivered a ruling by which it entered judgment for the plaintiff as prayed in the plaint.**

**(b) The decree was issued by the Deputy Registrar on 18<sup>th</sup> July 2018.**

**(c) The decree is clear that the Defendant is to clear all the rents as at the date of surrender or eviction from the suit premises.**

**(d) The Defendant was evicted from the suit premises under the supervision of the court bailiff on 1<sup>st</sup> August 2018.**

**(e) The rent arrears as at 1<sup>st</sup> August 2018 amounted to Kshs.107,000,000.00.**

**(f) As at the date of issue of the decree, the Defendant had not yet been evicted and the exact amount of rent arrears could not be ascertained for purposes of being included in the decree.**

3. The application is further supported by the affidavit of Mr. Ashok Doshi who reiterated the facts stated on the face of the application. Mr Doshi deposed that the defendant is under administration pursuant to the order issued on 22<sup>nd</sup> January 2018 in Nairobi insolvency Cause No 10 of 2017 therefore the applicant requires leave of this court to execute the decree. That it serves the interest of justice that the application be allowed.

4. The application is vehemently opposed by the replying affidavit sworn by Peter Obondo Kahi who is the Defendant's appointed administrator. Mr Obondo deposed to the irregularity in amending of the plaint and filing of the application for summary judgement and other applications which as far I am concerned are not matters for determination in this application. The Defendant deposes that all rent arrears if any prior to the administration order given on 22<sup>nd</sup> January 2018 remain a subject of the said administration cause and are only

payable on approval by the administrator's payment schedule of creditors.

5. The defendant deposes that only rents falling after the administration order are legally payable to the plaintiff/landlord "as is." That the rent arrears incurred during the pre-administration order are yet to be established and should not be lumped together in the sum of Kshs107,000,000.00 (pre & post administration) as is being claimed by the Plaintiff. The Defendant also contends that if there is any rent post-administration arrears the same was fully settled on 8<sup>th</sup> November 2018 vide cheque No.001528. That any rents pre-administration are yet to be demarcated and are subject to the insolvency proceedings where the applicant is actively pursuing her interests. For the reasons stated, the Respondent urged the court to disallow the motion in its entirety with costs to her.

6. In a further affidavit sworn on 28<sup>th</sup> February 2019, the plaintiff denied being a party to Nairobi Insolvency Cause No. 10 of 2017. That the orders issued on 28<sup>th</sup> August 2017 were not permanent and did not bar execution against the defendant. That the orders of 29<sup>th</sup> January 2018 was not a bar to future applications even by same landlords; that the issue was settled by this court's decision made on 30<sup>th</sup> May 2018. That the defendant has not tabled any document to counter the rent due of Kshs.107,000,000 as at the date of vacating the suit premises. The plaintiff acknowledges receipt of Kshs18,216,000= from Naivas Ltd which Mr. Ashock deposes does not bar the grant of the orders sought herein. That the defendant should not hide behind Insolvency Cause No. 10 of 2017 to defeat all lawful proceedings or defeat the cause of justice.

7. The parties' advocates filed their written submissions. The plaintiff submitted that approval to execute should be granted because the rents due were being used to service bank loans and the banks may execute against the applicant unless payment is made. Secondly that the plaintiff is not a party to the Insolvency Cause No. 10 of 2017 (at Nairobi High Court). On whether the decree should be corrected, Mr Oluga counsel for the applicant submitted that Order 21 rule 7(1) of the Civil Procedure Act requires a decree to agree with the judgment. That the taking of accounts cannot arise as the application brought by the defendant for taking of accounts had been abandoned.

8. The defendant on her part submitted that the plaintiff is an active party in the Nairobi High Court Cause No. 20 of 2017; *Re Nakumatt Holdings Limited*. That in Section 1 & 2 of the Insolvency Act, the court is defined as High Court. The defendant also defined what execution process means. That attachment and other forms of execution against a company in liquidation is stated as void. That Section 560 of the Insolvency Act provides that steps to enforce security over a company only with the consent of the administrator or with the approval of the court. That the plaintiff has not made out a sufficient case on the merits against the defendant to warrant the grant of the orders sought. She therefore urged the court to dismiss the application with costs.

