



REPUBLIC OF KENYA



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**Commissioner of Insurance v Kilel (Deceased) (Winding Up Cause 21 of 2003)
[2025] KEHC 1127 (KLR) (Commercial and Tax) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 1127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
WINDING UP CAUSE 21 OF 2003**

A MABEYA, J

MARCH 4, 2025

BETWEEN

COMMISSIONER OF INSURANCE APPLICANT

AND

JOHN KIPKEMBOI KILEL (DECEASED) RESPONDENT

RULING

1. Before Court is the application dated 19/7/2024 brought under section 13A of the *Government Proceedings Act* and order 51 rule 1 of the Civil Procedure rules 2010.
2. The application seeks that the applicant be granted leave to respond to the Notice of Motion dated 10/10/2014. It is supported by the grounds set out on the face of the Motion and the supporting affidavit of Godfrey Kiptum sworn on even date.
3. The applicant stated that in a petition filed on 27/5/2003, the then Commissioner of Insurance, Mr. Sammy Makove, sought orders to wind up Lakestar Insurance Company Limited. Gazette notices later confirmed that the company had been wound up, an interim liquidator was appointed and a six-month moratorium was placed on creditor and policyholder payments.
4. However, on 10/10/2014, the respondent filed an application to review or set aside the winding-up orders. The applicant, through his advocates, opposed the application, arguing that the Court lacked jurisdiction under the *Companies Act*, that there was no new evidence, and that the application was made too late, 11 years after the orders were issued. The applicant also pointed out that the respondent had previously filed a suit seeking compensation of Kshs. 12 billion over the winding-up, which was dismissed by the court on 13/8/2021 as an improper challenge to an earlier ruling.



5. The applicant further stated that the respondent, John Kipkemboi Kilel, passed away on 24/4/2016, yet no letters of administration or amended pleadings had been filed, meaning his claim had legally abated under court rules.
6. The applicant later learnt that the matter had come up in Court on 7/6/2024 for highlighting of submissions but was not represented. As a result, the Court treated the application as unopposed and scheduled the ruling for 31/7/2024. Attempts to access the court file and register the case on the judiciary system were unsuccessful as the judge had gone on leave.
7. The applicant now seeks to have the proceedings of 7/6/2024 set aside and be allowed to respond to the application filed in 2014. He argues that without the Court's intervention, the orders made in 2003 may be suspended, which could result in reopening a company that was wound up over 20 years ago for failing to meet its obligations. The applicant maintains that the matter is urgent and requires the Court's attention to ensure fairness and prevent any injustice.
8. The respondent opposed the application through grounds of opposition dated 12/7/2024. It was stated that the application was fundamentally defective, bad in law, and a nullity. That the application was misconceived, legally untenable and amounted to an abuse of the court process.
9. The respondent contended that the Court could not exercise its discretion in favor of the applicant, as no explanation was provided for the applicant's failure to attend court on 7/6/2024, despite having been served with the hearing date. Additionally, that the applicant had referred to a replying affidavit allegedly executed in 2014, which had not been filed to date and no justification was given for the 10-year delay in filing the document. In light of these arguments, the respondent urged the Court to dismiss the application dated 19/7/2024 with costs.
10. The application was canvassed by way of written submissions which I have considered.
11. In its submissions, the applicant opposed the respondent's Motion dated 10/10/2014, arguing that it sought to revive Lakestar Insurance Company Limited, which had been wound up over 20 years ago due to violations of the *Insurance Act*. That the company ceased to exist, its assets had been liquidated, and it lacked the capacity to operate. That further, the majority shareholder, John Kipkemboi Kilel, passed away in 2016, making it impossible for him to have instructed counsel to file the application. That since no letters of administration had been filed and no substitution application made, the suit had abated under Order 24 Rule 3 of the Civil Procedure Rules, 2010. The applicant also pointed out that previous attempts to challenge the winding-up had failed, including a 2013 suit seeking damages which was dismissed as an abuse of the court process.
12. The applicant further submitted that any advocate's mistake should not be used to deny justice. That parties should not suffer due to legal counsel's errors and urged the Court to exercise discretion and set aside the proceedings of 7/6/2024 to allow them to respond. The applicant also emphasized that an abated suit is legally non-existent unless revived. Since eight years had passed without an application for substitution, the applicant urged the Court to declare the matter abated.
13. On public interest, the applicant argued that reviving a failed insurance company would negatively impact policyholders and public confidence in the insurance sector. That the respondent was guilty of laches, having filed the Notice of Motion in 2014, more than 20 years after the company was wound up. The delay showed lack of diligence and the court should dismiss the application for being time-barred.
14. The respondent submitted that most of the grounds raised were responses to the application dated 10/10/2014 rather than justifications for setting aside the proceedings. The only argument supporting



the application was the claim that the applicant's advocate failed to file a replying affidavit since 2014, despite allegedly having it executed.

