



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 152 OF 2014

GERALD KATANA MWAMUMBA

SHRIKA HAMISI MUTSONGA

CHANDE HAMISI YAWA

MATSAKI HAMISI YAWA.....PLAINTIFFS/ APPLICANTS

-VERSUS-

ARM CEMENT PLC (Under Receivership)...DEFENDANT/ RESPONDENT

RULING

This ruling is in respect of a Notice of a Preliminary Objection dated 6th October 2021 by the Defendant/Respondent in respect of the Plaintiff/Applicants application dated 29th June 2021 for interpretation of the Judgment delivered on 19th July 2018 in respect of the award on Kshs 17 million. The objection was on the following grounds: -

- a. That the Plaintiffs/Applicants Application dated 29th June, 2021 is in violation of Section 560 of the Insolvency Act, 2015 which provides that while a company is under administration, a moratorium is placed over all legal proceedings against the company and if a party wishes to institute or continue with legal proceedings against such company, they must obtain the Consent of the Administrator or the leave of Court.
- b. That the Defendant / Respondent was placed under Administration with effect from 17th August, 2018 which Administration prevails to date.
- c. That the Plaintiffs/ Applicants have neither first sought nor subsequently obtained the consent of the Administrations or leave of the requisite Court to continue with the proceedings herein and thus this Honourable Court lacks the jurisdiction to proceed with this matter.
- d. That the Application dated 29th June, 2021 herein is therefore misconceived, incompetent, defective, an abuse of Court process and should thus be struck out.

Counsel agreed to canvas the Preliminary Objection by way of written submissions which were duly filed.

DEFENDANT/ RESPONDENT SUBMISSIONS.

Counsel relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** on the threshold for Preliminary Objections and submitted that the issue as to whether the court has jurisdiction to entertain this application is a point of law hence within the threshold.

Counsel submitted that the objection is premised on Section 560 of the Insolvency Act which places a moratorium on all other legal proceedings against a Company under administration and that the Defendant's administration is a matter of public notoriety which has been published in numerous nationwide dailies as well as the Kenya Gazette.

Mr. Kimathi further submitted that the administration has been admitted by the Plaintiffs in their application including on the body of the

Certificate of Urgency and in the description of parties.

It was counsel's submission that the Defendant was placed under administration with effect from 17th August 2018 as per the Notice of Appointment of Administrator filed together with the Preliminary Objection emanating from **High Court Insolvency Cause No. 14 of 2018**. Section 560 of the Insolvency Act provides that: -

“An administration order is an order appointing a person as the administrator of a company and providing for the administration of the company by that person.”

Counsel cited the case of **Bake N' Bite Mombasa Limited (Under Administration) vs Janendra Raichand Shah & 3 others (2018) eKLR** where the court held that the Insolvency Act comes immediately into force once notice is given by the operation of the law and there is no need by serving a notice to the Respondents in person once the notice is either gazetted or advertised. The court further stated that there is no excuse for anyone therefore to proceed on with attachment or execution to recover debts by attaching company's property once it is placed under Administration.

Mr. Kimathi submitted that Section 560(1) of the Insolvency Act is couched in mandatory terms thus the Plaintiffs may only commence or continue with legal proceedings against the Defendant while under administration after obtaining the leave of court or the consent of Administrators. That the Defendant has not received notification from the Plaintiffs of any leave being sought or subsequently obtained from the court or consent being sought or obtained from the Administrators to continue with the proceedings herein.

Counsel relied on the cases of **Midland Energy Limited vs George Muiruri t/a Leakeys Auctioneers & Another (2019) eKLR** and that of **Charity Wangui Ngumo vs Chase Bank Limited (In Receivership) & Antique Actions Agencies (ELC Nyeri) (2018) eKLR** where the Learned Judge cited the case of **George Mureithi and others v Kenatco Taxis Limited (In Receivership)** where the court stated that leave of court is mandatory as set out in the provisions of the Insolvency Act and that the same is couched in mandatory terms.

Counsel therefore urged the court to find that the court does not have jurisdiction to hear and determine this matter as it is an abuse of the court process.

APPLICANTS SUBMISSIONS.

Counsel for the Applicants submitted that it was not clear when the Respondent Company was placed under receivership and the same would require the Honourable Court to look into evidence to ascertain the date which the Respondent was placed under receivership. That the action by the Respondent to attempt to file documents in support of its Preliminary Objection denotes that the facts are not ascertained.

It was counsel's further submission that a Preliminary Objection cannot be supported by evidentiary evidence as it would be necessary to place the witness in the witness box to give sworn evidence and be cross examined on the documents.

