Commissioner of Insurance v Gathua & another (Winding Up Cause 22 of 2006) [2021] KEHC 99 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 99 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

WINDING UP CAUSE 22 OF 2006

JM MATIVO, J

SEPTEMBER 23, 2021

IN THE MATTER OF UNITED INSURANCE COMPANY

AND

IN THE MATTER OF THE COMPANY'S ACT, CAP 486

AND

IN THE MATTER OF AN APPLICATION

BY

BETWEEN

COMMISSIONER OF INSURANCE ..... PETITIONER

AND

BERNARD NJOROGE GATHUA ..... 1ST RESPONDENT

BENJO SERVICE LINE CO. LTD ..... 2ND RESPONDENT

RULING

1. This Winding Up Petition has a chequered history. For starters, it has been pending in this court for the last 15 years. One and a half decades is a long period by any standards. Despite the constitutional dictate in Article 159 which obligates courts to ensure speedy delivery of justice, trial delays still remain the bane of our justice delivery system. Such a long delay should prick the conscience of any one who cares about the value of prompt determination of court disputes. Litigants are obligated to support the courts to accomplish this constitutional prescription.

2. Hearing of this Petition was concluded before Tuiyot J (as he then was) on 30th September 2020. Judgment was scheduled for delivery 21st December 2020. However, on 16th December 2020, the trial

judge recused himself from these proceedings and referred the file back to the Presiding Judge who allocated the matter to this court and fixed it for mention for directions before this court on 13th April 2021. However, on the said date, my attention was drawn to a pending application dated 9th April 2021, the subject of this ruling. After hearing brief arguments from all the parties, I directed that the application be determined, hence this ruling.

The application

3. Two Policy Holders of United Insurance Company (the company), namely, Bernard Njoroge Gathua and Benjo Service Line Co. Ltd, the 149th and 150th Respondents moved this court vide the application dated 9th April 2021 seeking orders that these proceedings be truncated in the interests of justice in light of a Report by the Hon. Attorney General dated 14th January 2021. Alternatively, they pray that this Winding Up Petition to be struck out for being an abuse of court process and for want of the Petitioner's full disclosure of the liquidity status of the company. Also, they pray for costs of the application to be awarded to them in any event. Prayer (a) the application is spent.

4. The application is anchored on Articles 47(1), 48 and 159(2)(e) of the Constitution, Section 734(2) of the *Companies Act*[1] and Part VI and sections 522(1), (2), (3), (4) and 531 (b) of the *Insolvency Act*[2] and the inherent powers of the court. The grounds in support of the application are that the Petitioner is guilty of material non-disclosure that the Hon. Attorney General in exercise of his constitutional duty as the Chief Legal Advisor of the Government on all legal issues has advised the Petitioner against winding up the company vide a Report dated 14th January 2021.

5. The applicants states that the Petitioner has failed to bring to this court's attention the aforesaid expressed legal position which, were it to be acted upon as stipulated, would mean the revival of the company and the truncation of these proceedings. Additionally, the applicants state that the Hon. AG by his aforesaid in furtherance of the mandate under Article 156(4)(a) of the Constitution of Kenya has advised the Petitioner that "the parties should explore an amicable settlement of the Winding Up Cause given the findings that the subject Company can be revived..."

6. Further, the applicants state that these proceedings which are now are maintained, sustained or propelled by bad faith or extraneous reasons rather than the honest and subsisting factual and legal position constitute an abuse of court process and hence cannot be upheld. They also state that the effects on a company of the presentation of a Winding Up Petition such as an insurer of Public Service vehicles is so drastic that where evidence of revival of a company is overwhelming the Winding up should not be allowed. Also, they state that it would be unconscionable to permit the invocation of the machinery designed for winding up companies that are ordinarily insolvent to an insurer company which on available evidence is capable of having assets it holds liquidated, pay all its claims and debtors and have surplus sums to operate normally as an insurer. The applicants contend that the Petitioner has failed to disclose the above fact(s).

7. Additionally, they state that its breach of Article 47(1) of the Constitution for the Petitioner to use these proceedings to keep the revival of the company in abeyance while the Statutory Manager has continued to unlawfully use and deploy the company's resources in a never-ending "Statutory management" since June 2005 to date. They state that by a Report from Deloitte & Touche, dated 30th November 2011 it was demonstrated that the company had assets which if they were to be realized in full, would have settled its liabilities in excess of Kshs. 1.3 billion.

1 Act No. 17 of 2015.

2 Act No. 18 of 2015.

8. Also, the applicants state that on 25th September 2013, this court in Misc. 67 of 2012 issued an order for a Caretaker Board of Directors to revive the company. Further, the applicants state that Article 159(2)(e) of the Constitution mandates this court to direct parties to pursue alternative dispute resolution mechanisms other than raw litigation whose aim is to achieve Justice. The applicants stated that it is just and expedient to consider the justice of the matter especially to Policyholders, and not the narrow constructs of a Winding Up process.

