



**Kinuthia (Suing on behalf of and as donee of power of attorney from Catherine Wairimu Mwaura) v Bulleys Tanneries Limited & 3 others (Environment & Land Case E019 of 2021) [2023] KEELC 15844 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15844 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E019 OF 2021  
BM EBOSO, J  
FEBRUARY 9, 2023**

**BETWEEN**

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

**AND**

**BULLEYS TANNERIES LIMITED ..... 1<sup>ST</sup> DEFENDANT  
THE LAND REGISTRAR THIKA ..... 2<sup>ND</sup> DEFENDANT  
PETER MAINA ITHONDEKA ..... 3<sup>RD</sup> DEFENDANT  
NAIROBIRD PROPERTIES LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Benson Mwaura Kinuthia contends that he is the duly appointed attorney of Catherine Wairimu Mwaura [hereinafter referred to as “the donor”]. Through him, the donor initiated this suit vide a plaint dated 4/2/2021. An amended plaint was subsequently filed on 23/6/2021. Her case is that she bought land parcel number Thika Municipality Block 5/439 from Bulleys Tanneries Limited [the 1st defendant]. She paid purchase price over a period of time. The 1st defendant issued to her completion documents, including a duly executed transfer and the original certificate of lease. Despite paying purchase price in full, and despite being furnished with the completion documents, the 1st defendant transferred the suit property to the 3rd defendant. In the same statement of claim, the plaintiff alleges that the 4th defendant illegally transferred the suit property to the 3rd defendant.
2. Consequently, she seeks, among other reliefs: (i) a declaration that she is the rightful owner of the suit property; (ii) a declaration that the title issued to the 3rd defendant was improperly procured; (iii)



- an order compelling the 2nd defendant to rectify the parcel register relating to the suit property to expunge the registration made in favour of the 3rd defendant; and (iv) an injunctive order.
3. The 1st and 3rd defendants filed a joint statement of defence in which they contend that the plaintiff's suit is bad in law. They deny the plaintiff's allegations and contend that there has never been a valid sale agreement between the plaintiff and the 1st defendant. They add that the plaintiff was an employee of the 1st defendant who must have acquired the purported completion documents through falsehoods, fraud and misrepresentation. They have itemized various particulars of fraud and misrepresentation by the plaintiff. The 3rd defendant contends that he purchased the suit property from the 1st defendant's receiver and manager. Lastly, they contend that if there was any agreement between the plaintiff and the 1st defendant, the plaintiff was duly notified about the "repossession" of the suit property and the "rescission of the agreement (if any) for non-performance". They deny being served with a demand letter.
  4. Subsequent to filing the defence, the 1st defendant brought a notice of motion dated 10/6/2022, seeking an order striking out this suit on the ground that, at the time of initiating this suit, the 1st defendant was under receivership and no prior leave of the court was obtained sanctioning the suit. The application was supported by an affidavit sworn by one Evanson Muiyuro Karanja who described himself as "the duly appointed agent of the 1st defendant". He did not exhibit any instrument relating to his appointment as an agent of the 1st defendant. He contended that the 1st defendant was placed under receivership on 1/8/2004. He added that the suit herein ought to be struck out for non-compliance with Section 432(2) of the Insolvency Act 2015. He exhibited Form No 22 dated 19/8/2004 and contended that the said Form was the instrument through which M/s Bulleys Trading Co. [1988] Ltd, in pursuance of a Fixed and Floating Debenture dated 3/6/2004 and registered on 21/7/2004, appointed one Nderitu Wachira of Nderitu Wachira Associates as a Receiver and Manager of Bulleys Tanneries Limited (the 1st defendant).
  5. Mr Karanja swore a further affidavit dated 3/11/2022 in which he stated that prior to the enactment of the Companies Act of 2015 and the Insolvency Act of 2015, debenture holders had powers to appoint receivers and managers by notice in Form No 222 filed with the Registrar of Companies, without court proceedings and/or order since receivership was a "voluntary liquidation" in favour of the debenture holder. To support the 1st defendant's case, he contended that the transfer form exhibited by the plaintiff attested to the fact of receivership. He exhibited, *inter alia*: (i) a letter dated 1/11/2022 from the Registrar of Companies; (ii) a letter dated 27/10/2022 from M/s Nairobi Properties Ltd, signed by E. Karanja; (iii) Form No 222; (iv) a certificate of registration of mortgage relating to the floating and fixed debenture; and (v) an undated transfer relating to the suit property. He did not disclose whether he was the E. Karanja who signed the letter dated 27/10/2022.
  6. The application was canvassed through written submissions dated 3/11/2022, filed by M/s Milimo Muthomi & Co Advocates. Counsel for the applicant submitted that the suit herein offended the provisions of Section 432(2) of the Insolvency Act of 2015 in that the plaintiff did not obtain leave of the court prior to initiating the suit. Counsel cited various decisions to support his point, among them, the decision in Bougainville Estate Limited v Kenya Deposit Insurance Corporation & 2 others. Counsel argued that under Sections 96 and 99 of the Companies Act, the holder of a fixed and floating debenture had powers to appoint a receiver manager without leave of the court. Counsel urged the court to strike out the suit in limine.
  7. The plaintiff opposed the application through a replying affidavit sworn on 26/7/2022. He deposed that the applicant had failed to provide documents demonstrating that a liquidation or receivership order had been issued by the court. He added that Form 22 which the applicant had exhibited only indicated that the process of appointing a receiver and manager was ongoing. He faulted the 1st