Counsel questioned whether seeking interpretation of a court's judgment amounts to commencing /instituting and/or continuing legal proceedings as envisioned under Section 560 (1) (d) of the Insolvency Act, 2015. Counsel submitted that Section 560 (1) (d) of the Insolvency Act, 2015 mentions beginning or continuing legal proceedings against a company under receivership. It was the Applicant's contention that the Applicant's application dated 29th July, 2021 merely seeks to have this Honourable Court interpret its Judgment delivered on 19th July, 2018 and the same does not amount to commencing legal proceedings which entails the filing of a suit among other actions.

Mr. Weloba submitted that 'continuing legal proceedings' refers to proceedings which involve the enforcement of Judgments against the Company, including execution and distress. That seeking interpretation of Judgment where there is ambiguity does not amount to commencing or continuing legal proceedings as envisioned under Section 560 (1) (d) of the Insolvency Act.

It was counsel's further submission that one of the key mandates of the Official Receiver or Administrator is to achieve a better outcome for the company's creditor as a whole than would likely to be the case if the company were liquidated. That both parties are unsure as to the interpretation of the court's Judgment delivered on 19th July, 2018 and the Respondent is equally unable to discharge his mandate as envisioned under Section 522 of the Insolvency Act, 2015 and that in the circumstances, it is in the Respondent's interest that the Judgment is interpreted to enable them satisfy their objectives under Section 522 of the Act.

ANALYSIS AND DETERMINATION.

The issues for determination is whether the Preliminary Objection by the Defendant/Respondent meets the threshold of Preliminary Objections which should only be based on points of law.

The Preliminary Objection is based on the ground that the Applicant's Application dated 29th June, 2021 is in violation of Section 560 of the Insolvency Act, 2015. As the applicant did not seek and obtain consent from the Official Receiver of the Court to file this application, the Defendant having been put under administration on 17th August 2018.

In the Supreme Court of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** the court stated:

“Thus, a Preliminary Objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has

to be satisfied that there is no proper contest as to the facts.”

From the record and the application and more specifically at paragraph 3 of the certificate of urgency, counsel states that the Respondent is now in the process transitioning into full liquidation and is in the process of compensating its creditors who include the applicants herein.

This means that both parties do not dispute this fact which is in the public domain and within their knowledge. I have also seen a letter dated 14th May 2019 by the Plaintiff’s counsel to the Deputy Registrar of the Court received on 22nd May 2019 at paragraph 3 stating that: -

“This is in light of the fact that the Defendant Company was placed under Administration on 17th August 2018 and our clients are required to establish their claim”

That being the position it follows that section 560 (1) of the Insolvency Act applies as once the Respondent Company was placed under administration, no proceedings could be validly undertaken against the Respondent without obtaining the leave of the Court or consent of the administrator. Section 560(1) of the Insolvency Act provides as follows;

- a. A person may take steps to enforce a security over the company’s property only with the consent of the administrator or with the approval of the Court;**
- b. A person may take steps to repossess goods in the company’s possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;**
- c. A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and**
- d. A person may begin or continue legal proceedings (including execution and distress) against the company or the company’s property only with the consent of the administrator or with the approval of the Court.”**

In the case of **Fredrick Okoth Owino v T. S. S Grain Millers (2017) eKLR**, and quoted with approval by the Court of Appeal in the object of **Nakumatt Holdings Limited and Another v Ideal Locations Limited (2019) eKLR** the court held that:

“It is my considered view that the Insolvency Act intends (sic) to create a central forum for dealing with all insolvency disputes that may have been filed against the company. It does not matter whether the suits are pending appeal before the senior courts, the only court with the original jurisdiction to grant leave to continue suits against companies under administration, in my opinion, is the High Court.”

In the case of **Hoggers Limited (In Administration) v John Lee Halamandres & 11 others [2021] eKLR** where Majanja J stated that there is a dearth of decisions on the Insolvency Act in Kenya, hence it is necessary to refer to other jurisdictions that have enacted similar legislation and cited the case of **Bristol Airport PLC v Powdrill [1990] Ch. 744**, where the Court of Appeal in England considered whether the detention of an aircraft amounted to proceedings within the meaning of **section 11(3)(d) of the Insolvency Act, 1986** which provided for the moratorium as follows:

‘During the period for which an administration order is in force (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid.’

Counsel for the Applicant was of the view that the application merely sought for the interpretation of a judgment hence does not amount to commencing/continuing with legal proceedings as prescribed under Section 560(1) (d) of the Insolvency Act.

I beg to differ with counsel’s submission and I am of the view that the use of the words ‘begin’ and ‘continue’ being the statutory language refers to legal proceedings of any nature and any proceedings that can be resolved by a court of law.

In so far as I agree with the Applicant that it is in the Respondent’s interest that the Judgment is interpreted to enable them satisfy their objectives under Section 522 of the Insolvency Act, I am equally bound by the provisions of the same Act that requires such consent or leave of court to do certain acts. What was so difficult in seeking such consent of leave as required.

The upshot is that I find that the Preliminary Objection dated 6th October, 2021 has merit and is therefore upheld with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF MARCH, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.