



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**COMMERCIAL CASE NO. E 356 OF 2020**

**LATOYA MGHOI KAKA**

**(Suing on her own behalf**

**and on behalf of the Estate of the late**

**James Karanja Maina).....PLAINTIFF/APPLICANT**

**AND**

**PETER KAHU (As the Administrator,**

**Nakumatt Holdings Limited).....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ATULKUMAR MAGANLAL SHAH.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Plaintiff approached the Court by a Plaint accompanied by a Notice of Motion dated 11/9/2020 and amended on 17/9/2020. The Motion was expressed to be made, *inter alia*, **under Article 10(1) and (2)(b) of the Constitution, section 432 (2) of the Companies Act, 2015, Order 40 Rules 1 and 2 of the Civil Procedure Rules and sections 1A, 1B and 3A and 63 of the Civil Procedure Act, Cap21 Laws of Kenya.**
2. The Motion sought leave to commence proceedings against Nakumatt Holdings (in Liquidation) under **section 432(2) of the Insolvency Act No. 18 of 2015**. There were also prayers to restrain the paying out of certain monies amounting to KShs.30,000,000/- being pension, last expense and work injury benefits held by Nakumatt in trust for the Plaintiff and/or the dependants or Estate of the Deceased.
3. The application was supported by the affidavit of Latoya Mghoi Kaka, the widow of the late James Karanja Maina sworn on 17/9/2020. It was opposed by the respondents through a Notice of Preliminary Objection dated 29/9/2020 which is what is up for determination and was disposed by way of written submissions by the parties in support of their respective positions
4. The facts of the instant dispute can be gleaned from the application and the depositions of the parties. It was deponed that Nakumatt Holdings Limited (“Nakumatt”) owes the Estate of, James Karanja Maina, Kshs. 30,000,000/- being death and work injury benefits remitted to Nakumatt on 9/10/2015 by Kenindia Assurance Company Limited. The applicant seeks that the said amount be remitted by Nakumatt to her and/or the estate of the deceased.
5. The respondent raised a Preliminary Objection dated 29/9/2020 against the entire proceedings. The gist of the Objection was that the proceedings were *res sub judice* and thus a violation of **section 6 of the Civil Procedure Act, Cap 21**. That there were proceedings pending in **Milimani Commercial & Tax IP 10 of 2017** (“the Insolvency Petition”) where the applicant had filed Proof of Debt and was listed as one of the unsecured creditors.
6. That in the current proceedings, the applicant had sought the lifting of the corporate veil, yet before the said orders had not yet been granted, the proceedings had been filed against the two respondents in their individual capacity.
7. The applicant filed a rejoinder to the Preliminary Objection by way of Grounds of Opposition dated 29/9/2020. She contended that the suit was properly before court as no proof of debt had been filed in the Insolvency Petition as alleged by the respondents. That the suit was different from the Insolvency Petition, in that she was seeking funds held under a trust by **Nakumatt** whilst the Insolvency Petition sought the recovery of creditors’ monies. She was not a creditor but a beneficiary under an arrangement where funds were to be remitted to the

estate of the late **James Karanja Maina**.

8. I have considered the depositions and the submissions of the respective counsels.

9. The main issue for determination is whether the instant proceedings are *res sub judice* and whether the proceedings were improperly instituted against the respondents in their individual capacities.

10. In **Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013**, the Supreme Court of Kenya held: -

*“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696:*

*‘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 ... 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’.*

11. The term ‘*sub-judice*’ is defined in **Black’s Law Dictionary 9<sup>th</sup> Edition** as: “*Before the Court or Judge for determination.*” **Section 6 of the Civil Procedure Act, CAP 21, Laws of Kenya** provides: -

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.*

12. In **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] Eklr**, the Supreme Court of Kenya stated that the purpose of the *sub-judice* rule is to: -

*‘stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives’.*

13. Counsel for the applicant submitted that the preliminary objection raised issues of fact rather than law. That the respondents were urging the court to verify information from the Insolvency Petition regarding the parties thereby delving into factual matters, which has nothing to do with points of law. That this will involve actual adducing evidence to support their contention thereby disqualifying the preliminary objection from being a pure point of law. The cases of **Kenya Breweries Ltd & Anor v. Keroche Industries Ltd [2020] Eklr** and **Oraro v. Mbaja [2005] Eklr** were relied in support of those submissions.

