



Invesco Assurance Company Limited v Nzai & 58 others (Insolvency Cause 1 of 2018) [2023] KEHC 18006 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
INSOLVENCY CAUSE 1 OF 2018
SM GITHINJI, J
MAY 25, 2023**

BETWEEN

INVESCO ASSURANCE COMPANY LIMITED DEBTOR

AND

DAMA CHARO NZAI & 58 OTHERS CREDITOR

RULING

1. The Debtor filed a Notice of Motion dated 27th June 2022 seeking the following orders;
 1. Spent.
 2. Pending the service and hearing of the application inter partes there be a temporary stay of execution.
 3. Alternatively, the stay of execution order made on 25th May 2022 and issued on 2nd June 2022 be extended until the hearing and determination of the application herein.
 4. The honourable court be pleased to review the interim orders of liquidation and the appointment of the interim liquidator and instead allow the applicant to submit a scheme of arrangement.
 5. The advocate for the creditors be ordered to render true and just accounts of all the money received on behalf of the minor claimants and the deceased claims.
 6. Such further and other orders as are just and equitable to meet the interests of the minor creditors and the estate of the deceased creditors and that such arrangements supervised by the court to ensure transparency and compliance with the *Children's Act* and the *Law of Succession Act*.



7. Any other orders that are just and expedient under the circumstances of the case and the interests of justice.
8. The costs of the application be provided for.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of Daniel Muringi Mugao the Chief Executive Officer of the insurance deponing that the affidavit dated 29th April 2019 in support of the application for insolvency is incompetent having not been signed by two creditors and the rest of the affidavit bears thumb prints without showing their National Identity Cards or which finger.
3. He stated that there are 58 creditors and among them include minors who are represented by their next of friends thus need to be protected under the *Children's Act*. In addition, the Insurance has paid a sum of Kshs. 11,974,660 to the advocates of the creditors which sums includes minors and other beneficiaries without proof of court orders with competent jurisdiction making and or issuing investment orders.
4. Mr. Daniel Mugao further deponed that the Insurance is ready and willing to enter into a scheme of arrangement to pay the correct, transparent amounts that shall satisfy the Creditors and any other sums which shall meet the legal requirements and also the approval of the court.
5. The Creditors filed a replying affidavit dated 11th July 2022 sworn by Geoffrey Kilonzo counsel for the creditors who deponed that the application is; overtaken by events, not merited, ill-advised and misconceived, made in bad faith, bad in law, fishing expedition, res judicata, delaying tactic and an abuse of the court process. He added the issues raised in this application are res judicata having been dealt with earlier vide numerous applications by the debtor and this application is nothing but a delay tactic.
6. Mr. Kilonzo stated that the Court on 25/5/2022 having found that the debtor is unable to pay its debts, allowed the petition for winding up the debtor and the debtor consequently was granted 30 days stay of execution. He added that in this application, stay has been sought pending no substantial prayer and stay cannot be granted in vacuum since there is no appeal and the court lacks jurisdiction as it is functus officio.
7. It was also deponed that no review can be issued as the Insurance has not complied with the requirements of order 45 rule 1 of the *Civil Procedure Rules* since it is not stated that there is any new and important evidence, mistake or error apparent on the face of the record or any sufficient reason whatsoever. Additionally, the liquidation orders have been served upon the official receiver and the insurance regulatory authority and therefore the prayer seeking review of the appointment of the interim liquidator is overtaken by events.
8. Further, it was stated that the issue of thumbprints cannot be raised now since it should have been raised during the hearing of the petition and the thumbprints were intended to be signatures by the petitioners.
9. Mr. Kilonzo also stated that the insolvency petition arose from failure of the debtor to settle the decrees in favour of the creditors and it is not a scheme of debt collection since the decrees are unsatisfied, the judgments are valid as the Insurance has never reviewed or appealed against them. The creditors have a right to execute against the debtor as the debtor has disobeyed court orders by refusing to satisfy the decree.



10. It was also stated that this court lacks the jurisdiction to determine the issue of investment orders as it cannot purport to distribute the decretal sum which issues would have been raised in the trial court which issued the decrees. In addition, the court lacks the jurisdiction to determine the issues of letters of administration as the same would have been determined by the trial court that issued the decrees.
11. Moreover, it was stated that vide a ruling dated 21/2/19 the Insurance was ordered to pay Kshs. 10 million in 6 months and submit a scheme of payment to court within 6 months which order remains unsatisfied.
12. The creditors filed a Notice of Motion dated 27th July 2022 seeking the following orders;
 1. This honourable court be pleased to review and vary or set aside its orders issued on 14/7/22.
 2. This honourable court be pleased to arrest orders issued on 14/7/22.
 3. The costs of the application be provided for.
13. The application is hinged on the grounds set out on the face of the application and the sworn affidavit of Geoffrey Kilonzo who deponed that the application seeks to review the orders of Hon. Lady justice Njoki Mwangi issued on 14/7/22 for there is an error apparent on the face of record in that whereas the application dated 27/6/22 was coming for ex- parte hearing, the court appears to have given final orders. That from the court file, the orders were in the interim but the order as drafted was final. That on premise of misunderstanding and wrongful extraction of the order, the court should arrest the said orders ex debito justiae to avoid miscarriage of justice.
14. It was additionally deponed that the application dated 27/6/22 was to be mentioned on 13/7/22 but the court did not sit and the advocate for the creditors was not served with a hearing notice and the matter proceeded on 14/7/22 *ex parte* and the court cannot issue final orders ex parte. Further, the orders as drafted are incapable of being complied with and the creditors are apprehensive that they may be cited for contempt of court. He added that the application dated 27/6/22 is not merited at all because the orders sought cannot be granted in the insolvency matter but in the matters that gave rise to the decrees.
15. In response, the Insurance filed a replying affidavit sworn by Daniel Muriungi Mugao the Chief Executive Officer of the debtor stating that there is no judgment capable of arrest that was rendered by the Honourable judge and if the applicant is dissatisfied with it he should appeal. Further, there is no error apparent on the face of the record.
16. It was deponed that an order to render true and just account was the most appropriate order under the circumstances and if indeed there are records of disbursements then the same should be availed to court for scrutiny as the issue is whether or not the creditors have received the decree monies.
17. Mr. Daniel Mugao further stated that the affidavits sworn by counsel for the creditors contains contested issues and it is a settled law that no counsel should swear an affidavit on contested facts.