9. Further, the applicants state that the court has inherent power to do justice as sought, and, that Winding Up the Company is a drastic action, that no prejudice will be visited on any of the parties if Hon. AG advise is complied with.

Supporting Creditor(s)

10. Christine Adhiambo Oraro, Advocate representing the 11th Respondent swore the affidavit dated 14th April 2021 in support of the application. The nub of her affidavit is that the company should be revived as per the AG's Report; that the Petitioner is guilty of material non-disclosure on the liquidity status of the company; that the Petition was brought in bad faith and it is an abuse of the court process to circumvent payments to creditors; and, lastly, that it is in the interests of justice and fairness that the application be allowed.

The Petitioners Response

11. Godfrey K. Kiptum, the Commissioner of Insurance and the Chief Executive Officer of the Insurance Regulatory Authority (IRA) duly appointed under the provisions of the Insurance Act[3] swore the Replying affidavit dated 27th April 2021 in opposition to the application. The substance of the affidavit is that the application ought to be declined because the substantive hearing was completed and all parties by consent filed their submissions, hence, the application seeks to re-open the proceedings. She also deposed that the Policy holders in Misc Suit No. 67 of 2012 filed an application dated 1st November 2018 seeking inter alia that the Petitioner cedes control of the company to the Claims Settlement Committee, and in particular, they sought orders similar to those sought in the instant application but the said application has never been prosecuted, so the instant application is vexatious, an abuse of court process and res judicata. He averred that Civil Suit No. 67 of 2012 should not obfuscate these proceedings which are independent and distinct from the said case.

12. Additionally, Mr. Kiptum deposed that it is not true that the Company is solvent nor has the Statutory Manager decimated the assets of the Company as alleged. He averred that this Petition was lodged in good faith pursuant to Section 123 of the Insurance Act; and that on the 15th of July 2005 the Commissioner of Insurance placed the Company under statutory management for breach of mandatory provisions of the Insurance Act. Further, that the Statutory Manager issued its Report dated 24th May 2006 and the financial report demonstrated that the Company was insolvent to the tune of Kshs 1,954, 627, 420/= in breach of sections 41(2), 70, 50, 32 and 29 of the Insurance Act, so, the Manager recommended that the company be liquidated.

13. Mr. Kiptum deposed that pursuant to section 67C (2) (8) and (9) of the Insurance Act, the Statutory Manager recommended and the Minister for Finance accepted the recommendation that the Company be wound up. Additionally, he averred that only the Statutory Manager can make recommendations to revive or wind up an insurer and the ultimate decision rests, currently, with the Board of the Authority which, upon careful and diligent consideration of the Statutory Manager's report as prescribed by the Act makes the requisite decision. Further, he averred that the Company has been in financial trouble

[3] Cap 487, Laws of Kenya.

and with liquidity and insolvency problems since 1999 and for several years, the Commissioner tried his best to have the shareholders address the problem to meet the solvency requirements of the Act.

14. Mr. Kiptum deposed that as admitted by Mr. George Ngure, a shareholder there was gross neglect and mismanagement including in ability to pay debts. He averred that Mr. Njoroge Nani Mungai in his affidavit sworn on 3rd March 2009 deposed that Mr. George Kariuki and his co-director John K. Mbuu were involved in the sale of the company's assets after the appointment of the Statutory Manager, among them Land Reference Nos. 12715/460 and 12715/456 initially registered either under the Company or its wholly owned subsidiary company Fidei Ltd and they were transferred to Homeward Agencies Ltd which transactions were not sanctioned by the Statutory Manager or the court. He also deposed that the Statutory Manager handover report dated 27th September 2014 noted that the shareholders / directors of the company and their associates interfered with the assets of the company by disposing treasury bills and parcels of land belonging to the company and Fidei Holdings, the company's subsidiary.

15. Mr. Kiptum averred that the Petitioner never sought the AG's advice, but it was sought by the Claims Settlement Committee and the company's shareholders. Further, on 29th March 2021 M/s Charles Muturi Mwangi and Peter Kiragu Mwangi (a shareholder of the Company), and Godfrey Wainaina Kamau while presenting themselves as the Claims Settlement Committee, conspired to take over the management of the company by purposing to forcefully replace the current appointed Statutory Manager.

16. He deposed that the AG under section 6 (2) of the Office of Attorney General Act, and Article 156 of the Constitution can with the leave of the court or tribunal, appear at any stage of proceedings. Lastly, the applicants and shareholders intention is to derail the final determination of this Winding Up Cause.

Statutory Managers Replying affidavit

17. Mr. William Okari Masita, the Managing Trustee of Policyholders Compensation Fund, the Company's Statutory Manager swore the Replying affidavit dated 27th April 2021. He deposed that the applicants are not principal parties in this suit and as alleged Policy holders, and as third parties/ interested Parties they lack capacity to seek the orders sought. He averred that these proceedings were fully heard and only judgement is pending and it is not open to seek to have the proceedings struck out. Further, that Miscellaneous Civil Suit No. 67 of 2012 heavily relied upon by the applicants is a distinct suit. Also, the grounds cited go back to the years 2011, 2014 and 2015 and no explanation has been offered for the unreasonable and inordinate delay in filing and prosecuting the application premised on the said grounds, and, the issues cited in the application are either res judicata or Sub judice.

