



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
INSOLVENCY PETITION NO. E 174 OF 2019
IN THE MATTER OF THE COMPANIES ACT NO. 18 OF 2015
AND
IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015
AND
IN THE MATTER OF KINGS PRIDE PROPERTIES LIMITED
LIQUIDATION PETITION
(pursuant to Section 425 of the Insolvency Act No. 18 of 2015)

RULING (2)

This Court delivered Ruling on 19th March 2021 on the Notice of Preliminary Objection by the Company that the Petitioners Petition offends **Order 1 Rule 10 (2) CPR 2010** that the Respondent Company was wrongly sued as there is no existing contract between the Parties.

Secondly, that the Petition offends **Order 2 Rule 15 of CPR 2010** as the petition does not disclose a reasonable cause of action.

The Respondent Company deposed that the Petitioners' Affidavits in support of the Petition contained falsehoods.

The Ruling was to the affect that since the Petitioners failed to file Responses the Preliminary objection was unopposed and hence granted.

The Petitioners filed an Application for Review on 21st April 2014, that the Petitioners filed Written Submissions that the Court did not consider.

DETERMINATION

Order 45, Rule 1CPR 2010

Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

ANALYSIS

The Respondent Company was served with the Application for Review, pursuant to Court order of 8th June 2021, the Court did not see any response or attendance or representation by the Respondent Company.

The Court in its Ruling on the 19th March 2021, failed to take into account the Written Submissions of the Petitioners.

On 11th November 2020, the Petitioners informed the Court that they filed Written Submissions following Court orders of 21st September 2020 and served the Respondent Company and annexed Mention Notice and Affidavit of Service, but the Respondent did not appear or respond.

On 1st December 2020, both parties appeared in Court (virtually) and informed the Court that the Petitioners filed Written Submissions, the Respondent Company sought time to file skeletal submissions within 7 days if ongoing negotiations did not settle the matter.

On 17th March 2021, the Petitioners appeared but the Respondent Company failed to appear in Court (virtually) and Written submissions were not filed. The Court granted date of delivery of Ruling of Preliminary Objection.

The Court did not refer or include the Written Submissions of the Petitioners as the Petitioners failed to file and serve response to the Preliminary Objection and it was unopposed and hence upheld.

The Court considered the fact that Written Submissions are not pleadings and evidence cannot be adduced through submissions, they are a summary and/or evaluation of the law and facts presented to Court.

To that the Petitioners' Counsel informed this Court orally on 29th June 2021, that the Petitioners did not exercise their right to respond to the Preliminary Objection by filing Response because they annexed the contested contracts to the bundle filed with the Petition on 2nd January 2020. Secondly, the Preliminary Objection is on pure point of law and not based on evidence.

The Court found annexed to the Petition filed for liquidation of Kings Pride Properties Ltd the following Agreements;

a) Agreement on Letterhead of Kings Pride dated 26th August 2015 between Mr. Joseph Kiruga & Glenwoods Gardens Ltd signed by Director of Kings Pride.

b) Agreement on Letterheads of Kings Pride Dated 1st September 2015 between Mr. Sammy Mugendi Njeru and Glenwoods Gardens Ltd signed by Director of Kings Pride.

From the above disclosure of the Agreements/contracts on record which the Court had not seen/read or taken into consideration; as formal response by the Petitioners to the Preliminary Objection was not filed as the contested contracts were/are in the Petitioners bundle, means that the Ruling of 19th March 2021 has a mistake or error apparent on the face of the record, which mandates a review under **Order 45 CPR 2010**.

MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS (1969) EA 696.

At page 700, Law, JA stated that:

'The first matter relates to the increasing practice of raising points which should in normal manner, quite improperly by way of preliminary objection. A preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on assumption that all 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.'

..... 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 the contract giving rise to the suit to refer the dispute to arbitration.'

In light of the contested Agreements/Contracts the Preliminary Objection is not a pure point of law and the facts are not agreed on by the parties.

DISPOSITION

1.The Application for review of 21st April 2021 is granted and Ruling of 19th March 2021 is set aside.

2.The Preliminary Objection is now dismissed as the issues raised with regard to locus standi and privity of contracts are triable issues to be determined at the hearing and determination of the Petition.

DELIVERED SIGNED DATED IN OPEN COURT ON 30TH JUNE 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

PETITIONERS N/A

RESPONDENT N/A

COURT ASSISTANT: TUPET