15. The respondent further submitted that the application was defective because it was filed by an advocate, Sharleen Kihima, who was not properly on record. It was argued that Order 9 Rules 5, 6, 8, and 9 of the Civil Procedure Rules, 2010 had not been followed, making the application irregular and liable for striking out. The respondent pointed out that the applicant's previous advocates, Waweru Gatonye & Co Advocates, were still formally on record, as no notice of change of advocates had been filed or an application to cease acting determined by the Court. The respondent questioned how Sharleen Kihima had come on record, stating that there was no known legal process followed, as she had only appeared upon filing the current application. It was emphasized that under Order 9 Rule 5, a notice of change of advocates was required but had not been filed or served.
16. Additionally, under Order 9 Rule 9, since judgment had been delivered on 27/6/2003, the incoming advocate needed to seek leave of the Court or file a consent with the outgoing advocate, which had not been done. To support these arguments, the respondent cited case law where courts held that failure to comply with Order 9 Rule 9 affects the court's jurisdiction and that proceedings filed by an advocate without proper authorization should be struck out.
17. The respondent urged the court to dismiss the application as procedurally defective and incompetent without considering its merits. Finally, the respondent requested that the ruling initially scheduled for 31/7/2024 be delivered as planned and that the applicant be ordered to pay costs.
18. I have considered the pleadings, the submissions and the authorities cited. The main issue for determination is whether the proceedings of 7/6/2024 should be set aside and the applicant be granted leave to respond to the Motion dated 10/10/2024.
19. The applicant's contention was that the Motion dated 10/10/2014 sought to revive Lakestar Insurance Company Limited, which had been wound up by a court of competent jurisdiction over 20 years ago due to violations of the *Insurance Act*.
20. That the company had ceased to exist, its assets had been liquidated and it lacked the capacity to operate. Additionally, its majority shareholder, John Kipkemboi Kilel, passed away in 2016, making it impossible for him to have instructed Counsel to file the application. That previous attempts by the respondent to challenge the winding-up had failed, including a 2013 suit seeking damages, which was dismissed as an abuse of the court process.
21. The respondent on its part argued that the matter had already been determined and that the application was an attempt to reopen issues that had been conclusively settled. The respondent submitted that the applicant had been aware of the proceedings and had ample time to respond but failed to do so.
22. Order 51 rule 15 grants the court the discretion to set aside an order made ex parte. In setting aside ex parte orders, the Court must be satisfied of one of two things, namely, either that the respondent was not properly served or that the respondent failed to appear in Court at the hearing due to sufficient cause. (See – Philip Ongom, Capt v Catherine Nyero Owota Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003)).
23. Similarly, in *Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd* [2014] eKLR, the court held that: -

"The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or



otherwise, to obstruct or delay the cause of justice(see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali*.) It also goes without saying that the reason for failure to attend should be considered."Having considered the arguments from both parties, it is clear that the proceedings of 7th June 2024 resulted in a ruling date being set on the basis that the application dated 10th October 2014 was unopposed. However, the court must determine whether the circumstances surrounding the absence of the applicant's counsel warrant setting aside those proceedings. The guiding principle in this instance is whether there is sufficient cause to justify reopening the matter in a view of allowing all parties canvass the application dated 10/10/2014."

24. In *CMC Holdings Ltd vs James Mumo Nzioka* [2004] eKLR, the Court of Appeal held that: -

"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"

25. In this case, the applicant has demonstrated that its failure to participate in the proceedings was due to its advocate's inaction rather than deliberate lethargy on its part. Further, the nature of the orders sought in the Motion of 10/10/2014 has far reaching implications, not only for the applicant but also for the broader public interest, given that the company in question was wound up following regulatory concerns.

26. The applicant has also raised substantive legal arguments, including the issue of abatement due to the respondent's demise in 2016, which ought to be considered before a final determination is made. In the interest of justice and ensuring that all parties are given an opportunity to be heard, I find that there is merit in the application.

27. Accordingly, the proceedings of 7/6/2024 are hereby set aside. The applicant is granted leave to file and serve its response to the Motion of 10/10/2014 within 14 days. The respondent shall have corresponding leave to file any further affidavit and submissions, if necessary. However, the applicant shall bear the respondent's costs assessed at Kshs. 20,000/- payable within 30days.

It is so ordered.

SIGNED AT KISUMU THIS 27TH DAY OF FEBRUARY, 2025.

A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2025.

F. GIKONYO

JUDGE

