



**Ideal Locations Limited v Said (Insolvency Cause E003 of 2021)
[2022] KEHC 11361 (KLR) (20 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
INSOLVENCY CAUSE E003 OF 2021**

OA SEWE, J

APRIL 20, 2022

BETWEEN

IDEAL LOCATIONS LIMITED PETITIONER

AND

OMAR TAHIR SHEIKH SAID RESPONDENT

RULING

- [1] Before the court for determination is the respondent's Notice of Motion dated October 21, 2021. It was filed pursuant to section 3A, and 27 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, as well as Order 25 Rule 4; and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, for orders that:
- [a] Spent
 - [b] The Petitioner be ordered to pay to the respondent costs in Mombasa Insolvency Petition No. 11 of 2020: Ideal Locations Limited v Omar Tahir Sheikh Said;
 - (c) The court be pleased to make any other or such further orders as it may deem fit and just to grant.
 - [d] Costs of this Application be provided for.
- [2] The application was premised on the grounds that the petitioner has, on the same set of facts, filed another Petition against the respondent, after having withdrawn the earlier Petition, being Mombasa High Court Insolvency Petition No. 11 of 2020: Ideal Locations Limited v Omar Tahir Sheikh Said; and that the respondent opposed that Petition, whereupon the petitioner caused it to be unilaterally withdrawn. It was further contended by the respondent that he petitioner is yet to pay the costs of the earlier Petition and yet is poised to pursue the instant Petition.
- [3] The application is supported by the affidavit of the respondent, sworn on October 21, 2021 to which he annexed a copy of the Petition filed in Insolvency Cause No. 11 of 2020 as well as a copy of the



Notice of Withdrawal filed by the petitioner in the earlier Petition. The respondent further deposed that the petitioner has not disclosed the filing of the previous Petition in the current proceedings; and added that it is only fair and just that the petitioner be compelled to pay up the costs of the previous proceedings before taking any steps to prosecute the instant Petition.

- [4] The application was opposed by the petitioner vide a Replying Affidavit sworn on November 23, 2021 by Mohamed Talasam, the Project Manager of the petitioner. Mr. Talasam confirmed that the Petitioner had indeed filed Insolvency Petition No. 11 of 2020; and that the same was withdrawn as alleged by the respondent. He however explained that the same was withdrawn with no order as to costs; and therefore that the instant application is misconceived in so far as it is disguised as an appeal against the final order made in Insolvency Petition No. 11 of 2020. A copy of the Order was annexed to the Replying Affidavit as Annexure MT-2.
- [5] The application was canvassed by way of written submissions; and the contention of Mr. Mokaya for the Respondent, vide his written submissions dated December 1, 2021, was that, by dint of Order 25 Rule 4 of the *Civil Procedure Rules*, the respondent is entitled to payment of the costs of the discontinued suit; and that the Court may order a stay of such subsequent suit as this, until the costs of a previous suit on the same facts shall have been paid. He seemed to be of the view that it is sufficient that the instant Petition has been brought on the basis of the exact same facts as Insolvency Petition No. 11 of 2020.
- [6] On behalf of the petitioner, Ms. Esajee relied on her written submissions dated February 8, 2022. She urged the Court to note that the withdrawal of the earlier Petition was done with notice to the respondent; and that in spite of the Notice of Withdrawal, counsel for the respondent proceeded to file an application dated January 18, 2021 which was set for inter partes hearing on March 16, 2021. She explained that, as the respondent was not in attendance to prosecute that application, or to address the court on the issue of costs, an order was made for the withdrawal of the Petition with no order as to costs. She therefore urged the court to find that the application is misguided and ought not to be countenanced; seeing as it is disguised as an appeal against the final order in Insolvency Petition No. 11 of 2020.
- [7] Ms. Esajee therefore submitted that the respondent needed to demonstrate that the final order made in Insolvency Petition No. 11 of 2020 had thereafter been either reviewed or overturned on appeal to pave way for the payment of costs before invoking the provisions of Order 25 Rule 4 of the *Civil Procedure Rules*; and that even then, judgment of costs would have to be first signed by the Deputy Registrar of the Court in terms of Order 25 Rule 3 of the *Civil Procedure Rules* before the invocation of Rule 4. She relied on *Kiroket Ole Punya v Umash Ole Mwaniki & 2 others* [2018] eKLR.
- [8] I have given consideration to the application, the affidavits relied on by the parties, as well as the written submissions filed by their learned counsel. The background facts are not in dispute; and they are well-captured in the parties' respective affidavits and the documents annexed thereto. It is common ground therefore that the petitioner filed Insolvency Petition No. 11 of 2020 on December 4, 2020 seeking that a Bankruptcy Order be made against the respondent for failing to pay rent to the petitioner to the tune of Kshs. 5,428,777/=. It is also common ground that that Petition was subsequently withdrawn on March 16, 2021.
- [9] In my understanding of the arguments made by Mr. Mokaya, the respondent's application for the payment of costs is hinged, not on the court's discretion to award costs for purposes of section 27 of the



Civil Procedure Act, Chapter 21 of the Laws of Kenya; although that provision was cited as one of the enabling provisions, but primarily on Order 25 Rule 4 of the Civil Procedure Rules; which states that:

“If any subsequent suit shall be brought before payment of the costs of the discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.”

[10] Thus, the essential elements that the respondent must prove to succeed under the above provision, as aptly captured by Hon. Mwera, J. (as he then was) in Patrick Kigera Mathbia & another v Dr. Peter Mungai Ngugi & 2 others [2011] eKLR, are as follows:

- [a] That a suit was instituted and later discontinued by the claimant;
- [b] That costs were awarded and certified in respect of that discontinued suit to the respondent(s);
- [c] That those costs are known and have been demanded and remain unpaid by the claimant;
- [d] the claimant, nonetheless files another suit upon the same or substantially the same cause of action;

[11] In the premises, while it is not in dispute that the petitioner filed an earlier Petition, which was thereafter withdrawn, the question that then arises is whether the respondent has demonstrated that it was awarded costs in Insolvency Petition No. 11 of 2020; which remained unpaid as at the date of the instant Petition; which admittedly is premised on the same facts as the earlier Petition. I note, in this regard that, although the respondent was silent on the matter, the petitioner has demonstrated that the earlier Petition was withdrawn with no order as to costs. A copy of the formal order extracted in respect of the earlier Petition confirms as much. It further shows that the order marking Insolvency Petition No. 11 of 2020 as withdrawn was made by Hon. Njoki Mwangi, J. on the occasion of the hearing date for Notice of Motion dated January 18, 2021; and that counsel for the respondent/applicant was, on that occasion, absent. A copy of that application was annexed to the respondent’s Supporting Affidavit as Annexure OTS-2.

[12] There being no order for the payment of costs to the respondent, it then follows without saying that the application is misconceived. And, even if there was such an order, the respondent would have to go a step further and show that it complied with Rule 3 of Order 25 and had a judgment for costs duly executed by the Deputy Registrar, by exhibiting a copy thereof to the instant application. That Rule states:

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has wholly been discontinued, and any defendant may apply at the hearing of the costs of any part of the claim against him which has been withdrawn.”

[13] The above provision further underscores the fact that the issue of whether or not to award costs and the ensuing judgment for such costs is the preserve of the court that handled the dismissal, and no other. There being no proof of such an award or whether there exists judgment for costs in favour of the respondent, it is my considered finding that the instant application is entirely misconceived and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF APRIL 2022.

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OLGA SEWE
JUDGE

