



**Ogema v Banda Homes Limited (Insolvency Petition E026 of 2021)
[2022] KEHC 16884 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E026 OF 2021
DAS MAJANJA, J
DECEMBER 21, 2022**

BETWEEN

HERBERT MALINGU OGEMA PETITIONER

AND

BANDA HOMES LIMITED RESPONDENT

RULING

1. The subject of this ruling is a preliminary objection dated August 30, 2022 raised by Humphrey Okuku, an interested party, claiming that the petition dated July 21, 2021 offends section 427(3) (a), (b) and (c) of the *Insolvency Act*, 2015 as the agreement at special conditions contains an arbitration clause which the petitioner has not exhausted to warrant the petition and that it ought to be struck out.
2. I have heard the arguments by the parties and I am constrained to dismiss the preliminary objection on the following grounds. A preliminary objection as defined in the well-known case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors [1969] EA 696* is based on a pure point of law or uncontested facts. In that case Law JA, observed that:

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 pleading and which if argued as preliminary objection may dispose of the suit.

In other words, for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion.



3. On its face, the preliminary objection requires the court to review the agreement forming the basis of the petitioner's case. The contents of the agreement are not pleaded and the agreement is not available to the court at this stage hence the objection cannot constitute a preliminary objection within the meaning of the *Mukisa Biscuits Case* . The notice of preliminary objection dated August 30, 2022 is therefore dismissed with costs.
4. But this is not the end of the matter. At the hearing of the preliminary objection, counsel for the petitioner conceded that that the relationship between the parties was based on agreement between the parties which contained an arbitration clause. In the event the petition proceeds for hearing, the court would be called upon to resolve the dispute between the parties under the said agreement. Liquidation proceedings are ill-suited for determination of matter of breach of contract.
5. I therefore strike out the petition but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2022.

D S MAJANJA

JUDGE

Court Assistant: Mr M Onyango.

Mr Ouma instructed by Murgor and Murgor Advocates for the debtor/applicant.

Mr Mbugua instructed by Mbugua and Mbugua Advocates for the creditor/respondent/petitioner.