Analysis and Determination

18. Both applications were canvassed by way of written submissions. I have considered the applications before me, submissions, as well as authorities relied upon by the parties and the issues for determination are;
 1. Whether the application dated 27th June 2022 is *res judicata* and determined on merits by a competent court and therefore may not be pursued further by the same parties;



a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}?

2. Whether the orders for interim liquidation can be reviewed or set aside and the Insurance submits a scheme of payment?

19. The creditors in their opposition to the application dated 27th June 2022 stated that the subject of the entire application is res judicata. In order to decide as to whether a case is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}}, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. What issues were really determined in the previous case;

ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. Whether the parties are the same or are litigating under the same title and whether the previous case was determined by a court of competent jurisdiction.

20. The test in determining whether a matter is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} as stated was summarized in *Bernard Mugo Ndegwa v James Nderitu Gitbae and 2 Others* (2010) eKLR, as follows:

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

21. I have considered the application and the previous decisions in this matter. There is no shadow of doubt that the parties in the suit remain the same, the jurisdiction is the same and there was a finality in the decision. The ruling delivered by my brother Hon. Justice Nyakundi where he dismissed the notice of motion dated 1st July 2020, observed that;

“in the premises having examined the Notice of Motion, the affidavit and written submissions of learned counsel on both sides and on the basis of the reasons stated above, the application is res judicata and the applicant is estopped from pursuing this issue again and again.”

22. A cursory glance at the application dated 1st July 2020, the Insurance sought among other orders interim orders staying proceedings in insolvency cause No. 1 of 2028 pending conclusion of fraud investigations. The orders sought by the insurance in the application dated 27th June 2020 are for stay of the interim liquidation as ordered by the court vide the judgment dated 22/5/2022. In support of the application, the Insurance raises the issue of thumbprints used as opposed to signatures. These are the same issues that the insurance raised in the application dated 27th June 2020. In my view, the same are res judicata. No circumstances have changed and the parties remain the same. Guided by Section 7 of the *Civil Procedure Act*, I find that the order for stay of interim liquidation is not merited.



23. The Insurance further seeks to review the orders of the judgment dated 22/5/2022.
24. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -
- “ Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
25. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:
- “ 1. Any person considering himself aggrieved—
- (1)
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
26. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -
- “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
27. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held: -
- “Order 44 rule 1 (now Order 45 rule 1 in the 2010 *Civil Procedure Rules*) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason”



28. Resonating with the above statutes and case law, I am of the view that the Insurance was dissatisfied with the orders made *vide* the judgment delivered by this court on 22/5/2022 which are grounds for an appeal. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for an apparent error where without any elaborate argument one could point to the error and say here is an open obvious error which stares one in the face, and there could reasonably be no two opinions entertained about it, and therefore calls for correction. Additionally, it is trite that the court cannot sit on its appeal. That said, my finding is that the prayer for review of the interim orders of liquidation is not merited.
29. The Insurance has further in their orders sought to be permitted to submit a scheme of payment. Having perused the file, I note that there is a ruling delivered by Hon. Justice Korir on 21/2/19 wherein he stated thus;
- “ ... I suspend the Creditor’s Statutory Notice dated 18/11/2018 for a period of 6 months from the date of this ruling. The suspension of the demand is on condition that the Applicant pays the Creditors the sum of Kshs. 10,000,000 within 60 days from today’s date. It should also file a proposal in the court on how it intends to liquidate the balance within which the period of the suspension of the demand notice...”
30. The prayer for submission of a payment scheme at this point in my view is not made in good faith. The insurance was granted the same prayer and has not complied with it to this date. One of the maxims of equity is “He who seeks equity must come with clean hands.” I must point out that it is clear that the debtors’ hands are greased with dirt aimed at wasting judicial precious time which this court cannot aid.
31. Over and above that, the insurance raises passionately the issue of investment orders as regards the minors’ claims who are some of the creditors. My observation is that these are issues that would have been raised earlier in the day at the trial court. These claims arose out of competent decrees issued by a competent court which have never been challenged to date. The duty of this court as regards the Insolvency is to ensure realization of the said decrees through insolvency process as the insurance has demonstrated inability to satisfy the said decrees.
32. From the above discourse, my finding is that the application dated 27th June 2022 is devoid of merit and the same is hereby dismissed. Consequently, the orders made on 14th July 2022 are of no bearing and consequence to this petition.
33. Consequently, and for avoidance of doubt, the judgment of the court dated 22nd May, 2022 declaring the insurance insolvent and the appointment of an interim liquidator still stands.
34. The Insurance/ Debtor shall bear the costs of the application.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE



In the Presence of: -

1. Mr Kilonzo for the Petitioners

2. Mr Kibet for the Respondents/Applicants(absent)

