



REPUBLIC OF KENYA



KENYA LAW
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**Kiruga v Kings Pride Properties Limited (Insolvency Petition E174 of 2019)
[2023] KEHC 20377 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 20377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

INSOLVENCY PETITION E174 OF 2019

DO CHEPKWONY, J

MAY 26, 2023

IN THE MATTER OF: THE INSOLVENCY ACT NO. 18 OF 2015

AND

IN THE MATTER OF: THE COMPANIES ACT NO. 17 OF 2015

AND

IN THE MATTER OF: KINGSPRIDE PROPERTIES LIMITED

BETWEEN

JOSEPH KIRUGA PETITIONER

AND

KINGS PRIDE PROPERTIES LIMITED RESPONDENT

RULING

1. Joseph Kiruga and Sammy Mugendi Njeru filed the Liquidation Petition dated 5th December, 2019 in respect to Kings Pride Properties Limited “the Company” in their capacity as Creditors over debts of Kshs.9,776,000/=.
2. Several other Creditors filed their Affidavits of Justification in support of the Liquidation Petition such as:-
 - a. Evelyne Nduta Njuguna sworn on 14th Marc, 2022 over a debt of Ksh.2,415,858/=.
 - b. Lilian Wanja Nganda sworn on 11th April, 2022 over a debt of Kshs.2,110,000/=.
 - c. Peter Kimotho and Mary Wangui Wanyama sworn on 21stJune, 2022 over a debt of Kshs.1,700,000/=.



- d. John Njoroge Wagacha sworn on 5th July, 2022 over a debt of Ksh.939,000.00/=.
 - e. Kimani Mungai sworn on 31st October, 2022 over debt of Kshs.14,000,000.00/=.
3. The Company filed a Notice of Motion Application dated 11th March, 2022 which is the subject of this ruling. The Application seeks the following orders:
 - a. That the Honourable Court be pleased to stay proceedings in liquidation Petition pending the hearing and determination of the application.
 - b. That this Honourable Court be pleased to strike out the liquidation petition against Kingspride Properties Limited.
 - c. That costs of the Application be borne by the Petitioners.
 4. The Application has been supported by the grounds on its face and the Affidavit of David Karanja as a Director of the Company sworn on 11th March, 2022. The Company holds that it entered into a sales and marketing agreement with Glenwoods Gardens Limited “the Vendor” for purposes of sourcing buyers of some apartments in the property known as Kiambaa/Ruaka/674 “the Apartments”. According to the Company, it managed to get several interested purchasers for the apartments who are the Creditors in this case. It further contends that it offered to sell the apartments as an agent and on behalf of the Vendor and that it was the Vendor who was receiving the proceeds of sale which was deposited in the Vendor’s Bank account held at Standard Chartered Bank.
 5. The Company holds that it did not receive any monies from any of the purchasers but the same was paid to the Vendor and therefore the Liquidation petition is defective as there is no creditor-debtor relationship and it urges the court to dismiss it as it will ruin the company’s reputation and operations.
 6. The Petitioners opposed the application by Grounds of Opposition dated 11th March, 2022 and hold that the application is an abuse of the court process and *res judicata* for reasons that the issues raised therein had been raised in a past Notice of Preliminary Objection dated 26th May, 2020 which was dismissed for reasons that the issues raised on locus standi and privity of contracts were triable issues which required hearing of the Petition. The Petitioners argue that the application seeks to determine the issues on interlocutory stage.
 7. The Petitioners also filed a the Replying Affidavit sworn by Joseph Kiruga sworn on his own behalf and on behalf of the 2nd Petitioner on 11th May, 2022 in which the reiterated their position in the Grounds of Opposition. They further contend that the Purchasers of the properties entered into Letters of Offer with the Company and payments were made to it. That, consequently the Company issued them with receipts as indicated in the statement of accounts.
 8. Further, the Petitioners contend that upon the issuance of the statutory notice, the Company through its Counsel P. N. Karanja and Company Advocates issued a letter dated 6th September, 2019 acknowledging indebtedness and therefore the Liquidation Petition should not be struck off as it will cause injustice to the Petitioners as Creditors. The Petitioners have urged that the court dismisses the application.
 9. The parties have filed their respective submissions in respect to the application. In their submissions dated 6th December, 2022, the Petitioners raised three (3) issues for determination which are; whether the application was *res judicata*, whether there existed a contract between the parties and whether the Company is entitled to the prayers sought.



10. On the other hand, the Company raised four issues in its submissions which are: whether the Company is the owner of the development, whether the Company is the right party to be sued herein, whether the balance of probability is in favour of the Company and whether the Company is entitled to costs.

Analysis and Determination

11. Upon considering the application, the affidavits in support and rebuttal thereof together with the submissions filed by the parties, this Court finds the main issues for consideration being:
 - a. whether the suit is *res judicata*; and if not,
 - b. whether the Company is entitled to the reliefs sought.
12. The issue of *res-judicata* is a jurisdictional issue which must be determined first as it has the effect of settling the application without going into other issues that have been raised by the parties. The substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
13. This doctrine also applies to multiple applications within a suit which have already been determined to help litigation come to an end. See the Court of Appeal in the case of [Uhuru Highway Development Ltd –vs– Central Bank of Kenya, Exchange Bank Ltd \(in voluntary liquidation\) and Kamlesh Mansukhlal Pattni](#) where it held that:-

“That is to say, there must be an end to Applications of similar nature, that is to further, under principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or [Civil Procedure Act](#) caters for.”
14. It is common ground that the issues raised in this application are similar to those raised in the Preliminary Objection dated 26th May, 2020 which was dismissed in the court Ruling No.2 delivered on 30th June, 2021. The reasons for the dismissal was due to the fact that the issues on locus standi and privity of contracts were triable issues which ought to be determined at the hearing of the Petition.
15. Moreover, it is evident that the letters of offers for the properties were issued by the Company itself on its letterhead; the bank details are the bank account of the Company in Standard Chartered Bank; and the receipts were issued in the name of the Company, thus the Company cannot claim that it is not a necessary party to the suit. This Court agrees with the Petitioners that it cannot determine the issues raised in the application at an interlocutory stage but upon hearing of the Petition. The issues, having been determined in the ruling which dismissed the Notice of Preliminary Objection dated 26th May, 2020, cannot be entertained as this will offend the doctrine of *res-judicata*.
16. I therefore find that the application dated March 11, 2022 lacks merit by virtue of the doctrine of *res judicata* and the same is dismissed with costs to the Petitioners.



17. The matter to be mentioned on July 17, 2023 before the Presiding Judge of the Commercial Division for Directions on the Liquidation Petition dated December 5, 2019.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the Presence of:

Mr. Musyoka counsel for Respondent/Applicant

Mr. Obam for Mr. Kuria counsel for Petitioners

Mr. Njuguna Mwaura counsel for Lilian Nganda - Creditor

Mr. Githuku counsel for Kiman Mungai – Creditor

Court Assistant - Martin

