



Kinuthia (Suing on behalf of and as donee of power of attorney from Catherine Wairimu Mwaura) v Bulleys Tanneries Limited & 2 others (Environment & Land Case E019 of 2021) [2022] KEELC 90 (KLR) (11 May 2022) (Ruling)

Neutral citation: [2022] KEELC 90 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E019 OF 2021**

BM EBOSO, J

MAY 11, 2022

BETWEEN

**BENSON MWAURA KINUTHIA PLAINTIFF
SUING ON BEHALF OF AND AS DONEE OF POWER OF ATTORNEY FROM
CATHERINE WAIRIMU MWAURA**

AND

**BULLEYS TANNERIES LIMITED 1ST DEFENDANT
LAND REGISTRAR THIKA 2ND DEFENDANT
PETER MAINA ITHONDEKA 3RD DEFENDANT**

RULING

1. The 1st defendant brought a notice of preliminary objection dated 4/11/2021, urging the court to strike out this suit on the ground that the suit was fatally defective, premature, null and void, contending that the suit contravened Section 432(2) of the *Insolvency Act, 2015*. The preliminary objection was canvassed through written submissions dated 16/12/2021. The plaintiff responded to the preliminary objection by filing written submissions dated 26/1/2022. The said preliminary objection is what falls for determination in this ruling.
2. The gist of the preliminary objection is that the 1st defendant is in receivership and that the plaintiff instituted this suit against the 1st defendant without leave of the court. It is the case of the 1st defendant that, for the above reason, the suit against the 1st defendant offends the provisions of Section 432(2) of the *Insolvency Act 2015* and should therefore be struck out.
3. In his response submissions on the preliminary objection, the plaintiff argues that the point raised by the 1st defendant does not satisfy the key elements of a preliminary objection, hence it lacks merit.



The plaintiff argues that the 1st defendant has not provided any evidence to demonstrate that the 1st defendant is in liquidation or receivership.

4. I have considered the gist of the notice of preliminary objection, the parties' respective submissions, and the authorities cited in the parties' respective submissions. Two issues fall for determination in the notice of preliminary objection. The first issue is whether the point raised in the notice of preliminary objection and subsequently canvassed through written submissions does, in the circumstances of this case, meet the essential elements of a preliminary objection. The second issue is whether the point has merit that warrant the striking out of this suit.
5. What qualifies to be canvassed as a preliminary objection was explained by Newbold VP in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”
6. In the notice of preliminary objection under consideration, the 1st defendant has made a factual assertion through written submissions to the effect that it is in receivership. The fact of receivership is not one that the plaintiff admitted or acknowledged through his pleadings. In the circumstances, the factual assertion made by the 1st defendant through written submissions is one that ought to be canvassed on the platform of a formal application supported with an affidavit exhibiting all necessary evidence demonstrating receivership/administration/ liquidation. It is not a point that can be properly disposed on the basis of a notice of preliminary objection such as the one under consideration. My finding on the first issue, therefore, is that the point raised in the notice of preliminary objection and subsequently canvassed through written submissions does not meet the essential elements of a preliminary objection. It is a factual point or assertion which ought to be canvassed and ascertained on the platform of a formal application or during trial.
7. The result is that I will strike out the notice of preliminary objection dated 4/11/2021 without venturing into the merits of the point that was raised and canvassed. The 1st defendant will be at liberty to raise and canvass that point on the platform of a formal application or during trial.
8. Before I make my disposal orders, it is important to observe that the plaintiff purported to file a replying affidavit in response to the notice of preliminary objection. There is no record of payment of the requisite court fees relating to the purported replying affidavit. Secondly, the attempt to file a replying affidavit was a misconception from the beginning. A preliminary objection is canvassed on the basis of the law and the pleadings on record. Where a party elects to use a notice of preliminary objection inappropriately, the respondent is under no obligation to present evidence to clarify facts relating to the point inappropriately raised through the preliminary objection.
9. In the end, the court makes the following disposal orders on the 1st defendant's notice of preliminary objection dated 4/11/2021:
 - a. The 1st defendant's notice of preliminary objection dated 4/11/2021 is struck out for failure to meet the essential elements of a preliminary objection.
 - b. The 1st defendant shall, nonetheless, be at liberty to raise and canvass the point raised in the notice of preliminary objection on a proper platform.
 - c. The 1st defendant shall bear costs of the notice of preliminary objection.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 11TH DAY OF MAY
2022**

B M EBOSO

JUDGE

In the Presence of: -

Ms Limbere for the Plaintiff

Ms Ithondeka for the 3rd Defendant

Court Assistant: Lucy Muthoni

