



**Jinnah v Kanji & 5 others; KCB Bank Kenya Limited & 5 others (Interested Parties) (Insolvency Notice E187 of 2024) [2025] KEHC 8741 (KLR) (Commercial and Tax) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8741 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**INSOLVENCY NOTICE E187 OF 2024**  
**JWW MONG'ARE, J**  
**JUNE 18, 2025**  
**IN THE MATTER OF PEARL BEACH HOTELS LIMITED (IN RECEIVERSHIP)**  
**AND**  
**IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE LAWS OF KENYA**

**BETWEEN**

**NAZIR BHADURALI NURMOHAMED JINNAH ..... APPLICANT**

**AND**

**ALNOOR KANJI ..... 1<sup>ST</sup> RESPONDENT**

**NAFISA KANJI ..... 2<sup>ND</sup> RESPONDENT**

**AMYN KANJI ..... 3<sup>RD</sup> RESPONDENT**

**LEILA KANJI ..... 4<sup>TH</sup> RESPONDENT**

**KAMAL ANANTROY BHAT (SUED AS THE OFFICIAL RECEIVER OF PEARL BEACH HOTELS LIMITED) ..... 5<sup>TH</sup> RESPONDENT**

**APOLLO MUINDE ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**KCB BANK KENYA LIMITED ..... INTERESTED PARTY**

**REGISTRAR OF COMPANIES ..... INTERESTED PARTY**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY**



## RULING

1. The Applicant, (“Nazir”) approached the Court through an application dated 3<sup>rd</sup> September 2024 seeking orders to restrain the 1<sup>st</sup> to 6<sup>th</sup> Respondents from holding any special general meeting to oust him as a director of Pearl Beach Hotels Limited (under Receivership). The Respondents have opposed Nazir’s application through Preliminary Objections and an application dated 18<sup>th</sup> September 2024. These Objections primarily challenge the court’s jurisdiction, arguing that Nazir’s application is incompetent and bad in law because it offends sections 2 and 19 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) as read with Order 3 Rule 1(1) of the Civil Procedure Rules (“the Rules”). They also claim the court lacks jurisdiction under Order 5 Rules 21, 27, and 29 of the Rules and that the application offends Rule 7 of the Oaths and Statutory Declaration Rules.

1. Nazir has responded to the application through his replying affidavit sworn on 14<sup>th</sup> February 2025 whereas the Objections have been canvassed by way of written submissions which are on record and I will be considering and making relevant references to the same in this determination. The position on Preliminary Objections was stated by the predecessor of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696 and affirmed by the Supreme Court in *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR)]. In *Mukisa*(supra), Law J.A., and Newbold P. respectively at 700 and 701, held as follows:

Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“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 points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

3. In summary, for one to succeed in putting up a Preliminary Objection, the facts pleaded by the other party are assumed to be correct; it must be a matter of law which is capable of disposing off the suit; it must not be blurred by factual details calling for evidence; it must not call upon the Court to exercise discretion. Nazir submits that some of the Respondents’ Objections are not pure points of law because they require factual interrogation. Regarding the claim that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents (“Amyr” and “Leila”) are not residents of Kenya, Nazir submits that no evidence has been presented to support this claim, and the Respondents have not stated where they reside if not in Kenya. Concerning the compliance with Rule 7 of the Oaths and Statutory Declaration Rules, Nazir argues that this issue requires a full interrogation of facts and potentially his cross-examination and that of his counsel to



unearth the truth. Nazir avers that he did appear before counsel Stanley Njindo Matiba to sign the supporting affidavit, and without contrary evidence, this cannot be considered a pure point of law. The Applicant further contends that this ground, though based on a question of law, flows from a contested issue that requires examination of facts from both parties to ascertain its veracity and compliance with the law. Therefore, that the court cannot solely determine the competence of the supporting affidavit by applying legal principles but will be informed by evidence.

