



REPUBLIC OF KENYA



**Kilonzo & Company Advocates v Mututho (Insolvency Cause E031 of 2022)
[2025] KEHC 4036 (KLR) (Commercial and Tax) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E031 OF 2022
MN MWANGI, J
MARCH 21, 2025**

BETWEEN

KILONZO & COMPANY ADVOCATES PETITIONER

AND

JOHN MICHAEL MUTUTHO RESPONDENT

RULING

1. This ruling is in respect to the respondent's Notice of Preliminary Objection dated 4th October 2023 and the petitioner's Notice of Motion Application dated 24th January 2024.
2. The petitioner filed a Petition dated 18th October 2022, seeking a bankruptcy order against the respondent for failing to pay legal fees of Kshs.3,959,336.00 plus interest, as per a Court decree issued on 14th February 2014. In opposition to the said petition, the respondent filed a Notice of Preliminary Objection dated 4th October 2023 raising the following grounds –
 - i. The petitioner lacks the locus standi to institute this suit being a business name registered under the Business Names Act and as such this Court lacks the requisite jurisdiction to entertain this matter as there is no known petitioner in law before it; and
 - ii. The Petition herein offends mandatory provisions of the law and is not only a nonstarter but bad in law and for striking out as there exists active and parallel proceedings in Nairobi High Court Civil Suit No. 49 of 2010 between the parties herein seeking execution against the respondent.
3. Subsequent to the filing of the Preliminary Objection by the respondent, the petitioner filed a Notice of Motion application dated 24th January 2024 pursuant to the provisions of Order 8 Rule 3 of the



Civil Procedure Rules, 2010 and all enabling provisions and procedures of the law, seeking leave to amend its petition as set out in its draft amended petition.

4. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Laureen N. Magotsi, an Advocate of the High Court of Kenya practising in the petitioner law firm. She averred that the petition erroneously listed the petitioner as Kilonzo & Company Advocates, instead of Kethi D. Kilonzo & Mutula Kilonzo Junior T/A Kilonzo & Company Advocates, and the petitioner now seeks leave of the Court to amend the said error. She averred that the error was unintentional and was not meant to mislead. Ms Magotsi further averred that the amendment being sought is permissible under the Civil Procedure Rules, 2010 and will not prejudice the respondent and it is necessary to ensure accuracy. She asserted that it is a well established legal principle that suits should not be struck out if an amendment can rectify the issue.
5. In opposition to the petitioner's application, the respondent filed grounds of opposition dated 21st February 2024 raising the following grounds -
 - i. The application before Court is an abuse of Court process as it is an afterthought and made solely with the intention of defeating the respondent's Preliminary Objection dated 4th October 2023 which is already under consideration before this Honourable Court;
 - ii. That the petitioner is incapable of making the current application as it is non-existent and not known in law;
 - iii. That the petitioner having had no locus standi to institute the current petition before Court, it therefore goes without say that it then still lacks the locus to substitute itself with any other party as it lacks the legal authority to do so;
 - iv. That the bankruptcy petition as currently constituted is not capable of being amended as there is legally no competent petition before this Honourable Court;
 - v. That the petition is only for striking out and not amendment as is being sought by the petitioner;
 - vi. That any further proceedings by way of amendment as is being sought by the petitioner is prejudicial to the rights of the respondent herein and must be stopped by this Honourable Court;
 - vii. That the amendment as sought by the petitioner goes contra to the procedure provided for in law for bankruptcy proceedings; and
 - viii. The Honourable Court lacks the jurisdiction to entertain, hear or further proceed with the current application and the petition as a whole as the petitioner is non-existent and unknown in law.
6. The instant application and Notice of Preliminary Objection were canvassed by way of written submissions. The petitioner's submissions were filed by the law firm of Kilonzo & Co. Advocates on 28th March 2024, while the respondent's submissions were filed on 15th April 2024 by the firm of Mutua Nyongesa Muthoka Advocates.
7. Ms Kethi, learned Counsel for the petitioner cited the provisions of Order 30 Rules 1 & 2(1) of the Civil Procedure Rules, 2010 and submitted that a firm may sue in its own name, but shall be under an obligation to disclose the names of its partners upon demand. To buttress these submissions, she relied on the Court of Appeal case of *Mehul Nemchand Haria v Hombe Saw Mills & another* [2013]



eKLR, and the case of Skair Associates Architects v Evangelical Lutheran Church of Kenya & 4 others [2015] eKLR.