18. Mr. Masita deposed that the question of extension of the term of the Statutory Manager, was raised in Miscellaneous Civil Suit No. 67 of 2012. Further, that the last extension of the term of the Statutory Manager was the subject of an application dated 25th February, 2019 and an appeal to the Court of Appeal was dismissed paving way for these proceedings to continue. He deposed that this matter was fully heard and it is only pending determination and the Policy Holders having canvassed the Petition on merits, they are barred from seeking to have a second bite over the same issues through the instant application and the issues cited are sub judice.

19. Regarding the opinion of the Solicitor General, he averred that the Solicitor General has not sought to be enjoined in these proceedings to prosecute his opinion and he wrote the letter at the invitation of members of Claims Settlement Committee. Further, the determination of the questions relating to the mandate and powers of the Claims Settlement Committee is a live before court and it is not open for the applicants through the instant application to seek to canvass it afresh. Additionally, he

deposed that the Policy Holders in No. 67 of 2012 vide an application dated 1st November, 2018 sought among other prayers, that the Commissioner of Insurance cedes the control of the Company to the Claims Settlement Committee citing similar grounds as in the instant application which application has never been prosecuted, so it is not open for the Policy Holders to invoke similar prayers in the instant application.

20. Mr. Masita deposed that this court lacks jurisdiction to determine the instant application which is an abuse of the court process, res judicata and sub judice. Alternatively, he deposed that the depositions in the supporting affidavit are vague, verbose, argumentative, muddled up, pure generalities, lacking in specifications and unsubstantiated. Also, he averred that at the time the Attorney General rendered his opinion, the Winding Up proceedings had been fully heard and if the Solicitor General intended that his opinion be considered by this court, then the law permits the AG to apply to be enjoined to court proceedings. He averred that the applicants have no legal capacity to prosecute before this court an opinion rendered by an AG and or Solicitor General nor does the opinion override the facts as presented before the court by the respective parties.

21. Additionally, Mr. Masita deposed that it is not true that the company is liquid and able to settle its claims, but it is unable to settle its claims and or meet capital and other statutory requirements to justify its revival and or licensing under the Insurance Act. He deposed that the placement of an insurance Company under statutory management is a statutory process expressly provided for under the Insurance Act. Further, that the appointment of a Statutory Manager is a mandate expressly and exclusively vested in an officer of the IRA under the Insurance Act, Section 67C (2) (i) and in exercise of this power, Statutory Managers have been duly appointed, namely, Kenya Reinsurance Corporation, Mr. Evanson Munene and Policyholders Compensation Fund and upon lapse of the initial 1 year, the subsequent terms have been granted on merit by the High Court. Further, no application for review and or appeal has been field by any aggrieved party.

22. Additionally, he averred that the term of the Statutory Manager will come to an end upon the determination of these proceedings and that the Policy Holders, by virtue of the instant application are delaying the conclusion of these proceedings and by extension, the term of the Statutory Manager. Also, it is not true that the Statutory Manager makes the decision to Wind Up or revive an insurance company, but, the Statutory Manager only recommends to the Commissioner of Insurance either to revive or wind up, which in this case, the recommendation to wind up was made way back in the year 2006. Further, the decision to either wind up or revive is in the exclusive jurisdiction of the IRA and her designated organs under the Insurance Act.

23. Mr. Masita deposed that the establishment of a caretaker Board was an ad hoc committee which was established in good faith with an intention of, in particular, inviting the shareholders to assist the Statutory Manager with information relating to the land assets and realization of the same to improve the company's liquidity. Further, he averred that the Caretaker Board failed to achieve its purpose and objective and its mandate came to an end and an attempt by the shareholders to seek the establishment of another Caretaker Board was found to be without merit by the High Court and struck out on 20th February, 2017 in Cause No. 316 of 2016 (O.S). He averred that the shareholders aggrieved by the said decision appealed to the Court of Appeal, in Civil Appeal No. 381 of 2017 which they are yet to prosecute.

24. Mr. Masita averred that the Solicitor General's letter dated 14th January, 2021 is not a report but an opinion and or unsolicited advice on the part of the Petitioner which opinion is incorrect. Lastly, the application is an afterthought calculated to delay the disposal of the Petition and it is devoid of any merit.

