



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 247 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 2nd July, 2018)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKS.....CLAIMANT/APPLICANT

VERSUS

PETER OBONDO KAHI.....1ST RESPONDENT

NAKUMATT HOLDINGS LIMITED2ND RESPONDENT

RULING

1. The 1st and 2nd Respondent raised Preliminary Objections on the jurisdiction of the Honourable Court to hear and determine this matter on the following grounds:-

1. That as readily admitted by the Applicant in its pleadings before the Honourable Court, Nakumatt Holdings Ltd was placed under Administration order on 22nd January 2018.

2. That under section 560 (1)(d) of the Insolvency Act No.18 of 2015, while a company is under administration no person may begin or continue legal proceedings (including execution and distress) against the company of the company's property except with the consent of the Administrator or with the approval of the Court.

3. That the Claimant/Applicant has not sought or obtained either the leave of the Administrator or the Court wherefore, the Honourable Court lacks the jurisdiction to make any other step(s) in this matter.

4. That the Claimants have totally misunderstood the meaning and definition of the term insolvency as provided in section 67(b) (i) of the Employment Act 11 of 2007, which definition includes a company against which an Administrator order has been made wherefore these proceedings are an abuse of the court process.

5. That the claim by the Claimants are full covered by the provisions of the second schedule of the insolvency Act, wherein they fall under the second priority claims and wherefore the proceedings before the Honourable court are an abuse of the of the court process.

6. That for the reasons above stated this Honourable Court does not have jurisdiction to hear and determine this matter.

2. The Claimant filed their Replying Affidavit to Respondent's Preliminary Objection where they stated that the company was placed under administration on 22nd January 2018 by an order of the Court and an administrator was appointed to work closely with the company, the creditors and the guarantors and closely supervised by the court to make it possible for all to know whether or not the business was still viable.

3. They aver that on 22nd February 2018, the administrator, without observing Section 40(1) of the Employment Act, 2007 and Clause 30 of the Parties Collective Bargaining Agreement decided to terminate the services of several employees he targeted to terminate in total being one thousand, four hundred (1,400) employees in total disregard of the law governing redundancies and in violation of the parties Collective Bargaining Agreement which prompted the filing of the application being challenged.

4. They further aver that the 2nd Respondent continues to operate its business by consuming the services of employees and as a going concern. They aver that the Employment Act, 2007 or any other employment law and the parties CBA are not suspended by the Insolvency Act No.18 of 2015.

5. They aver that the administrator is under duty to respect the law governing redundancies and clauses 30 of the Parties CBA and when he acts in breach of such laws and agreement, the workers have a right to question his actions. While he is sacking regular employees without following the law as regards selection procedure, he at the same time is employing others on contract terms whose emoluments are superior to those whose services he is terminating which defeats the very purpose of downsizing.

6. They state that in the application the workers are not asking the Administrator not to downsize or right size his labour force but on the contrary, they are asking him to follow the law and the CBA to carry out downsizing/rightsizing whatever it is meant to reduce staff to suit the Administrator's staff requirement. He should not be allowed to misuse the protection donated by the Insolvency Act. No 18 of 2015 to violate other laws/agreements as his rights under the Insolvency Act does not override the rights of employees donated by other laws and the CBA.

7. They further state that this is a labour issue involving employees who have walked with the company and supported it during very difficult times and it is the right time that they are not so badly treated including replacing them with contract labour which defeats the purpose and intention of downsizing.

8. They therefore urge the Court to ignore and overlook procedural technicalities and allow the application dated 1st March 2018 to progress to hearing and determination. They also pray that the Respondent's Preliminary Objection dated 7th March 2018 be dismissed with costs to the Applicant/Claimant.

9. I have considered the averments of both parties concerning this Preliminary Objection.

10. It is not in doubt that the 2nd Respondent was placed under an Administrator on 22/1/2018 by an order of Court in Insolvency No. 18/2015.

11. Section 560 (1) (d) of the Insolvency Act No. 18 of 2015:-

“Moratorium or other legal process while administrator order has effect:-

1) While a company is under administrator:-

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”.

12. There is no indication that the Claimant sought leave of the Court or the administrator to commence these proceedings.

13. A similar issue had been raised in **Cause No. 507 of 2013 George Mureithi & Others v Kenatco Taxis (in receivership)** and this Court found that the claim could not proceed as leave of Court had been sought. The Court cited **Misc. Application 828/2006 Muturi & Apopo Advocates vs Cyrus Jirongo & Sopololo Outlets** where J. Osiemo dismissed the Applicant's application for failure to obtain leave of Court before filing the Application.

14. In **Charity Wangui Ngumo vs Chase Bank Limited (in Receivership) & Antique Actions Agencies (ELC Nyeri)**, Waithaki L N Judge cited Mbogholi J in **Amos Omusotsi vs Bulleys Tanneries (under Receivership)** where the Learned Judge also held that:-

“1st defendant is under receivership. No claim can be brought against the company under receivership without leave of Court Leave having not been sought and granted in this mater, the suit is incompetent ab-initio....”

15. The current suit was filed without the requisite leave from this Court and/or from the administrator. In the circumstances, I find the claim is incompletely before Court. I therefore strike out the entire suit for being improperly before Court.

16. Costs to the Respondents.

Dated and delivered in open Court this 2nd day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyumba for Claimant – Present

Respondents – Absent