



Pine Care Limited v I&M Bank Limited & another (Miscellaneous Application E892 of 2021) [2022] KEHC 3287 (KLR) (Commercial and Tax) (24 June 2022) (Ruling)

Neutral citation: [2022] KEHC 3287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E892 OF 2021**

A MSHILA, J

JUNE 24, 2022

BETWEEN

PINE CARE LIMITED APPLICANT

AND

I&M BANK LIMITED 1ST RESPONDENT

**PONANGIPALLI VENKATA RAMANA RAO (ADMINISTRATOR OF
PINECARE LTD) 2ND RESPONDENT**

RULING

1. There are two applications herein. The 1st Application is a Notice of Motion dated 3rd December 2021 brought under Sections 522, 532, 533, 534, 568, 573, 578, 582, 586, 581, 591, 592, 597 of the [Insolvency Act](#) 2015 and Sections 1A, 1B & 3A of [Civil Procedure Act](#). The Application was supported by the sworn Affidavit of Bharat Kumar Alias Sushill Kumar Bhatt who sought the following orders;
 - a. The Applicant be given leave to institute legal proceedings to challenge the appointment of the 2nd Respondent as its administrator in respect of property LR. No. 1870/1/183-Eldama Ravine Road Nairobi pursuant to orders made in Insolvency case No. E025 of 2021 and his eventual removal therefrom;
 - b. There be a temporary conservatory order to restrain the Defendants, their agents or servants from disposing of the suit property LR No. 1870/1/183-Eldama Ravine Road Nairobi and/or selling the Applicant's assets thereon or alienating or transferring the suit property pending the hearing and determination of this Application;
 - c. The court to order the 2nd Respondent to convene a proper meeting for the creditors and make full disclosure of the status of all the accounts and dealings he is handling relating to this matter;



- d. In the alternative the court to make directions and orders as it deems fit and just in the circumstances;
 - e. Costs of this Application be in the cause.
2. The Applicant stated that since the appointment of the 2nd Respondent as the administrator of the Applicant's affairs on the suit property, he has conducted himself in an opaque manner and in breach of the provisions of the [Insolvency Act](#) for the following reasons inter alia:
- i. He has secretly opened a separate bank account in his name in which he has received huge deposits of money from third parties to whom he has secretly proposed to sell the suit property without the Applicant's knowledge and without following the necessary legal procedure provided under the law and in breach of his fiduciary duties as an agent of the Applicant company;
 - ii. Any funds paid pursuant to the sale of the suit property or any assets thereon must be deposited in an escrow account on interest until the sale is completed but on the contrary the 2nd Respondent caused monies to be deposited in his own account and has been utilizing the funds to pay expenses incurred by himself in his capacity as an administrator and without the applicant's knowledge which is untenable;
 - iii. The 2nd Respondent has also utilized the funds to pay premiums for insurance for the suit properties without disclosure of the value of the property insured and without the applicant's knowledge;
 - iv. The 2nd Respondent has also purported to be negotiating with the Applicant on how to resolve this matter while concealing the fact that he has already offered the suit property to 3rd parties of his own choice and has already received substantial deposits for the purchase price without any notification of the sale as required and without any formal notification of the intended liquidation of the applicant's assets which is in gross breach of law as he is not being accountable to the applicant;
 - v. The 2nd Respondent has also secretly drawn funds from the Applicant's account to pay valuers for the valuation of the suit property and has failed to disclose this or share the valuation report with the Applicant choosing to keep it in the dark which is in bad faith and mischievous;
 - vi. The 1st Defendant also secretly drew funds from the Applicant's account to pay its own lawyers to institute the insolvency proceedings leading to the appointment of the administrator for its own benefit and without the Applicant's knowledge;
 - vii. The 2nd Respondent has failed, neglected to convene a creditors meeting as required;
 - viii. The Respondents have acted in contravention of the express provisions of the [Insolvency Act](#) in their own interests which are not those of the Applicant company herein.
3. The Respondents filed a Notice of Preliminary Objection dated 3rd February 2022 to have the Application dated 3rd December 2021 struck out on the grounds that:
1. The court does not have jurisdiction to determine the legal issues and grant the orders sought in the Notice of Motion dated 3rd December 2021 because:
 - (a) It is only the Insolvency Court which has the jurisdiction to entertain the said application under Section 2 of the [Insolvency Act](#) No. 18 of 2015.