Applicant's advocates submissions

25. Mr. Kinyanjui, the applicant's counsel submitted that the the AG vide a letter dated 14th January 2021 advised that these proceedings should not proceed and that the parties do pursue an amicable settlement. He submitted that the AG's advice was issued pursuant to his mandate under Article 156(4)(a) of the Constitution. He cited section 6(1) of the Office of *Attorney General Act,2012* and argued that the AG's advice is equivalent to his appearance and submissions before this court. He argued that the AG's advice should be given deference and the weight it carries both in statute and under the Constitution and that this court cannot close its eyes or ignore a constitutionally-inspired advice grounded on Statute. He argued that under section 5 of the Office of the Attorney General Act the AG is responsible for giving binding advice, to Government Ministries, Government Departments, Constitutional commissions and State Corporations. He argued that the Petitioner being the head of a State Corporation falls within the ambit of entities that are bound by the Hon. AG's advice.

26. Counsel submitted that the court is bound to uphold the Constitution and in deference of the AG's opinion truncate these proceedings. He argued that the advice was not rendered in a vacuum but it is an in-depth and analytical advice which cites specific Reports which point to the solvency of the company. He argued that this court would be contravening the Constitution and the Act if it proceeds with the hearing without regard to the stated official Government position captured by the AG. He submitted that it has not been demonstrated that the opinion is deficient or irrelevant. He likened the AG's Advisory Opinion as having the same weight as that of the Supreme Court to the parties specified in Section 5 of the Act and cited the Supreme Court Advisory Opinion in Application No. 2 of 2011.

27. He submitted that disregarding the opinion is a violation of Article 3 of the Constitution and cited *Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi*[4] which held that the AG is expressly granted two types of powers, namely; executive power and legislative power. In addition, he relied on *Katiba Institute & another v Attorney General & another; Iseme, Kamau & Maema Advocates (Interested Party)*[5] for the holding that Article 156(6) requires the Attorney General to promote, protect and uphold the rule of law as well as defend public interest.

28. Regarding the alternative prayer, he submitted that the Government's official stand cannot be ignored just because these proceedings are at an advanced stage. He argued that all efforts should be directed towards the revival of the company. He submitted that the Petitioner failed to disclose the AG's advice to the court and cited *Signature Tours & Travel Limited v National Bank of Kenya Limited*[6] in support of the proposition that an applicant has a duty to make full and fair disclosure of the material facts which are those which it is material for the judge to know in dealing with the matter and the materiality is to be decided by the court. He argued that the AG' advise is material to the Petitioner's case and that the non-disclosure is a ground for the court to truncate these proceedings. He relied on *Standard Limited v Alfred Mincha Ndubi*[7] in which the court underscored the importance of full disclosure of material facts.

4 {2019} e KLR.

5 {2020} e KLR.

6 {2017} e KLR.

7 {2018} e KLR.

29. Additionally, Mr. Kinyanjui argued that the AG's advice creates an estoppel under Section 120 of the Evidence Act and cited *Esther Akinyi Odidi & 2 others v Sagar Hardware Stores Ltd & another*[9] which held that the person who made representation which the other believed and acted upon or his representative cannot turn round and deny the truth of the representation in any suit or proceeding. He submitted that the applicants having become aware of the AG's Advice on these proceedings are entitled to rely on it and the Petitioner cannot resile from it nor can the Petitioner deny the estoppel created. To fortify his argument, he cited the *Hogg, QM., Lord Hailsham (Ed) 1990 Halsbury's Laws of England London: Butterworth*[10] thus:-

FOOTNOTE 8

Cap 80, Laws of Kenya.

30. Mr. Kinyanjui submitted that the applicants have satisfied all the elements of binding statutory estoppel which are (a) Representation; (b) Reasonableness; (c) Reliance; (d) Detriment and (e) Unconscionability. He also cited *Carol Construction Engineers Limited & another v National Bank of Kenya*[11] which held that where each of these elements is demonstrated, a party will be permitted to raise an estoppel to prevent the opposite party from going back on their word and establishing by evidence any averment which is substantially at variance with his former representation. Also, he argued that it is presumed that the AG acted in the best interests of the public. In support of this proposition, he relied on *R v Commission for Racial Equality ex-parte Hillingdon London Borough Council*[12] and submitted that the above presumption operates to defuse an allegation by the Commissioner of Insurance that the AG would not be acting fairly in directing the termination of these proceedings and the pursuit of all efforts to revive the Company.

Submissions by supporting creditors

31. Mr. Charles Lutta Kassamani, a Creditor submitted that this Petition was primarily premised on the ground that the company was insolvent to the tune of Kshs. 1,954,627,420/= based on the Statutory Managers report dated 24/5/2006. He argued that in a subsequent affidavit, the Commissioner of Insurance deponed that the company could offset all the liabilities and regain solvency to the tune of Kshs 1.3 billion. He argued that in the circumstances, the company's assets exceed the liabilities which was the basis for constituting the claims/ debt settlement committee in High court Misc. 67 of 2012.

32. Mr. Kassamani submitted that the Solicitor General is the Principal Assistant of the AG, and he advised the Petitioner to amicably settle this case given that the company can be revived. He argued that in addition to the functions under Article 156 of the Constitution, the role of the AG is to advise Government ministries, Departments, constitutional Commissions and state corporations on

9 {2006} e KLR.