- defendant for failing to respond to the pleadings. It was his case that the suit before court was not subject to the leave contemplated under Section 432(2) of the *Insolvency Act*. He added that Section 432(2) of the *Insolvency Act* only applied to companies under liquidation.
8. In addition to the replying affidavit, the plaintiff filed written submissions through M/s Otsyula & Limbere Advocates. Counsel for the plaintiff submitted that Section 432(2) of the *Insolvency Act* applies when a liquidation order has been made or a provisional liquidator has been appointed. Citing the transitional framework in Section 734 of the *Insolvency Act*, counsel for the plaintiff submitted that the receiver/manager having been appointed prior to the enacted of the *Insolvency Act* of 2015, the activities of the 1st defendant were regulated by the provisions of the *Companies Act* to the exclusion of the *Insolvency Act*. Counsel urged the court to reject the application.
  9. I have considered the application together with the parties' rival submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issue that falls for determination in the application. The single issue falling for determination in the application is whether this suit offends the mandatory requirements of Section 432(2) of the *Insolvency Act*, No 18 of 2015.
  10. Section 432 (2) of the *Insolvency Act* provides as follows:

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate”.
  11. The gist of the application under consideration is that the 1st defendant was placed under receivership in 2004 and that the present suit is a non-starter because the plaintiff did not obtain leave of the court under Section 432(2) of the *Insolvency Act* prior to initiating the suit. I have reflected over the contention that Section 432(2) renders this suit untenable by dint of the fact that the plaintiff did not obtain leave prior to filing the suit. I have also reflected over the tenor and import of the framework in Section 432(2) of the *Insolvency Act* which the applicant invited the court to invoke and strike out this suit. First, by dint of the transitional framework contained in Section 734(2) of the *Insolvency Act*, all receiverships that crystallized prior to the enactment of the *Insolvency Act* 2015 are governed by the repealed legal framework that existed under the *Companies Act*. For avoidance of doubt, the transitional framework in Section 734(2) of the *Insolvency Act* provides as follows:

“Despite the repeal of the *Companies Act*, or of parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding relating to that past event, even if it is a step or proceeding that is taken after the commencement?”
  12. The tenor and import of the above transitional framework is that the provisions of the *Insolvency Act* do not apply to the receiverships that crystalized prior to the enactment of the Act. It is therefore a misconception for the 1st defendant to invoke Section 432(2) of the *Insolvency Act* in the circumstances of this case.
  13. That is not all. Section 432(2) of the *Insolvency Act* which the applicant invited this court to invoke and strike out this suit relates to legal proceedings that are contemplated to be initiated after the court has made a liquidation order or after a provisional liquidator has been appointed in relation to a company. Section 432(2) of the *Insolvency Act* provides that upon the court making a liquidation order or upon a provisional liquidator being appointed in relation to a company, legal proceedings against the company may be begun or continued only with the approval of the court and subject to such conditions as



the court considers appropriate. The framework in Section 432(2) does not apply to the pre-2015 receiverships. It applies to post-2015 liquidation processes.

14. There is a clear distinction between the pre-2015 receiverships and the liquidation contemplated in the *Insolvency Act* of 2015. The receivership contemplated under the pre-2015 *Companies Act* involved the placement of certain assets and affairs of a company under the management and control of an agent called receiver or receiver and manager for the purpose of managing those assets and affairs with a view to recovering the debt owed to the debenture holder. Not every asset of the company would be automatically placed under receivership. The assets to be placed under receivership were those specified in the debenture instrument. On the other hand, liquidation under the *Insolvency Act* of 2015 entails the process of winding up the company.
15. Counsel for the applicant relied on decisions relating to suits against companies that were placed under receivership or liquidation under the *Kenya Deposit Insurance Act* and the repealed sections of the *Banking Act*. Those decisions relate to specific receiverships and liquidations where the statutes contain clear and specific provisions requiring obtention of leave of the court before instituting suits against those companies. A case in point is Section 56 of the *Kenya Deposit Insurance Act*, No 10 of 2012. These are clearly distinguishable from the pre-2015 receiverships under the repealed Sections of the *Companies Act*.
16. It is clear from the foregoing that the applicant did not fully appreciate the difference between the liquidation contemplated under Section 432(2) of the *Insolvency Act* of 2015 and the pre-2015 receiverships. My understanding of the law is that the two are different. Section 432(2) of the *Insolvency Act* does not, in the circumstances, provide a proper legal basis for striking out this suit. I can only say that if there was a proper legal basis for striking out this suit, that legal basis was not canvassed in the present application and cannot be considered in this ruling. I will not say more on this point.
17. It is also observed that the alleged receiver and manager has not stepped forward in this suit to demonstrate that, indeed, there is a subsisting receivership. It is not lost to the court that the mandate of a receiver under the repealed sections of the *Companies Act* are specific to the receiver. Mr Evanson Muiyuro Karanja who described himself as an agent of the 1st defendant did not demonstrate that he is the alleged receiver and manager. Further, in his letter dated 1/11/2022, the Registrar of Companies stated that he was unable to provide information relating to the status of the 1st defendant. The Registrar of Companies wrote thus:

“Kindly note that the company has not updated its records since then. We are thus unable to provide any further information regarding the status of the receivership.”
18. The result is that the applicant has failed to demonstrate that this suit is incompetent by dint of the provisions of Section 432(2) of the *Insolvency Act* of 2015. Consequently, it is my finding that the applicant has failed to demonstrate that this suit offends the mandatory requirements of Section 432(2) of the *Insolvency Act*, No 18 of 2015. In the end, the notice of motion dated 10/6/2022 fails for the above reasons.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF FEBRUARY 2023**

**B M EBOSO**

**JUDGE**

Mr Otsyula for the Plaintiff

Mr Muthomi for the 1st Defendant



Ms Ithondeka for the 3rd Defendant

Court Assistant: Hinga

