



Parsaure (Suing as the personal representative of Massare Ole Alaseso Mapi alias Masare Ole Alasejo Mapi - Deceased) v Athi River Mining Company Limited (Miscellaneous Application 31 of 2020) [2022] KEHC 159 (KLR) (Commercial and Tax) (25 February 2022) (Ruling)

Neutral citation: [2022] KEHC 159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 31 OF 2020
A MABEYA, J
FEBRUARY 25, 2022**

BETWEEN

LELOPA OLE PARSAURE (SUING AS THE PERSONAL REPRESENTATIVE OF MASSARE OLE ALASESO MAPI ALIAS MASARE OLE ALASEJO MAPI - DECEASED) APPLICANT

AND

ATHI RIVER MINING COMPANY LIMITED RESPONDENT

RULING

1. The application before Court is dated 19/11/2019. It was brought under Article 159 of *the Constitution*, sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, and sections 560 and 561 of the *Insolvency Act*.
2. The application sought orders granting the application leave to formally join the respondent as a party in Kajiado ELC Case No. 201 of 2018.
3. The application was supported by the affidavit dated 19/11/2019 and a supplementary affidavit dated 13/1/2020 both sworn by Lelopa Ole Pasaurei. It was contended that the deceased was the registered owner of Land Ref Kajiado/Ololoitikoshi/Kitengela/3 which was later illegally subdivided by the respondent as the owner of land parcels No. Kajiado/Kitengela/11345, 11346 and 11347. That the respondent was currently under administration hence the need for leave to formally join it in the suit file at ELC.
4. It was also contended that at the time of filing the suit, the administration order had not been gazetted thus the applicant was unaware of the administration. That the respondent had been sued as the 5th



defendant in the suit but was struck out after the respondent's preliminary objection on jurisdiction was allowed on 30/9/2019.

5. That it was thus important to join the respondent in the suit to preserve the suit property from disposal by the joint administrators of the respondent, creditors and other third parties.
6. In the supplementary affidavit, it was contended that the respondent intimated that the applicant should seek to be joined in Insolvency Cause 14 of 2018 filed before this court. It was however contended that the insolvency cause was not a creditor's petition as revolved around the sale of the assets of the respondent pursuant to a floating charge, hence the applicant had no locus in that application as his claim against the respondent was for the alleged fraudulent acquisition of the deceased.
7. The respondent opposed the application vide the replying affidavit sworn by George Weru on 2/7/2021. He was one of the respondent's joint administrators. He averred that the suit properties complained of were part of the assets transferred to National Cement Company Limited in 2018 from the respondent. That the properties were no longer owned by the respondent. That the applicant thus lacked a cause of action against the respondent to warrant the leave sought. That such leave would have prejudiced the respondent which was under administration as it would incur huge litigation costs to the detriment of its creditors.
8. The parties filed their respective submissions dated 6/7/2021 and 10/8/2021, respectively. I have considered those submissions and authorities, the pleadings and evidence before me. The sole issue for determination is whether leave ought to be granted to the applicant to formally join the respondent in the suit.
9. This matter was transferred from the High Court at Kajiado to this Court because the parties did not know what the position was in respect of Insolvency Cause No. 4 of 2018.
10. The applicant moved this Court under inter alia sections 560 and 561 of the Insolvency Act ("the Act"). Section 560(1) of the Act provides: -

“ While a company is under administration—
a-c
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.”
11. From the foregoing, it is clear that while a company is under administration, for one to take steps to enforce, begin or continue legal proceedings against such company, one has to obtain a consent of the administrator or act with the approval of the court.
12. In this case, the applicant had brought proceedings against the respondent without such leave or consent causing the same to be struck out. He now seeks to rectify that defect by seeking leave from this Court to continue proceedings against the company.
13. Whereas the Court has the right to exercise discretion in granting approval, the Court needs to take into consideration a number of factors as laid down under section 560A of the Act as follows: -

“ When considering whether to grant approval under section 560, the court may in particular take into consideration-
a. the statutory purpose of the administration;



- b. the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;
 - c. the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and (d) the conduct of the parties.”
14. In *Re Atlantic Computer Systems PLC* [1992] Ch 505, it was held that in considering a matter under section 560A of the Act, the court has to balance the legitimate interests of (i) the Claimant and (ii) the company’s other creditors. It was noted by the court that in such an exercise, great weight is normally given to the proprietary interests of the claimant. It is normally sufficient to make a successful case if it can be demonstrated that denial of permission would cause significant loss to the claimant, unless doing so would cause a greater loss to others.
15. In this case, the applicant brought a claim against the respondent and others claiming that the suit property belonged to the deceased, but was illegally and fraudulently obtained by the respondent who then subdivided it. On a balance of probabilities, if the leave sought is not granted, who stands to suffer? I believe that it is the applicant who will bear significant loss and would remain with an unsettled claim against the respondent and be denied a chance to be heard in a court of law.
16. It is not enough for the respondent to claim that the properties complained of were already transferred to a third party, hence there is no cause of action as against the respondent. The plaint annexed to the application alleges fraud in the manner in which the respondent acquired the ownership of the properties. Should such allegation be successfully proven, the respondent would be responsible for its said action. It is for it to enjoin the alleged 3rd party.
17. In *Bakery Confectionery Food Manufacturers & Allied Workers Union (K) v Tahir Sheikh Grain Millers Limited* [2020] eKLR, it was held: -
- “ Article 50 (1) of *the Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided upon in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In the circumstances, since the dispute between the parties was not resolved through conciliation, it will be a clog to justice in denying the parties a day in court. All other issues can be addressed once the suit is filed.”
18. It would thus be in the interest of justice to allow the leave sought and determine the dispute between the parties on merit and with finality. The respondent contended that it would be prejudiced only because it would be forced to incur huge litigation costs. Unfortunately, this ground is not merited enough, as any such costs will be refunded should the applicant’s claim fail to succeed.
19. The upshot is that the application is merited and the same is allowed with costs to the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCIArb

JUDGE