10 Vol. 16 4th Edition, Paragraph 1471.

> " Where a party lies by his words or conduct waived or made to the other party a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position the party who gave the promise or assurance either by words or conduct cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him. He must accept their legal obligations subject to the qualification which he has himself so introduced either by words or conduct even though it is not supported by any legal agreement."

11 {2020} e KLR.

12 {1982} AC 779.

legislative and other legal matters. Further, the AG may issue directions to any officer performing legal functions in any Government Ministry. He submitted that having rendered the opinion as to the conduct of the Petition, the Petitioner is bound by the Advisory, so, this Petition must be collapsed and the Company handed over to the Claims Settlement Committee to carry out its mandate of paying claims and thereafter hand over the company to the shareholders. He prayed that these proceedings be struck out with costs for being abuse of court process.

33. Mr. Kopere representing a supporting creditor reiterated that his client's position was that the company was not for winding up and that the Petitioner cannot run away from the AG' advise. Miss Ithondeka representing some Policy holders supported the application submitted that the AG's opinion represents the position of the Commissioner of Insurance. Mr. Wambugu also representing a supporting creditor supported the application. Lastly,Mr. Githua representing KCB, a creditor also supported the application.

Statutory Managers submissions

34. Mr. Milimo, representing the Statutory Manager opposed the application. He arguing that the issues raised in the application are res judicata and sub judice. He submitted that under section 67 (c) of the Insurance Act, the Commissioner has powers to place the company under Statutory Management, that the company was placed under Statutory Management in 2015 and after a year a decision was made to wind it up, and subsequently an extension was granted under section 67 (c) (3) by the court on merits, and thereafter the court has been granting extensions. He submitted that through the instant application, the Policy Holders are questioning the various extensions granted by the court instead of appealing or applying for review, thereby indirectly or directly attacking the powers of this court.

35. Mr. Milimo submitted that the issues relating to the expenses of the Statutory Manager were resolved in Hccc No. 67 of 2012 vide a ruling dated 16th September 2019, and that the Policy Holders participated in the said proceedings and they have never appealed against the decision or applied for review.

36. Additionally, he submitted that the Policy Holders attempted to constitute a caretaker board through a court process by filing Case No. 316 of 2016 which was heard and dismissed, so, so long as the applicants seek to rely on the matters decided in the said case, the issues are res judicata. He submitted that the above decision was appealed against in Court of Appeal No. 381 of 2017 which is still pending, so, the Policy Holders should pursue the pending appeal instead of raising the issues in these proceedings.

37. On the argument that the application is sub judice, he submitted that the issue of liquidity is among the issues raised in the instant proceedings which are pending judgment. He submitted that the question whether or not the company can be revived is a matter for the main Petition, and that the applicants are seeking to re-litigate the same issues. Also, he submitted that this court is being asked to determine the main issues in the Petition and added that the Claim Settlement Committee was established in Case No. 67 of 2012 vide a ruling delivered on 8th March 2018, and there is a pending application in the said case founded on the same issues contained in the AG's opinion. He argued that the Claim Settlement Committee declined to use the opinion being used by the Policy Holders.

38. Mr. Milimo argued that the AG is not a party in these proceedings and it is not open for the Policy Holders to prosecute the case on behalf of the AG. He urged the court to ignore the AG's opinion and refuse to cede judicial authority which is vested to this court by the Constitution. He submitted that the doctrine of sub judice prevents every person including the AG from commenting on matters pending in court, so, the opinion is a direct onslaught on the doctrine and it ought to be ignored nor can the opinion create estoppel as submitted by Mr. Kinyanjui. He submitted that section 123 (1) of

the Insurance Act grants the Commissioner of Insurance power and mandate which cannot be fettered by the AG.

The Petitioner's advocates submissions

39. M/s Lucy Kambuni, SC associated herself with Mr. Milimo's submissions. She underscored judicial independence under Article 160 of the Constitution and submitted that this court is only subject to the Constitution. She submitted that the AG erred in giving advice on matters pending before the court. She argued that the advice which is the fulcrum of the application was sought by the claims settlement committee which lacks the capacity under the winding up proceedings. She submitted that the stage at which the application was filed amounts to abuse of court process.

40. Counsel submitted that the basis of the case is abuse of section 123 of the Insurance Act, and that the Petition was filed because the company remained in breach of all the grounds under the Act. She argued that the directors and the shareholders have been disposing the company's assets. Also, counsel submitted that the Solicitor General appears to have been given the wrong information including the status of the various suits and the decisions made. On the role of the AG, she referred the court to *R v AG & LSK ex parte Moriasi*[13] and argued that the Commissioner of Insurance has exclusive jurisdiction under the Insurance Act and the court cannot interfere with his powers. Counsel also relied on the Supreme Court advisory Opinion (*supra*) at paragraph 61 for the proposition that the AGs advise is not necessarily binding. She submitted that estoppel does not apply in the instant case and that the applicant seeks to re-litigate the same issues dealt with in this case which is pending judgment. She urged the court to dismiss the application with costs.

