



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 400 OF 2017

IDEAL LOCATIONS LIMITED.....PLAINTIFF

-VS-

NAKUMATT HOLDINGS LIMITED.....1ST DEFENDANT

ATUL SHAH.....2ND DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 17th December 2018 in which the Plaintiff/Applicant seeks leave and approval of this court to execute the decree issued herein against the Defendants jointly and severally. The Application is premised on the grounds *inter alia*, that as against the 1st Defendant, approval of the court is required because the 1st Defendant is presently under administration while leave is required as against the 2nd Defendant because costs have not been ascertained. The Application is supported the affidavit of Anish Doshi sworn on 17th December, 2018.

2. The Plaintiff contends that Section 561(4)(f) of the Insolvency Act No.18 of 2015 mandates the Plaintiff to obtain leave of this court before the Plaintiff can execute the decree against the 1st Defendant. That the 1st Defendant was put under administration by an order of the court issued on 22nd January 2018. It was further submitted that Section 94 of the Civil Procedure Act requires that a decree holder obtains leave of the court to execute and recover the decretal amount before costs are ascertained so as not to subject judgment debtor to the risk of double execution.

3. In opposing the Application, the Defendants filed Grounds of Opposition dated 1st March 2019 and a replying affidavit sworn by Peter Obondo Kahi on 5th March, 2019. Briefly, it is the Defendants' contention that pursuant to Nairobi Insolvency Cause No.10 of 2017, all outstanding rent arrears prior to the Administration Order given on 22nd January 2018 remain a subject of the said Administration and are only payable upon approval of the Administrator's schedule of payment by the creditors, with the sanction of the Insolvency court, and that only rent payments in respect of the months falling after the Administration Order are legally payable to the Plaintiff/Landlord "as is". The Defendants added that the exact amount of arrears, if any incurred during the pre-administration order are yet to be established and remain within the exclusive jurisdiction of the Insolvency court.

4. The Application was canvassed by way of written submissions which were duly filed by both parties. The Plaintiff submitted that as a decree holder, it is entitled to enjoy the fruits of the judgment, adding that it will not serve any legal purpose for the Plaintiff to hold paper decree that cannot be executed, and that if is not allowed to execute and recover the decretal amount from the Defendants, the bank is likely to take adverse steps against it including disposing of the suit property to recover a loan taken. The Plaintiff further submitted that it is not a party to the Insolvency Cause No.10 of 2017. Mr. Oluga counsel for the Plaintiff submitted that the amount due from the Defendants ceased to be rent arrears the moment this court entered judgment in favour of the Plaintiff, and that it became decretal amount and cannot be subjected to trial or legal process in another court of equal status. The Plaintiff further submitted that there is no reason way execution should not issue against the 2nd Defendant who is an individual and who is not subject of any insolvency proceedings.

5. On their part, the Defendants submitted *inter alia*, that no execution of the decree herein can proceed legally owing to the status of the Insolvency Cause No. 10 of 2017 and Mombasa Court of Appeal Civil Appeal No.27 of 2018. The Defendants submitted that proceeding in the instant suit "as is" prior to the outcome of the Insolvency Cause No. 10 of 2017 would be blatant disregard and/or defiance of the express, mandatory provisions of the orders issued in that Insolvency Cause, the law and doctrines of *lis pendens* and *estoppel*. Mr. Ngonze counsel for the Defendants submitted that this court ought to proceed more cautiously and disregard the temptation to entertain and purport to determine issues beyond its jurisdiction, which issues, he submitted, are the exclusive domain of the Insolvency Court whilst administration Insolvency proceedings are still ongoing. The Defendants submitted that the Plaintiff has totally failed to make out a sufficient case on the merits against the Defendants to warrant grant of the orders sought in the application and urged the court to disallow the Application with costs.

6. I have considered all the issues raised in the Application, the affidavits in support and against, the grounds of opposition and the rival submissions. The only issue for determination is whether or not the orders sought in the Application should be granted. On 23rd November 2017, the Plaintiff filed a Notice of Motion dated 23rd November 2017 seeking among others, approval of this court to allow the Plaintiff to continue the suit against the Defendants. In response to that Application, the Defendants filed Grounds of Opposition dated 7th December, 2017 and Notice of Preliminary Objection dated 16th January 2018. The said Application was heard and determined on its merits and a ruling delivered by this court on 5th March, 2018. In the said ruling, the court made reference to the administration order issued in Nairobi Insolvency Cause No.10 of 2017.

7. Upon considering the Plaintiff's Application dated 23rd November, 2017 this court gave approval to the Plaintiff to continue the suit against the Defendants and proceeded to enter summary judgment as sought by the Plaintiff. In my considered view, the determination of the Motion dated 23rd November 2017 which inter alia gave the Plaintiff approval to continue the suit against the Defendants included approval or leave to take every step until conclusion which includes to carry out execution. While dealing with a similar application, Omollo J, in Mombasa ELC No.439 of 2017, **Nova Holding Ltd –v- Nakumatt Holdings Ltd** (unreported) held that **“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 approval/leave had been granted....”** I am persuaded by the holding in that decision. In my view, it would be superfluous to grant leave/approval again in the matter especially when the leave/approval initially granted was not limited to an action in the suit. The order of 5th March is still in force as the same as not been reviewed, set aside or stayed. It is therefore my finding that the Plaintiff does not require another leave or approval of this court to execute the decree herein.

8. The upshot is that the Notice of Motion dated 17th December 2018 is without merit and is dismissed. Considering the circumstance of this case, I order that each party shall bear own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mwadzogo holding brief for Ngonze for defendants

Ngoya holding brief for Oluga for plaintiff.

Yumna Court Assistant

C.K. YANO

JUDGE