14. On his part, Counsel for the respondent submitted that proof of debt is evidenced and can be inferred from the email produced as “**LMK 5**” in the supporting affidavit of the applicant. Counsel further submitted that the email could only be understood as a debt. That the issue of debt is the subject matter of this suit and had been listed on the list of creditors under the administration on the ongoing in the Insolvency Petition.

15. Counsel further submitted that, it is trite law that an administrator can only accept and process proven debts under the terms and conditions of the **Insolvency Act. No. 18 of 2015**. That in making the request to the 1<sup>st</sup> respondent to rank her debt in priority, the applicant had made it within the ambit of the Insolvency Petition being the only proceedings where administration orders have been made with regard to Nakumatt. That having done so, the applicant had submitted to the jurisdiction of the court in the said proceedings. That in any event, the applicant appeared in the list of creditors in the Insolvency Petition number 50. The cases of **Nakuru ELC No.11 of 2017 Mwangi Stephen Mureithi v. Daniel T. Arap Moi & Another** were relied on in support of those submissions.

16. I have carefully considered the rival pleadings and submissions of the parties. The subsistence of the **Insolvency Petition No. 10 of 2017, In the Matter of Nakumatt Holdings Limited** is not contested. The applicant admits having filed a Notice of Appointment of Advocates in that Petition. However, she denies that she is a creditor but rather a beneficiary pursuing funds held under a trust by Nakumatt.

17. One of the definitions of a creditor given by the **Black’s Law Dictionary, Tenth Edition** at page 449 is “*one to whom any obligation is owed, whether contractual or otherwise.*” Another definition is “*a person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation*”.

18. The question is whether the issue before this Court is the same as before the Insolvency Court. I believe that the purpose of Insolvency proceedings is to preserve the assets of the Company for the benefit of all the creditors. In **Nakumatt Holdings Limited & another v Ideal Locations Limited [2019] eKLR**, the Court of Appeal held: -

***“The administration of an insolvent company is for the benefit of all creditors of such company and a situation where creditors separately attack or take assets of a company would defeat the overall objective of the administration.”***

19. In the present case, the applicant has sought several declarations to the effect that the monies totaling Kshs.30,000,000/- received by the Company from Kenindia Insurance were so received in trust for her. That the same was trust property and did not form part of the assets of the Company. She has placed reliance in **section 106 of the Insolvency Act**.

20. **Section 106 of the Insolvency Act** provides: -

***“Property held by the bankrupt in trust for another person vests in the bankruptcy trustee, who shall assume control of the property and deal with it for the benefit of the beneficiaries”.***

21. The question that arises is whether that provision is applicable to an insolvent company rather than a bankrupt individual. That section is under Part III of the **Insolvency Act, 2015** which deals with bankruptcy of natural persons. That being the case, I doubt whether that provision is applicable in the circumstances of the **Insolvency Petition No. 10 of 2017, In the Matter of Nakumatt Holdings Limited**.

22. The question that will be raised in the said **Insolvency Petition No. 10 of 2017, In the Matter of Nakumatt Holdings Limited** is whether the Company owed the applicant. Insolvency and administration deals with assets of the company. In the present case, the applicant is categorical, she is calling upon the respondents to account for trust property. Although the applicant may have filed a Notice of appointment in the insolvency proceedings, her claim therein will be completely different from that of the other creditors both secured and unsecured.

23. What I understood the applicant to be saying is that monies meant to the estate was paid to the company for onward transmission to her in 2015. However, for unknown reasons the company through its directors, the 2<sup>nd</sup> respondent included failed to act as proper trustees in respect thereof and converted the same.

24. In this regard, the applicant’s claim herein is completely different from the insolvency proceedings. In those proceedings, all that will be dealt with is whether the assets of the company will be adequate to settle the company’s debts. In these proceedings, the question will be, how did the company through its directors deal with the trust property meant for the estate of the deceased.

25. In the foregoing, it is my opinion that it would not be against the spirit of **Section 6 of the Civil Procedure Act, CAP 21 Laws of Kenya**, to maintain these proceedings parallel with the aforesaid insolvency proceedings.

26. Accordingly, I find that the respondents’ Preliminary Objection dated 29/9/2020 to be without merit and the same is hereby dismissed with costs. It is so ordered.

**DATED and DELIVERED at Nairobi this 14<sup>th</sup> day of December, 2020.**

**A. MABEYA, FCI Arb**

**JUDGE**