- (b) Section 2 of the *Insolvency Act*, No. 18 of 2015 defines the Insolvency Court as "the High Court, and if there is an insolvency division of that Court, means that division".
 - (c) The said Insolvency Court with jurisdiction to grant the orders sought is High Court Insolvency Cause No. E025 OF 2021: In the Matter of Pine Care Limited.
 - (d) In the circumstances, the Application has been filed in violation of Section 2 of the *Insolvency Act*, No. 18 of 2015.
2. The Application has been filed in violation of Section 581 of the *Insolvency Act* No. 18 of 2015 because:
- (a) The director of the company under administration Mr. Bharat Kumar Alias Sushil Kumar Bhatt is performing or exercising a management function by appointing an Advocate who filed this application without the consent of the Administrator.
 - (b) The appointment of the said Advocate has interfered with the exercise of the Administrator's functions as the application seeks to stop the Administrator from selling the property LR No. 1870/1/183 Eldama Ravine Road, Nairobi.
 - (c) The said director has committed an offence under Section 581 [4] of the *Insolvency Act* No. 18 of 2015 and he is liable for a fine not exceeding Kshs 500,000.00 or to imprisonment for a term not exceeding six [6] months or both.
3. The application is incurably and fatally defective and a nullity ab initio for the following reasons:
- (a) The Applicant purports to commence suit by way of the said application which is not a legally recognized originating process.
 - (b) The Applicant purports to seek a temporary order of injunction through the said Application without a substantive suit seeking similar final orders of a permanent injunction.
 - (c) The said Application can only be cured if it was filed within a properly instituted substantive suit.
 - (d) The Application offends the provisions Order 3 Rule 1 of the *Civil Procedure Rules*, 2010.

Applicant's Case

- 4. The Applicant submitted that the respondent has not responded to the substantive matters/issues raised in the application as directed by the court, which should be construed as an admission on the issues there. Consequently, the Preliminary Objection was merely founded on technicalities of law rather than substance which the court should discourage in the current constitutional dispensation.
- 5. On the issues raised by the Respondents that the court lacks jurisdiction to determine the issues raised in these proceedings by virtue of existence of the Insolvency Suit No. E025 of 2021. The Applicant submitted that this court has the option to consolidate the two suits and adjudicate on the issue in question rather than summarily strike out the suit, which will accord with the overriding principle enunciated in the Constitution.



6. It was the Applicant's case that it is seeking the courts leave to challenge the 2nd Respondent appointment and conduct in the premises of this case. This right to seek the court's intervention is available to the Applicant where the administrator conducts himself contrary to the law.
7. The current proceedings are supplemental in nature and are intended to prevent the ends of justice from being defeated and cannot be described as a suit as submitted by the respondents. Under Section 63 of the Civil Procedure Act, the court is conferred with the powers/ jurisdiction to prevent the ends of justice from being defeated through supplemental proceedings.
8. The Applicant relied on the case of Insolvency Notice No. E013 of 2018- *In the matter of Allied East Africa Ltd (Formerly Hill port Ltd) between I&M Bank Ltd v ABC Bank Ltd & another* where the court declined to strike out the proceedings on the mere assertion that the pleadings/ proceedings should have been filed in the main insolvency case.
9. The Applicant urged the court to reject the Preliminary Objection and grant the Application as the issues raised therein have not been rebutted.

Respondents' Case

10. The Respondents in response submitted that the court had no jurisdiction to grant the orders sought in the application. It was only the Insolvency Court which has the jurisdiction to entertain the said application under Section 2 of the Insolvency Act No. 18 of 2015. Section 2 of the Insolvency Act, No. 18 of 2015 defines the Insolvency Court.
11. The company under administration has been cited as the Applicant in the purported Application when in actual fact it has no capacity to be sued as such, other than by leave of the Insolvency Court or by consent of the Administrator. Section 560 (l) (d) of the Insolvency Act.
12. Further, the Respondent stated that it is clear from the reading of Section 560 (l) of the Insolvency Act that commencing such legal proceedings against a company under administration is totally barred in the absence of consent of the administrator or approval of the court so long as a moratorium is in force. The Respondents relied on the case of Midland Energy Limited v African Banking Corporation Ltd & another [2020] eKLR noted that a suit filed without leave as envisaged under section 560(1) of the Insolvency Act is incompetent *ab initio*.
13. The company is under administration, its director or the Advocate purportedly representing it in this application have not obtained any leave from the Insolvency Court nor any consent from the Administrator to file the application. In the circumstances, the Application should be struck out as the company under administration has no locus standi to sue as the Applicant without the consent of the Administrator.
14. It was the Respondents' submission that this Application has been filed in violation of Section 581 of the Insolvency Act. It is not in dispute that the purported Applicant has been placed under Administration under the provisions of the Insolvency Act. Once a company is placed under Administration, the management of the company vests in the Administrator to the exclusion of the directors of the company whose functions are suspended.
15. Consequently, the directors of a company under administration have no legal capacity, or status to perform managerial functions without the consent of the administrator. Upon commencement of administration, the Administrator, as the proper agent of the company under administration, has the power to assume control of the assets of the company and manage its affairs to achieve the objectives set out under Section 522 of the Insolvency Act.



