



REPUBLIC OF KENYA



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Grain Industries Limited v Bjandari (Sued as the Administrator of New Generation Service Store Limited) (Insolvency Petition 7 of 2022) [2023] KEHC 22199 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 22199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
INSOLVENCY PETITION 7 OF 2022**

F WANGARI, J

MAY 25, 2023

BETWEEN

GRAIN INDUSTRIES LIMITED PETITIONER

AND

MADHAV SUDHIR BJANDARI (SUED AS THE ADMINISTRATOR OF NEW GENERATION SERVICE STORE LIMITED) RESPONDENT

RULING

1. The Petitioner vide an application dated May 26, 2022 and filed on May 26, 2022 sought for the following orders: -
 - a. The application be certified urgent, service be dispensed with and heard ex-parte in the first instance;
 - b. Pending hearing and determination of this application interpartes, an order to issue directing the Respondent to set aside 20% of the proceeds of the sale of the 53 trailers/items of New Generation Self Service Store Limited (under administration) scheduled for auction on 27/5/2022 together with 20% from the proceeds of sale of any other asset of New Generation Self Service Store Limited (under administration) for the satisfaction of the decretal sum of Kshs 177,157,844.94 obtained by the Petitioner against New Generation Self Service Store Limited (under administration) in Mombasa High Court Civil Suit No E006 of 2022; *Grain Industries Limited v New Generation Self Service Store Limited & 2 Others*;
 - c. Pending hearing and determination of this suit, an order to issue directing the Respondent to set aside 20% of the proceeds of the sale of the 53 trailers/items of New Generation Self Service Store Limited (under administration) scheduled for auction on 27/5/2022 together with 20% from the proceeds of sale of any other asset of New Generation Self Service Store Limited (under administration) for the satisfaction of the decretal sum of Kshs



177,157,844.94 obtained by the Petitioner against New Generation Self Service Store Limited (under administration) in Mombasa High Court Civil Suit No E006 of 2022; *Grain Industries Limited v New Generation Self Service Store Limited & 2 Others*;

- d. Costs.
2. The application is opposed. Upon service, the Respondent lodged a notice of preliminary objection dated May 31, 2022 and filed on June 2, 2022. The grounds are inter alia: -
 - a. The Honourable Court lacks jurisdiction to hear and determine the instant application and petition dated May 26, 2022 for the reason that the Petitioner/Applicant did not seek consent from the Administrator of the Honourable Court prior to instituting the instant proceedings;
 - b. Under section 560 (1) (d) of the *Insolvency Act, 2015*, any person who wishes to begin or continue legal proceedings (including execution and distress) against a company under administration or such company's property must obtain consent from the Administrator or the consent of court;
 - c. The Petitioner/Applicant has neither sought the consent of the Administrator of the company nor has it sought the Court's consent to file the instant Petition and Application;
 - d. Consequently, the Respondent prays that the Petition and Application dated May 26, 2022 be struck out with costs to the Respondent.
 3. Directions were taken that the preliminary objection be disposed off by way of written submissions. Both parties complied by filing their respective submissions together with authorities in support of their rival submissions. The Respondent's submissions are dated July 14, 2022 and filed on February 21, 2023. The Petitioner's submissions are dated February 20, 2023 and filed on February 21, 2023.

Analysis and Determination

4. I have considered the application dated May 26, 2022, the response, the submissions, authorities relied on as well as the law and in my view, the following are the issues for determination: -
 - a. Whether the court has jurisdiction to entertain the Application and Petition;
 - b. What is the order as to costs?
5. On the first issue, the application is objected to on the grounds that no leave was sought from either the administrator or the court. This is anchored on the provisions of section 560 (1) (d) of the *Insolvency Act, 2015*. Since it is a jurisdictional question, the court must first determine whether indeed if its jurisdiction has been properly invoked or not. In *Public Service Commission & 4 others v Cheruoyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment), the Court of Appeal had the following to say on jurisdiction: -

“...Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to



kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...”

6. The locus classicus on matters jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows: -

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

7. In *Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others* [2012] eKLR, the Supreme Court had the following to say on jurisdiction: -

“....A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law...”

8. The validity of any preliminary objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- West End Distributors Ltd* (1969) EA 696 page 700 where the Court observed as follows: -

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration... preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues and this improper practice should stop...”

9. As to whether jurisdiction is a point of law, the Supreme Court in Petition No 7 of 2013 *Mary Wambui Munene v Peter Gichuki Kingara and Six Others* [2014] eKLR stated that jurisdiction is a pure question of law and should be resolved on priority basis. Contextualizing the above, the objection is founded



upon the provisions of section 560 (1) (d) of the [Insolvency Act, 2015](#). Section 560 (1) provides as follows: -

- 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;
- b. A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;
- c. A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and
- d. A person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court."

10. It is thus imperative to determine whether the reliefs sought for by the Petitioner constitutes legal proceedings. In [Hoggers Limited \(In Administration\) v John Lee Halamandres & 11 others](#) [2021] eKLR, the Court grappled with what constitutes legal proceedings. The Court cited England's Court of Appeal decision in [Bristol Airport PLC v Powdrill](#) [1990] Ch 744 where it was held as follows: -

"...the natural meaning of the words "no other proceedings . . . may be commenced or continued" is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration. the reference to the "commencement" and "continuation" of proceedings indicates that what Parliament had in mind was legal proceedings. The use of the word "proceedings" in the plural together with the words "commence" and "continue" are far more appropriate to legal proceedings (which are normally so described) than to the doing of some act of a more general nature..."

11. Are there legal proceedings that necessitates for leave as required by section 560 (1) (d) of the [Insolvency Act, 2015](#)? I find no difficulty in answering this question in the affirmative. Therefore, leave is a prerequisite before any commencement or continuation of proceedings. I have looked at the application dated May 26, 2022 as well as the petition. None of the prayers seek leave to commence or continue legal proceedings against the company under administration. In the petition, the Petitioner in the alternative prayer has sought for leave to execute against the assets of the New Generation Self Service Store Limited (under administration). In its submissions, the Petitioner states under prayer two of the Petition it sought for leave.

12. Is leave to execute same as leave to commence or continue? The answer must be negative since that was not the intention of Parliament when enacting section 560 (1) (d) of the [Insolvency Act, 2015](#). Words in a statute must be given its ordinary meaning. The Petitioner relied on the case of [Bakery Confectionery Food Manufacturers & Allied Workers Union \(K\) v Tabir Sheikh Grain Millers Limited](#) [2020] eKLR. However, that case is distinguishable to the present case since in the said case, there was a specific prayer seeking for leave. This is not the case herein. This court's jurisdiction is thus ousted and consequently, I find merit in the notice of preliminary objection dated May 31, 2022.

13. On the issue of costs, the same follows the event. This is what section 27 of the [Civil Procedure Act](#) decrees. The Respondent being the successfully party is entitled to costs and I so award.



14. Consequently, the Petition dated May 25, 2022 as well as the application dated May 26, 2022 be and are hereby struck out with costs to the Respondent.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 25TH DAY OF MAY, 2023.

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F. WANGARI

JUDGE

