



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ECL CIVIL CASE NO. 439 OF 2017

NOVA HOLDINGS LIMITED.....PLAINTIFF

-VERSUS-

NAKUMATT HOLDINGS LIMITED.....DEFENDANT

RULING

1. The Plaintiff/Applicant herein brought a suit against the defendant on 1st December 2017. The claim was subsequently amended on 18th January. Thereafter the plaintiff filed an application dated 24.1.2018 under the provisions of Order 36 of the Civil Procedure Rules and Section 561 (4) (e) and (f) of the Insolvency Act 2015 seeking the following prayers:

- 1. This application be certified urgent and the Court be pleased to fix the same for hearing on priority basis at the earliest available date.**
- 2. 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 making of the orders herein.**
- 3. Summary judgment be and is hereby entered for the Plaintiff as against the Defendant as prayed in the Amended Plaint filed herein.**
- 4. The Defendant be and is hereby ordered to immediately vacate the premises Warehouses Numbers 5, 6, 7, 8, 9 and 10 Shop Numbers 9, 10, 11 and 12 all situate on land Title Number MOMBASA/BLOCK XLVIII/157 in default of which the Plaintiff be at liberty to evict the Defendant forcefully.**
- 5. Costs of this application and of the main suit be paid by the Defendants jointly and severally.**

2. The application is opposed by the Defendant through the replying affidavit of Mr Peter Kahi dated 16th February 2018. In this replying affidavit, the Defendant/Respondent deposed that they have experienced a severe credit squeeze as a result of enactment of the Banking (Amendment) Act No 25 of 2016 which capped interest rates. As a result of this, two Insolvency Proceedings were commenced against them on 24.5.2017 i.e. cause No 10 of 2017 in the matter of Nakumatt Holdings Ltd and Petition No 1 of 2017 seeking to wind up the Respondent. That on 28.8.2017, the Court issued an order prohibiting all of the Respondents' creditors from levying distress and or executing against them until further orders of that Court.

3. The Respondent deposed further that on 22.1.2018 the Court approved the appointment of an Administrator to the Respondent and the deponent was duly appointed. Further that the High Court on 29.1.2018 dismissed the application by several landlords seeking re – entry into their respective premises. Mr Kahi deposes that the Applicants' actions are in breach of express provisions of:

- i. Section 430 of the Insolvency Act**
- ii. Of the Court issued on 28.8.2017**
- iii. The purpose of the administration granted on 22.1.2018**
- iv. Of the ruling by the High Court delivered on 29.1.2018 which declined re – entry prayers.**

4. The Respondent also deposed that this Court lacks jurisdiction to hear this application & suit in the circumstances of both the insolvency

Petition and Administration Order concurrently. He therefore urged the Court to decline the prayers sought and instead dismiss the present application.

5. Both parties filed written submissions for arguing the motion. The Respondent chose not to submit on the merits of the application. Instead he addressed the Court on lack of jurisdiction. The Applicant addressed the Court on both. I will therefore deal with the question of whether the ELC has jurisdiction to hear & determine this case or not.

6. The Respondent has made reference to the definition of Land in article 260 of the Constitution and Section 13 (2) of ELC Act to imply the suit property does not constitute land hence this Court lacks jurisdiction as it is regards a commercial dispute. In my opinion the interpretation of the said statutes by the Respondent is basically meant to suit their situation and cannot be taken to be correct. The premises comprises a building which is not hanging on the air. The said building is physically constructed on a piece of land. The relationship between the Applicant and the Respondent is of **Landlord & Tenant** pursuant to a lease agreement executed between the two parties and annexed to this application as **"AD 1"**. They signed a lease. This Court is clothed with jurisdiction to determine use, occupation & title to land. A lease in my understanding constitutes occupation of buildings and by extension land. For this reason, I find merit lacking for the objection raised that this Court lacks jurisdiction because the premises are **"commercial"** as the word commercial is being used in abstract.

7. The second limb of the objection is on account of the orders issued in the existing suits in the High Court. The order issued in cause No 10 of 2017 read thus:

"1. That an order be and is hereby issued prohibiting any attachment, sequestration, distress or execution against any assets of the Applicant after the commencement of the present winding up proceedings.

2. That there shall consequently issue an order directed at all creditors of the Company Nakumatt Holding Ltd prohibiting any attachment, sequestration, distress and or execution against the Company of the assets of the Company until further orders of the Court."