16. The director of the company under administration Mr. Bharat Kumar Alias Sushil Kumar Bhat was purporting to perform or exercise a management function by appointing an Advocate who filed this application without the consent of the Administrator or leave of the court. The said action amounts to interference with the administrator's functions. The appointment of the said Advocate has interfered with the exercise of the Administrator's functions because the application seeks to stop the Administrator from selling the property LR No. 1870/1/183-Eldama Ravine Road, Nairobi.
17. In addition, the said director has committed an offence under Section 581 (4) of the *Insolvency Act* No. 18 of 2015 and he is liable for a fine not exceeding Kshs.500, 000.00 or to imprisonment for a term not exceeding six [6] months or both. In the circumstances, it was submitted that the Application herein was irregularly filed by a suspended director hence hopeless, incompetent, fatally defective and inadmissible and ought to be dismissed.
18. Further, that the Applicant purports to commence suit by way of the said Application which is not a legally recognized originating process. A suit cannot be commenced by a Notice of Motion application as it is not legally recognized as an originating process. In the case of *Proto Energy Limited v Hasbi Energy Limited* [2019] eKLR the court upheld a similar Preliminary Objection and struck out the Notice of Motion Application.

Issues for determination

19. The Court has considered the Application, the Response, the Submissions made on behalf of the parties and the decisions relied on and has framed only one issue for determination which is as follows;
 - a. Whether the Preliminary Objection should be upheld;

Analysis

Whether the Preliminary Objection should be upheld;

20. A Preliminary Objection was raised by the 1st Respondent and it was its contention that this court did not have jurisdiction to determine the legal issues and grant the orders sought in the Notice of Motion dated 3rd December 2021 because it is only the Insolvency Court which has the jurisdiction to entertain the said application under Section 2 of the *Insolvency Act* No. 18 of 2015.
21. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is the landmark case on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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 a contract giving rise to the suit to refer the dispute to arbitration”

22. In the same case Sir Charles Newbold, P. stated:

“A 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 issue, and this improper practice should stop”.

23. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR has also pronounced itself on the same subject. The court expressed itself as follows:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

24. The Preliminary Objection is premised on the provision of Section 2 of the *Insolvency Act* No. 18 of 2015 which defines the Insolvency Court as: “The Court means the High Court, and if there is an insolvency division of that Court, means that division”

25. It is not in dispute that there exists another suit High Court Insolvency Cause No. E025 of 2021: In the Matter of Pine Care Limited. The Respondents contended that the court handling Insolvency Cause No. E025 of 2021: In the Matter of Pine Care Limited is clothed with jurisdiction to grant the orders sought herein.

26. In the case of *Mark Properties Limited v Coulson Harney LLP Advocates; Le Mac Management Company Limited & another (Applicants)* [2021] eKLR the court stated as follows;

“Any issue relating to the administration ought to be taken up with the court exercising insolvency jurisdiction, that is, within proceedings in Milimani High Court IC No. E010 of 2021 Re: Mark Prime Properties Limited [Under Administration] in accordance with Section 591 of the Insolvency Act.”

27. This court is persuaded by the above sentiment as it is in line with the provision of Section 2 of the *Insolvency Act*. In this case the court exercising insolvency jurisdiction is Insolvency Cause No. E025 of 2021: In the Matter of Pine Care Limited which ought to deal with issues raised by the Applicant relating to administration.

28. In addition, the Respondent stated that there is no provision in law by which a party can institute a suit by way of a Notice of Motion. One can only institute a suit through Originating process being a Plaint, a Petition or an Originating summons.

29. Order 3 Rule (i) (ii) of the *Civil Procedure Rules* provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicant failed to file any originating process in this matter and this renders the entire Application defective.

30. The other issue raised in the Preliminary Objection is that the Application has been filed in violation of Section 581 of the *Insolvency Act* No. 18 of 2015 which provides;

“Company under administration not to perform management functions without administrator’s consent

- (1) A company under administration, or an officer of a company under administration, shall not perform or exercise a management function without the consent of the administrator.

- (2) For the purpose of subsection (1)—



- (a) "management function" means a function or power that could be performed or exercised so as to interfere with the exercise of the administrator's functions; and
 - (b) consent may be general or specific.
- (3) A company that contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding one million shillings.
- (4) An officer of a company who contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both."
31. It is not disputed that the Applicant company is under administration; its director or the Advocate purportedly representing it in this Application ought then to have obtained leave from the Insolvency Court to file the Application as it is the court seized with jurisdiction; or sought consent from the Administrator
32. The upshot of this is that this court is satisfied that the Preliminary Objection is meritorious.

Findings And Determination

33. In the light of the foregoing this court makes the following findings and determinations;
- i. The Preliminary Objection is found to have merit and it is hereby upheld;
 - ii. The application dated 3rd December 2021 is found to be incompetent and is hereby struck out;
 - iii. The Applicant is at liberty to obtain leave from the Insolvency Court or consent from the Administrator for filing of the requisite application for the orders sought herein;
 - iv. Each party to bear its own costs in the respective Application and Preliminary Objection.
- Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Wawire for the Respondent

Nduati for the Applicant

Lucy-----Court Assistant