Determination

41. As mentioned at the introductory paragraph of this ruling, this case had been concluded and it was only pending delivery of judgment when the instant application was filed. It is basic law that a court will not delve into merits of a case while determining an interlocutory application. The court will not delve into the merits of the case further than is necessary to determine an interlocutory application. The rationale for this proposition is not heard to discern. It is to avoid the danger of prejudicing the final determination. Accordingly, conscious that the Petition is pending delivery of the judgment, I will deliberately avoid delving into any issues touching on the merits or de-merits of the Petition.

42. There is no dispute that the trial had been closed and what is pending is the final judgment. That being the position, a pertinent question arises, which is, whether the application before me seeks to re-open a concluded trial. However, before addressing the tests, another pertinent question arises, which is the applicants seem to have assumed that the proceedings are still open despite being aware that hearing was concluded and the matter is only pending delivery of judgment.

43. The applicants never included a prayer that the proceedings be re-opened. They sought substantive prayers in the application as if the proceedings were still open. To me, the applicant's assumption that the proceedings were still open such that they could casually seek the orders sought is a grave error. It is my position that the applicants ought to have included a prayer seeking to re-open the proceedings. In this regard, it is my view that the application suffers a major defect which is incurable. To buttress my finding, I refer to the *Canadian Encyclopedic Digest* – Evidence, IV.12. (a), which summarizes the typical judicial approaches employed in applications to re-open proceedings in the following passage: - "§266 Where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case." The applicants never sought to re-open their case, yet they are seeking to introduce the AG's report through an application in which they are seeking

13 {2016} e KLR.

orders premised on the said report. The report was not part of the evidence tendered in this case. Its now being introduced through the back door notwithstanding that the proceedings are closed. On this ground alone, the application collapses because courts leave to re-open the proceedings is necessary; otherwise litigation will be endless if parties were to be left free to file any applications they desire after hearing is concluded and before delivery of judgment.

44. The above finding notwithstanding, I will proceed to determine the tests for re-opening a trial. For starters, there is an expectation imposed upon litigating parties to place the whole of their case before the decision-maker at the time of the initial hearing. Re-opening a proceeding to introduce new or further evidence, or even to file an application such as the one before me premised on new evidence which was not before the court, whether done before or after a decision has been issued in the matter, is an extraordinary step; one that the importance of finality and quickly resolving disputes militates against taking unless exceptional circumstances are present.[14] As stated by *Andre J in Oakley v Royal Bank of Canada-*:[15]

45. In deciding whether to re-open a trial, the court considers the complexity of the evidence and the possibility that the opposing party will need to call evidence in reply. The AG's opinion is contested. Introducing it at this stage by way of an application deprives the Respondents the opportunity to rebut it as they are entitled. In addition, courts will be hesitant to re-open proceedings where it would essentially amount to a second trial. A reading of the diametrically opposed arguments presented by the parties leaves no doubt that the applicants are essentially seeking to re-opening the dispute by inter alia challenging the decision to put the company under liquidation.

46. In any event, the criteria governing the exercise of the discretionary power to re-open a case to admit further evidence or even to allow an application such as the one before me where the hearing has been concluded but judgment has not been delivered have been said to be as follows:[16]

47. The above principles make it clear that the granting of leave to re-open is discretionary. That discretion is guided by the interests of justice. The essential question is, is the court more able to do justice in the facts and circumstances of the particular case if the application is granted.

48. An orderly system of litigation requires that each party put his or her best foot forward. It contemplates that judgment will be rendered after each party has done so. Litigation by instalments is not to be

[14] *Varco Canada Ltd. v Pason Systems Corp*., 2011 FC 467, 92 CPR (4th) 399 (FC), QL at para. 17.

[15] 2013 ONSC 145, [2013] OJ No. 109 (SC).

> " 10. The Court requires the parties to litigation to bring forward their whole case. ... In both civil and criminal matters, the Crown or plaintiff must produce and enter in its own case all clearly relevant evidence it has. ...
>
> 1.1 On the other hand, a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however, must be exercised judicially. It must involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interests of justice. ..."

[16] See *Reid v Brett* [2005] VSC 18, Habersberger J said (citing others).

a. the further evidence is so material that the interests of justice require its admission;

b. the further evidence, if accepted, would most probably affect the result of the case;

c. the further evidence could not by reasonable diligence have been discovered earlier; and

d. no prejudice would ensue to the other party by reason of the late admission of the further evidence.

encouraged. There is a strong interest in finality, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions. After the trial is complete and judgment is pending or has been rendered, there is a danger of a party to go about reconstructing his case especially if a party is anticipating defeat or desires to delay conclusion of the case. Equally, there is a danger of a party procuring evidence after the trial and before the delivery of the judgment so as to re-construct his case.

