



**Techno-Plast Limited v Mark Properties Limited (Civil Case 28 of 2019)  
[2023] KEHC 18152 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 28 OF 2019**

**A MABEYA, J**

**MAY 26, 2023**

**BETWEEN**

**TECHNO-PLAST LIMITED ..... PLAINTIFF**

**AND**

**MARK PROPERTIES LIMITED ..... DEFENDANT**

**RULING**

1. Before Court is the defendant's Motion on Notice dated 1/9/2021. It was brought under Articles 50 and 159(2)(b) of *the Constitution*, Order 9 Rule 9 & 10, Order 42 Rule 6, Order 45 Rule 1 and 5 of the *Civil Procedure Rules* and Section 560 of the *Insolvency Act*.
2. The prayers sought are the review and setting aside of the orders of 8/7/2021 and a stay of these proceedings pending the completion of the administration process in High Court Insolvency Cause No. E010 of 2021: In the matter of Mark Prime Properties Limited which is ongoing.
3. The grounds for the application were that; by a ruling dated 8/7/2021, the Court allowed the plaintiff's application dated 26/4/2021 which sought to strike out the defendant's defence and enter judgement in favour of the plaintiff for the sum of Kshs.145,320,329/- plus interest at court rate and costs of the suit.
4. That on 26/3/2021, the defendant was placed under administration which created an automatic moratorium over all legal proceedings unless leave is granted by either the administrator or the Insolvency Court. That at the time of issuance of the said order of 8/7/2021, the defendant could not bring to the attention of this court the fact that an administrator had been appointed.
5. That there is an error apparent on the face of the record as the proceedings were proceeded with without the consent of the administrator or leave of the Insolvency Court. That unless the orders sought were



granted, the defendant would suffer irreparable loss as the plaintiff would proceed to execute the ruling of 8/7/2021 by attaching and selling the defendant's properties to the detriment of the defendant and its other creditors.

6. In opposition, the plaintiff filed a preliminary objection dated 10/11/2021 and a replying affidavit sworn on the same date by Himesh Shah.
7. In the objection, the plaintiff contended that the application was res judicata as the issues therein had been decided on merit in the ruling made by Okwany J on 8/7/2021. That this Court has no jurisdiction to entertain the application as it has become functus officio having fully discharged its duty in the matter. In the premises, the application should be struck out with costs.
8. In the replying affidavit, it was contended that the defendant had been informed of the proceedings that culminated in the impugned ruling but chose not to participate. That the Court having given its ruling, it had become functus officio and had no jurisdiction to entertain the review application. That the only remedy available to the defendant was to appeal against that ruling.
9. As regards stay of execution, it was contended that the defendant had not satisfied the conditions applicable for the grant of such orders. That no security had been offered by the defendant to warrant the grant of the stay sought.
10. Res judicata is provided for under section 7 of the Civil Procedure Rules which provides: -

“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.”
11. In *E.T. v Attorney General & another* [2012] eKLR, it was held:

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”
12. I have looked at the ruling delivered by Okwany J on 8/7/2021. She allowed the plaintiff's application dated 26/4/2021 as prayed which effectively struck out the defendant's defence and judgment was entered as prayed in the plaint for Kshs.145,320,329/-. The application that was allowed was for striking out the defence. It was allowed ex-parte as the defendant did not appear.
13. Where a matter is determined ex-parte, the party who has not been heard is entitled to apply for setting aside such proceedings if he has good reasons. It cannot be argued that the Court has either become functus officio or that the matter is res judicata.
14. In the present case, the plaintiff's application was determined ex-parte and it cannot be said that the present application is res judicata as alleged. Accordingly, the objection has no merit and is hereby dismissed.
15. On merit, this is an application for review under Order 45 of the Civil Procedure Rules and a stay of proceedings. On review, a party has to establish the discovery of new and important matter or evidence



- which was not within his knowledge, or that there is an error apparent on the face of the record, or for any other sufficient reason. In addition, the application must be made without unreasonable delay.
16. The defendant's main reason for seeking review was that there was a discovery of new evidence, which was that the defendant company had been placed under administration on 26/3/2021 and the administrator was unaware of these proceedings.
  17. The administrator blamed one of the directors of the defendant for not notifying the Court that the defendant had been placed under administration. I note that the defendant was placed under administration on 17/3/2021. On that date, I&M bank, as the holder of a qualifying floating charge over the all the assets of Mark Prime Properties Limited, appointed Mr. Ponangipalli Venkata Ramana Rao as administrator of the company.
  18. The fact of administration of the company was not brought to the attention of the Court before it gave the impugned ruling. The affidavit of service that was relied on to proceed ex-parte shows that the hearing notice was served upon the then advocates for the company, Messrs. Chris Mutuku, Advocate on 25/5/2021.
  19. By the time the application and hearing date were being served, the defendant was already under administration. The process was supposed to be effected upon the Administrator and not the said advocate. This is because, the said advocate was an agent appointed by the directors of the Company who no longer had any power to run the affairs of the defendant.
  20. Accordingly, to the extent that the Administrator was not served with the said application and the hearing date thereof, the ruling made ex-parte on 8/7/2021 cannot be allowed to stand.
  21. In any event, the proceedings of the 8/7/2021 were contra statute. Section 560 of the *Insolvency Act* provides that a person may not commence or continue with any legal proceedings against a company or the company's property which is under administration save with the consent of the administrator or with the approval of the Insolvency Court.
  22. In this case such, neither the consent of the Administrator was obtained nor the approval of the Court sought. There is therefore an error apparent on the face of the record, in that the proceedings proceeded without such consent or approval. The proceedings cannot legally be continued with.
  23. Accordingly, I find the undated application of September, 2021 to be meritorious and I allow the same in terms of prayer nos. 5, 6 and 7 of the Motion.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

