



REPUBLIC OF KENYA



**Gatabaki v Muga Developers Limited (Civil Suit 90 of 2015)
[2022] KEHC 14605 (KLR) (Civ) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 90 OF 2015

CW MEOLI, J

OCTOBER 27, 2022

BETWEEN

NANCY WANJA GATABAKI PLAINTIFF

AND

MUGA DEVELOPERS LIMITED DEFENDANT

RULING

1. The suit herein was filed by Nancy Wanja Gatabaki (hereafter the plaintiff) against Muga Developers Limited (hereafter the defendant) pursuant to an agreement in which the defendant agreed to pay the plaintiff the sum of Kshs 10,000,000/- (Ten Million Shillings) as compensation for loss arising from demolition of the plaintiff's house erected on land parcels known as LR No 28223/2 (originally 5980) and LR No 45081/1.
2. The defendant subsequently filed a defence statement and on October 19, 2021 the filed a notice of preliminary objection concerning the plaintiff's suit on grounds that the defendant was by a notice of appointment of a receiver and manager dated February 10, 2020 placed under receivership which then the subject of the court proceedings in Nairobi HCCC No E082 of 2020; that contrary to section 560 of the *Insolvency Act* No 18 of 2015, the plaintiff had not obtained the consent of the administrator or approval of the court to institute and or continue this instant suit; and that the suit is liable for dismissal for want of compliance with the mandatory provisions of the *Insolvency Act*.
3. On October 22, 2021 the plaintiff filed grounds of opposition to the defendant's preliminary objection. The plaintiff's grounds are to the effect that the defendant's preliminary objection is based on a misapprehension of the law; that the preliminary objection is based on wrong application of the law to the facts; and that the defendant's preliminary objection is made in bad faith and is an abuse of the court process for the sole intention of delaying the hearing of the plaintiff's suit.



4. Parties took directions to canvass the preliminary objection by way of written submissions.
5. On the part of the defendant counsel anchored his submissions on section 560 of the *Insolvency Act*, the decision in the matter of *Athi River Steel Plant Limited (In Receivership) [2020] eKLR* and *KSC International Limited (In Receivership) & 5 Others v Bank of Africa (K) Limited & 6 Others [2018] eKLR* to argue that where a receiver and manager has been appointed in respect of a company after the coming into operation of the relevant parts of the *Insolvency Act*, any subsequent legal action against such company is regulated by the provisions of the said Act. That as of February 10, 2020 a receiver and manager was appointed in respect of the defendant under the provisions of the *Insolvency Act* and, based on this fact and the decision in *Midland Energy Limited v African Banking Corporation & Another [2020] eKLR* the present suit instituted or continued without prior consent of the receiver and managers of the defendant, or the approval of the court contravenes the mandatory provisions of section 560 of the *Insolvency Act*. In conclusion the court was urged to dismiss the plaintiff's suit with costs.
6. On behalf of the plaintiff, it was submitted that there is a fundamental difference between receivership and administration of a company. That the primary goal of administration is to help the company pay off its debts and restore the company to viability, whereas receivership is intended to facilitate collection and sale of the assets of the company for the benefit of secured creditors. It was argued that receivership does not trigger an automatic statutory moratorium and that other creditors can commence or continue legal action against the company, including petitioning for winding up orders. That section 560 of the *Insolvency Act* is only applicable to companies under administration.
7. As to whether the defendant company is under administration, counsel relied on sections 520, 523(b), 534, 538, 537 and 560 of the *Insolvency Act* to argue that the purported appointed receivers and managers of the defendant have not complied with section 537 of the *Insolvency Act* and as such the defendant is not under administration as contended. That the decisions in *Muga Developers Limited v Equity Bank of Kenya Limited & 4 Others [2020] eKLR*, The Matter of Athi River Steel Plant Limited (supra) and KSC International Limited (supra) are not applicable in the instant matter because the former decision neither confirmed that the defendant was placed under receivership nor address the application of section 560 of the *Insolvency Act*. That in the latter decision, the receivers were appointed before the enactment of the *Insolvency Act*. Counsel therefore asserted that section 560 of the *Insolvency Act* was inapplicable to the suit which ought to be allowed to proceed for hearing without further delay. Alternatively, counsel urged the view that if the court were to find merit in the preliminary objection, the appropriate order would not be striking out of the suit filed before the receivers were appointed, and that striking out is a draconian measure that should be a last resort where no alternative remedy was available.
8. The court has considered the rival submissions by the parties and the record herein. The defendant's preliminary objection (PO) is fundamentally premised on section 560 of the *Insolvency Act* 2015 which states:

- “(1) While a company is under administration—
- (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.

- (2) In giving approval for a transaction under subsection (1), the court may impose a condition on, or a requirement in connection with, the transaction.”