The orders issued on 22.1.18 read thus:

"1. That if the landlords were to be authorized to immediately re-enter their premises and thus remove Nakumatt therefrom, that is likely to impede the achievement of the purpose of administration.

2. That the Administrator has been given a period of sixty (60) days within which he must provide the Court and the Creditors with proof of what he will have achieved and what he planned to achieve thereafter.

6. That the decision cannot be a bar to other applications, even by the same landlords, at a future date. I so hold because Administration, by its very nature, purpose and intent is supposed to be an interim or temporary regime..."

8. The Respondent at paragraph 11 of his submissions stated at paragraph 11 (c) that the Landlord's right to re-enter could only be exercised with the approval of the Court as provided in Section 56 (4) (e) of the solvency Act. In prayer (1) of the present application, the Applicant has specifically sought leave of the Court for the orders to be granted. Secondly, subsequent to the orders of August 2017, some Landlords filed fresh suits (Petition No 1 of 2017) seeking to be allowed re-entry. Justice Fred Ochieng after hearing their application dismissed that application but made fresh orders which were issued on 22.1.2018. In my opinion and I so hold, the import of the orders of 22.1.2018 thus overtook the ones of 28.8.2017 in respect to the Landlords' right of re-entry.

9. The orders of 22.1.2018 were also very clear as the Judge stated in paragraph 6 of the order thus:

"That the decision cannot be a bar to the applications even by the same landlords at a future date. I so hold because Administration by its very nature, purpose & intent is supposed to be an interim or temporary regime."

Apart from the order giving the Administrator 60 days to put his house in order, the Court was clear that the order was temporary and was not to be used as a bar to any subsequent application being made even by the same Landlords who had moved the Court. The present Applicant was not a party to the Insolvency Cause No 10 of 2017.

10. This application was heard on 20.2.2018 before the 60 days had lapsed but the date reserved for ruling was on 27.4.2018. No copy of a report was filed by the Administrator between then and the 27.4.18 except for the application filed on 25.4.18 seeking to stay the current proceedings. The two orders referred to by the Respondent in my opinion do not oust this Court's of jurisdiction in a case where the Respondent Company has not been declared insolvent. The Insolvency Act does not state that once the insolvency proceedings are commenced then all claims are automatically stayed. Accordingly I hold that the reasons given for this Court lacking in jurisdiction are hollow which result in the said objection being hereby dismissed.

11. Now on the merits of the application, the Applicant pleaded and submitted that the Respondent is in breach of their lease agreement by defaulting in paying due rents, from December 2016 to date. The Applicant pleaded that the Respondent has sublet the suit premises to other entities without the approval of the Applicant. Consequently the Applicant's right of forfeiture & peaceable re-entry into the premises has crystallized. These facts were not denied by the Respondent. The Respondent stated that their discussions with the financial Institutions to enable them recapitalize the business has taken longer than anticipated.

12. Under Order 36 of the Civil Procedure Rules, where a party commences suit for recovery of vacant possession and after service of pleadings is done on the Defendant but before a defence is filed, such a party on moving the Court appropriately is entitled to summary

judgment. In this case, other than the preliminary objection and the replying affidavit filed, the defendant did not file any defence either before the application was filed or at the time of hearing the application to state if they have a defence to the prayers sought in the pleadings. The facts deposed to in the affidavit in opposition to the application did not raise any defence to the alleged breaches pleaded. The Court is left with only one duty in the circumstances i.e. to enter summary judgement for the applicant as prayed (see the decision of Madam JA in the case of **Gupta vs Continental Builders Ltd (1976 – 980) IKLR 809**)

13. Consequently, I do allow the motion dated 24.1.2018 on the following terms:

- a) The Court grants the Defendant/Respondent 60 days from the date of delivery of this ruling to vacate the leased premises comprised in MSA/BLOCK XLVIII/ 157 in default of which the plaintiff is at liberty to evict the defendant using lawful means.**
- b) The Defendant/Respondent to clear all outstanding rents as at the date of surrender of the vacant possession and or eviction of the suit premises.**
- c) I grant the plaintiff costs of the main suit and costs of this application. It is so ordered.**

Dated, signed & delivered at Mombasa this 30TH May 2018

A. OMOLLO

JUDGE