49. When all of the various factors, tests and considerations are taken together, the importance of the integrity of the trial process - the search for the truth through evidence - is an overarching consideration.A trial judge has an unfettered discretion to reopen a trial. The discretion is to be used sparingly to avoid fraud and abuse of the court process. The fundamental consideration in each case is to prevent a miscarriage of justice. The test is, first, whether the evidence, if presented at trial, would probably have changed the result and second, whether the evidence could have been obtained before the trial by the exercise of reasonable diligence.

50. As a matter of law, when considering an application filed after close of the trial and before delivery of judgment, the test still requires that the evidence could have the effect of altering the prospective judgment and that it could not have been obtained by reasonable diligence during trial. Even when the elements of the test are met, it's a matter of judicial discretion. In exercising the discretion, the court should consider the need to prevent abuse and miscarriage of justice, but must exercise that discretion sparingly and with the greatest of care. Court proceedings are based on an adversarial process, one party advances a position that is then rebutted by the defendant. Disruption of this process, by 'case splitting,' is an abuse of court process. In *Davidson v. Patten*,[17] it was held: -

51. The above prohibition applies equally after a case has closed. There should be a point where the litigation is completed. The manner in which due diligence is evaluated by a trial judge may be influenced by the timing of the application. In this regard, I am cognizant that after close of the trial, a party has an opportunity to reflect on what it ought to have done at the trial to strengthen its case and may therefore after the fact seek evidence to shore up that case or use the new found evidence to mount an application seeking to disrupt the trial process. Courts must scrutinize any application to admit fresh evidence or seeking orders based on new evidence or reports as in this case which amounts to an abusive 'tactical' approach to litigation.[18]

52. No explanation has been offered as why the AG's opinion if it was so crucial was not obtained before the trial. There was no suggestion that despite the exercise of due diligence, it could not have been procured. The argument that the AG's opinion or advise is legally binding is legally frail. Even if the opinion was properly tendered during the trial, it is for the court to determine its probative value. Like all other evidence, it must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to the AG's opinion will derive from how that opinion is assessed in the context of all other evidence. This is because while

[17] 2003 ABQB 996 (Alta. Q.B.) at para. 7.

> (7) It's an old trial maxim that Plaintiffs must exhaust their evidence at the outset. They cannot split the case. In other words, they cannot rely on one set of facts, and when these have been shaken by the opponent, try to adduce more or other facts. The Plaintiff must present the case in its entirety before the defendant is called upon to choose whether to elicit its own evidence. This rule allows the Defendant to know the case to be met and plan the defence. (Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd., [1976] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22) 29

[18] See *Alberta v. B.M.* {2009} ABCA 258, at para. 33.

the AG's opinion if properly tendered to the court is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[19] Four consequences flow from this.[20]

53. Firstly, such evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with evidence tendered before them after evaluating the totality of the evidence. The argument that the AG's opinion is binding to this court is misguided and lacks basis in law. The evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that the AG's opinion or evidence if properly tendered as evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

54. Secondly, a judge must not consider evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the AG's opinion and vice versa. For example, the AG's evidence can only provide a framework for the consideration of all the other evidence. Nor can the evidence AG's opinion introduced through the window be used to overthrow the evidence on record. The moment the AG opts to tender evidence or opinion in a dispute, he becomes a witness and rules governing presentation and admissibility of evidence apply. The opinion cannot be introduced after the close of a trial and then the court is asked to treat it as "super" evidence to be admitted without question.

55. Thirdly, where there is a conflicting opinion, a judge should test it against the background of all the other evidence in the case in order to decide which evidence is cogent and give reasons why the court prefers the evidence of one witness as opposed to the other. Such evaluation is only possible if the evidence is properly introduced and the opposite party is afforded an opportunity to challenge it. A litigant has a right to assail evidence mounted against him. Accordingly, the attempt to introduce the so-called opinion after the close of the case and seek such drastic orders is alien to law and procedure.

56. Fourthly, a judge should consider all the evidence in the case, before making any findings of fact. The applicant's application is not a review. It's not a re-hearing. But is it seeking to uproot all the evidence on record and as if that is not enough the applicant is trying to improperly use the AG's opinion as a basis for drastic orders?

57. The contention that the AG has recommended that the company be revived is not "new evidence." In fact, the said argument goes into the merits of the Petition. The applicants are seeking a short cut to evade the pending determination on merit.

58. The applicants attached great weight to the AG's advice describing it as binding. This argument is attractive. However, where proceedings do not involve the State, the circumstances in which the AG might intervene are very limited. This is because AG does not become involved in private legal disputes.

59. In any event, even if I were to hold that these proceedings are public in nature, the AG has no power to 're-open' civil proceedings which have been finalized by a court or tribunal, or to review their decisions. The AG may become involved in active or ongoing civil proceedings, where there is a public interest that would not otherwise be protected before the court. The AG may also intervene if the matter is one of significant public importance, that is, the outcome of the matter has significant implications for the community, which go beyond the interests and concerns of the parties involved in the proceedings.