9. I have analysed the pleadings filed together with the submissions rendered. At the commencement of these proceedings, the plaintiff filed a plaint together with a notice of motion application dated 24<sup>th</sup> January 2018. Prayer 2 of the said motion was in the following terms;

**"The Honourable Court be pleased to give its approval to the plaintiff to continue this suit as against the defendant and to give its approval of the making of the orders herein."**

10. The application of 24<sup>th</sup> January 2018 was heard and determined on its merits and a ruling delivered by this court on 30<sup>th</sup> May 2018. In my said ruling I made reference to the administration order issued on 22<sup>nd</sup> January 2018 in Insolvency Cause No. 10 of 2018. Under paragraph 6 of the insolvency order, the trial judge clearly stated that his decision was not to be interpreted as a bar to applications even by the same landlords at a future date. He took this view on account of the **fact that an administration by its nature and purpose is supposed to be an interim or temporary regime**. (underline mine for emphasis).

11. The plaintiff's application of 24<sup>th</sup> January 2018 was allowed and the defendant was given timelines to surrender vacant possession and also pay all rent arrears due at the time of vacating the suit premises. The net effect of allowing the application also meant that the court gave the plaintiff approval to continue the suit and I proceeded to grant the orders prayed in the plaint (by entering summary judgement). From the depositions made for and against the current application, part of the decree made has been realised e.g. surrender of vacant possession.

12. The defendant also deposed that she has paid part of the rent in the sum of Kshs18,216,000 vide cheque no. 001528 which payment the plaintiff acknowledges receipt of. The defendant did not appeal the findings of this court made on 30<sup>th</sup> May 2018 nor was there a stay of execution of this decision exhibited to have been obtained in any court. In the circumstances, submitting on the import of the administration orders made prior to my decision of 30<sup>th</sup> May 2018 does not help the defendant in an application intended for execution of the said ruling of 30<sup>th</sup> May 2018. The defendant has referred this court to orders issued in NBI High Court Insolvency Cause no 10 of 2017 on various dates i.e. on 28<sup>th</sup> August 2017, 22<sup>nd</sup> January 2018 and 29<sup>th</sup> January 2018 which as I have pointed above are overtaken by events in so far as this suit is concerned since the same issues were raised during the hearing of the application dated 24<sup>th</sup> January 2018 and the court rendered herself on the same. The present application is not seeking any review orders therefore it is not open for me to discuss whether rents due prior to the administration order can be executed.

13. On the same breath, the determination of the motion of 24<sup>th</sup> January 2018 essentially gave the plaintiff approval to recover the suit premises and all the outstanding rents as at the date of obtaining the vacant possession of the suit premises. It is my considered opinion and I so hold that the plaintiff did not need to apply **again** for leave/approval in the same proceedings where the approval/leave had been granted. Thus, it serves no purpose for me to grant leave as is being sought in prayer 2 of the motion.

14. Further the ruling of 30<sup>th</sup> May 2018 gave the plaintiff permission to collect rents due upto the time of surrender of vacant possession. The plaintiff pleaded that possession was obtained on 1<sup>st</sup> August 2018 (which fact is not denied by the Respondent). The parties had a lease agreement between them which specified the monthly/quarterly rents payable in respect of the suit premises. All the plaintiff required was to extract a decree stating the amount upto and including 30<sup>th</sup> of July 2018 less what she was already paid and serve that decree on the Defendant/Respondent. Thereafter let the defendant to dispute the figure of Kshs107,000,000 or any figure either informally or by filing an application. Currently the defendant has not pleaded that according to him, the pre-administration order rent arrears is this much and the post

administration order rents amounts due.

15. Since the order of 30<sup>th</sup> May 2018 has not been stayed or reviewed, nothing stops the plaintiff/applicant from executing for rents due to her as stated in prayer 3 of the motion less the sum of Kshs18,216,000 acknowledge as already paid. Consequently, it is my finding that the plaintiff does not require leave of this court to execute or extract the decree to comply with the terms of the judgement. The costs of the motion dated 2<sup>nd</sup> November 2018 is awarded to the defendant in any event.

**Dated, Signed and Delivered at Mombasa this 31<sup>st</sup> day of July 2019.**

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**A. OMOLLO**

**JUDGE.**