8. She referred to the provisions of Order 8 Rule 3 of the Civil Procedure Rules, 2010 and argued that Courts have the discretion to grant leave for a party to amend its pleadings at any stage. Ms Kethi cited the case of Equity Bank Limited v George Amos Wagara & Rift Valley Bottlers Limited [2021] eKLR, and stated that the petitioner initially filed the petition under the law firm's name and now seeks to amend it by substituting the firm's name with the names of its partners to clarify the petitioner's identity.
9. Mr. Mutua, learned Counsel for the respondent relied on the case of Melickzedek Shem Kamau v Beatrice Waithera Maina & 2 others [2020] eKLR, and submitted that this petition was filed by an entity without legal personality, thus it lacks the capacity to sue in its own name. He referred to the case of Agatha Kaluki Mutie v Director, St. Teresa's Academy [2013] eKLR, and contended that there is no legally recognized petitioner before this Court, rendering this petition unsustainable and subject to dismissal. He contended that the petition cannot be amended as it is defective. He argued that locus standi cannot be attained through amendment, as its absence renders the action invalid from the start and incapable of being cured.
10. Mr. Mutua cited the provisions of Section 17 of the Insolvency Act and Regulation 15 of the Insolvency Regulations, 2016, as amended in Insolvency (Amendment) Regulations 2018 and stated that the Insolvency Act and its Regulations do not provide for the amendment of a Bankruptcy Petition. He argued that even if amendments were permitted, Regulation 15(3) mandates that a Bankruptcy Petition be preceded by a statutory demand served at least 21 days before the filing of a the petition. He maintained that even if this petition is amended, it would create a mismatch with the original statutory demand, rendering it defective and warranting its dismissal. Additionally, he stated that if the petitioner amends the statutory demand, it would violate Regulation 15, as the statutory demand must be served before the petition is filed, not simultaneously.

Analysis And Determination.

11. Upon consideration of the instant application, the grounds on the face of it and the affidavit filed in support thereof, the respondent's Notice of Preliminary Objection and Grounds of Opposition and the written submissions by Counsel for the parties, the issues that arise for determination are –
 - i. Whether the respondent's Notice of Preliminary Objection should be upheld; and
 - ii. If the petitioner should be granted leave to amend its petition.

Whether the respondent's Notice of Preliminary Objection should be upheld.

12. The Court in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd. [1969] EA 696, defined what constitutes a Preliminary Objection as hereunder–

...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 a contract giving rise to the suit to refer the dispute to arbitration.
13. In the same case, Sir Charles Newbold, P., stated 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 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.



The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

14. The respondent's Counsel submitted that since the petitioner is a business name registered under the Business Names Act, it lacks the capacity to sue and be sued in its own name, which means that this petition has been filed by an entity without legal personality, rendering it unsustainable and subject to dismissal. The petitioner on the other hand stated that pursuant to the provisions of Order 30 Rules 1 & 2(1) of the Civil Procedure Rules, 2010, a firm such as the petitioner may sue in its own name, but shall be under an obligation to disclose the names of its partners upon demand.
15. Order 30 Rules 1 & 2 of the Civil Procedure Rules, 2010 provides that –
 1. Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.
 2. Disclosure of partners' names
 1. Where a suit is instituted by partners in the name of their firm, the plaintiffs or their advocate shall, on demand in writing by or on behalf of any defendant, within seven days, declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.
 2. Where the plaintiffs or their advocate fail to comply with any demand made under subrule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.
 3. Where the names of the partners are declared in the manner referred to in subrule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

16. From the above provisions, it is evident that a suit can be filed in a firm's name if it has two or more partners. However, for a sole proprietorship the suit must be in the proprietor's name, not the firm's, and that the firm's name is merely descriptive and does not create a separate legal entity for purposes of litigation. In the oft cited Court of Appeal case of *Mehul Nemchand Haria v Hombé Saw Mills & another* (supra), the Court held as follows–

“It is clear from rule 1 of Order 29 (now Order 30) that where a firm has two or more partners, a suit can be instituted in the firm's name. If, however, the firm is a sole proprietorship, the rule does not apply and consequently a suit against a sole proprietor must be in the name of the proprietor as opposed to the name of the firm...