19 *Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons* [2010] E.W.C.A. Civ 54.

20 *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR.

60. But even then, the AG will be required to seek leave from the court or tribunal before becoming a party to the proceedings. The AG is not a party in these proceedings nor did he seek leave to be enjoined. The attempt to invoke Article 156 of the Constitution does not help the situation. The applicants cannot purport to purport to convert their own partisan interests into public interest and worse still seek to prosecute the AG's interests real or imagined. The application as framed and founded is a non-starter.

61. The applicants seek an alternative prayer that this Winding Up Petition be struck out for being an abuse of court process and for want of the Petitioner's full disclosure of the liquidity status of the company. First, this is a matter pending delivery of judgment. The judgment date was reserved on 30th September 2021.The applicants argue that the Petitioner never disclosed the AG's opinion to this court. However, the AG's opinion is dated 14th January 2021 long after the trial was concluded. Even if the opinion existed before the trial, it could only be presented as evidence by the party desiring to rely on it. Nothing prevented the applicants from procuring the opinion and adducing it as part of their evidence.

62. It would be incongruous, to forego the fact that the very integrity of a fair trial depends on true and full disclosure of all facts within the framework of the rules of evidence, which in turn inspires public confidence. The assumption is that a judgment issued by a judge who has reviewed all the material disclosed is bound to be fair. However, a party can only make disclosures based on the information reasonably available to it. This opinion came when the matter was pending judgment. The applicants have not explained why they think the opinion was within the Petitioner's knowledge at the time of the trial.

63. But more important is the fact that the applicants are inviting this court to strike out a Petition which is pending judgment. One wonders why they never moved the court earlier if at all they had grounds to mount such prayer. Equally more important is the question whether the applicant have brought out any grounds to warrant such a drastic prayer. The principles for striking out pleadings were set out in *D T Dobie & Company (K) Ltd v Muchina*.[21] The law is no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.

64. The parties presented their respective cases and the matter is waiting determination on merit. They cannot turn back and claim the Petition has no merit. Striking out a pleading is a draconian act which may only be resorted to in plain cases. A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment[22] or where a pleading is vague or frivolous. An argument that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. As was held in *Madison Insurance Company Limited v Augustine Kamanda Gitau*,[23] the power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. I refrain from commenting on the merits of the Petition because its pending judgment. It will suffice to state that the invitation to strike out the Petition is totally misguided.

65. The applicants argue that the Petitioner is estopped from proceedings with these proceedings because the Hon. AG has advised that the same ought to be stopped and the parties ought to discuss amicable settlement. Estoppel is a bar that prevents one from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as true. Estoppel may be used as a bar to

21 {1982} KLR 1.

22 See *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* Civil Appeal No. 54 of 1999.

23 {2020} e KLR.

the re-litigation of issues or as an affirmative defense. The Petitioner has not been cited as having said or done anything that can bar him from proceeding with this case. The Report being cited is attributed to the AG. This leads me to the next question, which is whether the said opinion creates an estoppel as the applicants seem to suggest.

66. There are two species of estoppel per rem judicatam namely:- (i) cause of action estoppel; and (ii) issue estoppel. The particular type of estoppel in the applicant seeks to create is issue estoppel. The classic modern statement of the nature of issue estoppel is to be found in a passage from the judgment of Diplock LJ (as he then was) in *Mills v Cooper*,[24] approved subsequently by the House of Lords in *DPP v Humphreys*.[25] Diplock LJ said:-

67. The AG's opinion is not a court judgment nor does his mandate under Article 156(4) of the Constitution cloth it with conclusiveness such that once he pronounces it becomes the law. As stated earlier, the opinion is just an opinion, its part of the evidence which the court may consider and reject or admit.

68. To establish an issue estoppel there must have been a final judgment between the same parties or their privies, litigating in the same capacity in the same issue, and the estoppel must be pleaded.[26] The reason why it must be pleaded is not hard to discern. It must me established by way of evidence not through an application or legal submissions presented long after the close of the trial. The operation of issue estoppel, therefore, is subject to the following five requirements being met:- Finality of judgment, Identity of parties, Identity of capacity, Identity of issue and Pleading of estoppel.

69. None of the two species of estoppel discussed above, namely, (i) cause of action estoppel or (ii) issue estoppel has been demonstrated to exist in the circumstances of this case. The argument that the Petition is estopped from proceeding with this cause fails.

70. Flowing my analysis of the facts, the law and the conclusions arrived at herein above, it is my finding that the application dated 9th April 2021 is totally unmerited. I dismiss the said application with costs to the Petitioner and the Statutory Manager.

Orders accordingly. Right of appeal

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

JOHN M. MATIVO

JUDGE

24 {1967} 2 All ER l00 at l04.

25 {1976} 2 All ER 497

> " This doctrine [namely of issue estoppel], so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

26 See Murphy's *A Practical Approach to Evidence*, 3rd Ed, p313.