9. The court must determine whether in the circumstances of this case, the preliminary objection raised by the defendant raises a pure point of law and whether the preliminary objection is well grounded. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors (1969) EA 696*, Law J A stated:”

“So far as I am aware, 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

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, or occasion, confuse the issues, and this improper practice should stop.”

10. In the case of *Oraro v Mbaja (2005) KLR 141*, Ojwang J (as he then was) reiterated the foregoing by stating that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”



11. The Court of Appeal in *Mulemi v Angweye & another (Civil Appeal 170 of 2016) [2021] KECA 214* further distilled the constituent ingredients of a preliminary objection in Mukisa Biscuits (*supra*) by stating as follows:-

“.....a preliminary objection may be distilled as follows:

- i) It must be a pure point of law;
 - ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
 - iii) If argued as a pure point of law, it may dispose of the suit;
 - iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.
12. It is the court’s view that elements (i), (ii) & (iv) are intertwined. In a word, the defendant’s objection is that the plaintiff’s cause of action was instituted in contravention of section 560 of the *Insolvency Act* No 18 of 2015 as neither the consent of the administrator nor approval of the court has been obtained to institute and continue instant suit. The alleged factual foundation of the objection is that the defendant was placed under receivership on February 10, 2020 by way of a notice of appointment of a receiver /manager which receivership is currently the subject of the court proceedings in Nairobi HCCC No E082 of 2020. The plaintiff through counsel have vehemently disputed this assertion and sought to distinguish between receivership and administration and attendant legal implications, and to assert that section 560 of the *Insolvency Act* is inapplicable to the instant matter. Mainly because, the purported appointed receivers/ managers of the defendant have not complied with section 537 of the said act.
13. Section 534 of the *Insolvency Act* provides for the appointment of an administrator by the holder of a qualifying floating charge. However, the process by which the appointment takes effect is prescribed in sections 537 and 538 of the act as follows:

“537. Holder of relevant floating charge to notify the court on appointing administrator

- (1) A person who appoints an administrator of a company under section 534 shall lodge with the court—
 - (a) a notice of appointment that complies with subsections (2); and
 - (b) such other documents as may be prescribed by the insolvency regulations for the purposes of this section.
- (2) A notice of appointment complies with this subsection if—
 - (a) it includes a statutory declaration by or on behalf of the person who makes the appointment—
 - (i) that the person is the holder of a qualifying floating charge in respect of the company’s property;
 - (ii) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment; and



- (iii) that the appointment is in accordance with this Part; and
- (b) it identifies the administrator and is accompanied by a statement by the administrator—
 - (i) that the administrator consents to the appointment;
 - (ii) that in the administrator's opinion the purpose of administration is reasonably likely to be achieved; and
 - (iii) giving such other information and opinions of a kind prescribed by the insolvency regulations for the purposes of this section.
- (3) A statutory declaration under subsection (2) is not effective unless it is made during the period prescribed by the insolvency regulations for the purposes of this section.

537.

538. When administrator's appointment takes effect The appointment of an administrator under ~~534~~ takes effect when the requirements of section 537 are satisfied.”

14. Thus, while there is no dispute that vide the notice of appointment of a receiver and Manager dated February 10, 2021 (see defendant's list of documents dated October 19, 2021) Muniu Thoithi and George Weru were appointed by Equity Bank Limited as receiver and managers in respect of the defendant company, it has not been shown that the process contemplated above has been complied with so as to place the defendant under administration in the terms envisaged in section 521 (a) and (b) of the *Insolvency Act*. Moreover, the appointment of the said receiver and managers was done after the *Insolvency Act* came into force, unlike the position in some of the decisions cited by the defendant. That being the case, it is difficult to see how section 560 of the act could successfully be invoked in this case.
15. In sum, the foundational question arising from the arguments put forth by the parties is whether by the undisputed appointment of a receiver and manager the defendant company was placed under “administration” or “receivership”. The question is key to determining whether the provisions of section 560 of the *Insolvency Act* apply to the present suit. Although the provisions of section 560 of the *Insolvency Act* require no interpretation, the question whether they apply in this case is largely a question of fact contested by the parties, and hence can only be determined upon evidence, and cannot in the circumstances of this matter qualify as a pure point of law.
16. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR* cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR* where the latter court emphasized that: -

“(16) 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. (See *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others, Civil Application No 14 of 2014, [2014] eKLR*).”



17. Consequently, upon careful review of the material canvassed in respect of the preliminary objection, the court is not persuaded that the preliminary objection by the defendant is well taken and the same is hereby dismissed with costs to the plaintiff.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 2022.

C MEOLI

JUDGE

In the presence of:

For the plaintiff: Mr Muturi

For the defendant: Mr Otieno

C/A: Carol