The responsibility of ensuring that a suit against a firm would hold reposed on the appellant. The rules were designed to protect claimants such as the appellant so that they do not end up chasing a mirage in the shape of a firm-name when individual partners who may be liable exist. The rules in Order 29, (now Order 30) were made in public interest. Their breach by the party intended to be protected by them should not, in our view, render the suit bad in law. However, the High Court ought to have directed amendment of the plaint to ensure its



compliance with the rules always remembering that rules of procedure are intended to serve as the handmaidens of justice, not to defeat it (see *Iron & Steelwares Ltd v. C.W. Martyrs & Co.* [1956] 23 EACA 175 (CA-U) at page 177. Applying this reasoning, it was wrong, in our view, for the trial Court to strike out the suit without granting the appellant an opportunity to regularize it."

17. This Court notes that the case law relied on by the respondent in urging this Court to strike out the petition on grounds that the petitioner does not have the requisite locus standi to file it is in respect to sole proprietorship. It is not disputed that the petitioner law firm is not a sole proprietorship but has two partners by the name of Kethi D. Kilonzo & Mutula Kilonzo Junior. This Court therefore finds that the case law relied on by respondent does not apply to the circumstances of this case. The respondent's Notice of Preliminary Objection therefore fails on that ground.
18. The respondent also raised a Preliminary Objection to this petition on the ground that it violates mandatory legal provisions and it is legally defective as there are active parallel proceedings in Nairobi High Court Civil Suit No. 49 of 2010, seeking execution against the respondent. In order to determine whether Nairobi High Court Civil Suit No. 49 of 2010 is a bar to this petition proceeding as filed, this Court has to not only ascertain facts but also interrogate evidence. It is now well settled that facts that require to be analyzed and/or verified through evidence do not qualify as Preliminary Objections, but can only be addressed by way of replying affidavits. In the circumstances, this Court finds that the respondent's Notice of Preliminary Objection fails on that ground as well.
19. The upshot is that the respondent's Notice of Preliminary Objection is not merited. It is hereby dismissed with costs to the petitioner.
If the petitioner should be granted leave to amend its petition.
20. Amendments of pleadings with leave of the Court is provided for under Order 8 Rule 3 of the Civil Procedure Rules, 2010 which states that –

- “ 1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
2. Where an application to the Court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
3. An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.



5. An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment." (Emphasis added).
21. It is trite that amendments to pleadings before the hearing of a case commences should generally be allowed, provided that they do not cause injustice to the other party, especially if any prejudice can be remedied through costs.
22. The Court of Appeal in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR outlined the principles in amendment of pleadings as follows -

The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's *Precedents of Pleading - 12th Edition*, in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:-

- "6. The ratio that emerges out of what was quoted from the said book is that powers of the Court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the Court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."(Emphasis added).
23. Having found that the filing of the petition herein in the law firm's name instead of the partners' names is not fatal, the respondent's argument that the amendment sought would violate bankruptcy procedures lacks merit. Further, on perusal of the draft amended petition, I note that the proposed amendments only seek to correct the petitioner's name by including the law firm's partners and the Advocate petitioning for the bankruptcy order. Based on the foregoing, and the fact that the petition has not yet proceeded to hearing, I am persuaded that the proposed amendments are not only in tandem with the original cause of action but will also facilitate the determination of the real questions in controversy between the parties herein.
24. In the end, this Court finds that allowing the amendment sought will not result in the petitioner serving the respondent with the statutory demand alongside the petition. Additionally, the respondent will not suffer any prejudice if the amendment is granted. The upshot is that the petitioner's application dated 24th January 2024 is merited. It is however not lost to this Court that the proposed amendments came up as a result of the Notice of Preliminary Objection that was filed by the respondent. Even



though the petitioner has emerged successful in its application for amendment of the petition, it will pay costs to the respondent.

25. I make the following orders –

- i. The respondent’s Notice of Preliminary Objection dated 4th October 2023 is hereby dismissed with costs to the petitioner;
- ii. Leave is hereby granted to the petitioner to amend, file and serve its petition in the manner set out in its draft amended petition within 14 days; and
- iii. Thrown away costs of Kshs.20,000/= are granted to the respondent.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF MARCH 2025.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Masheti h/b for Ms Kethi for the petitioner

Mr. Mutua for the respondent

Ms B. Wokabi - Court Assistant.

NJOKI MWANGI, J