4. I am in total agreement with Nazir's submissions above that the Objections raised by the Respondents in respect of commissioning of his deposition and the residency of Aryn and Leila require the court's examination and perusal of evidence and from the submissions, these objections are in respect of disputed facts. This cannot be points of law capable of sustaining a Preliminary Objection and I accordingly dismiss the same. In any event, I note that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ("Alnoor" and "Nafisa") have through their application challenged Nazir's deposition by stating that the same was purportedly sworn on 3<sup>rd</sup> September 2024 in Nairobi before one Stanley Njindo Matiba Advocate yet at the same time, Nazir acknowledges being outside jurisdiction of this Court in the United Kingdom(UK). As such, they contend that the said impugned affidavit is therefore defective, fraudulent and violates the provisions of the Oaths & Statutory Declarations Act and the Rules thereto and that the material deponed thereon cannot be considered as sworn statements and the same ought to be struck out.
5. In response, Nazir states that he appeared before counsel Stanley Njindo Matiba, where he confirmed and signed the contents of the said supporting affidavit dated 3<sup>rd</sup> September 2024 and that he holds dual citizenship in Kenya and the UK, and frequently travels to the UK and other countries for business and personal reasons. He clarifies that he never stated he did not appear before the counsel to execute the supporting affidavit and that no evidence has been presented to confirm that the supporting affidavit is fraudulent, and he asserts that he would be the one complaining if there was fraud concerning his signatures.
6. Section 5 of the Oaths & Statutory Declarations Act provides that, "Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made". Rule 7 provides that "A Commissioner for Oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same, and that such person is outwardly in a fit state to understand what he is doing". From the aforementioned provisions, it is clear that it is the Commissioner of the Oath who is to satisfy themselves about the place and date of affidavit and that the person appearing before them is the one named in the affidavit. The Commissioner of the said affidavit has not stated that Nazir never appeared before him or that the place and date of the affidavit are false. Further, whereas Nazir stated in his affidavit that he travelled to the UK on May 2024, he has equally stated that he travels between Kenya and the UK and that he indeed appeared before the Commissioner of the Oath on the said date. No evidence has been tabled to the contrary and such, I fail to find any defect in his deposition.
7. I also note that the 5<sup>th</sup> Respondent ("the Official Receiver") has stated that the application commenced by the motion is incompetent, bad in law, and a nullity ab initio because civil suits are to be instituted by way of a pleading being a plaint, petition or originating summons particularly in instances where a party is seeking substantive orders as the ones sought by Nazir in the instant motion. In response, Nazir asserts that the court has jurisdiction to entertain the application under section 692 of the *Insolvency Act* which section empowers the court to grant injunctive orders to a person who claims to be adversely affected by certain conduct or failure to act by another person, as outlined in the Act. Nazir highlights that the Act envisages approaching the court via an application, not a suit, and does not restrict who



can approach the court as long as they are adversely affected. Furthermore, that the provision does not require consent from an administrator or court approval for seeking injunctive orders. The said section 692 provides in part as follows:

692. Power of the Court to grant injunctions in certain cases

- (1) The Official Receiver, or a person who claims to have been, to be or to be about to be adversely affected—
  - (a) by the past or continuing conduct of, or by a threat to engage in conduct made by, a person referred to in subsection (2); or
  - (b) by the past or continuing refusal or failure, or by a threatened refusal or failure, of a person do an act or thing that the person is required by this Act to do, may apply to the Court to grant an injunction under subsection (2) or (3).
- (2) ) If, on the hearing of an application under subsection (1), the Court is satisfied that a person has engaged, is engaging or has threatened to engage in conduct that constituted, constitutes or would constitute.....—

8. From the above, it is clear that section 692 of the *Insolvency Act* envisages an application. Whether such an application must be anchored in a suit is dependent on the law and the court's past pronouncements. As submitted by the Respondents, "suit" is defined under section 2 of the *Civil Procedure Act*, as "all civil proceedings commenced in any manner prescribed". The understanding of this court is "prescribed" means 'prescribed by Rules' and "Rules" under the *Civil Procedure Act* means "rules and forms made by the Rules Committee to regulate the procedure of courts". It is also not in dispute that section 19 of the *Civil Procedure Act* states that "every suit shall be instituted in such manner as may be prescribed by rules" and that under Order 3 Rule 1 of the Rules this can be done either through a Plaint, a Petition or an Originating Summons.

9. I am in agreement with the court's view in *Synergy Industrial Credit Limited v Mitchell Cotts Freight (K) Ltd* [2020] KEHC 1927 (KLR) that section 19 does not confine a monopoly to the Civil Procedure Rules on how a suit should be instituted. It provides that suits may be instituted in the manner prescribed by rules and in the considered view of this Court, there could be rules in other Statutes on how proceedings may be commenced. A similar view was expressed by the court in the case of *Abdi Abdullahi Somo v Ben Chikamai & 2 others* [2016] KEHC 4283 (KLR) where Gikonyo J., stated thus:

In my life as a judge, I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that, as a matter of general principle, a Notice of Motion is a competent way of initiating substantive proceedings in court. It will all depend on the particular statute governing the particular proceeding in question. Therefore, where the law provides for the manner of commencing a suit or proceedings in court, then that procedure applies. For instance, proceedings for appointment of inspectors under the *Companies Act* are commenced by way of Notice of Motion yet they are substantive proceedings. Close to the proceedings at hand, substantive judicial review proceedings under Order 53 rule 3 of the Civil Procedure Rules are commenced by a Notice of Motion. Before I conclude on this point, I should say that *the Constitution* seems to seek keeping of formalities especially on applications based on denial, or violation or infringement or threatening of fundamental rights and freedoms, to bear minimum. On this please see article 22(3) (b) of *the Constitution*. I need not say more about this objection. It fails flat.



10. In my view, section 692 of the *Insolvency Act* does not expressly state that the subject application must be anchored in a suit. I am also in agreement with Nazir's submission that Rule 10(4) of the Insolvency Regulations mandates that all such applications should be by way of Notice of Motion. In this regard, it is clear that the *Insolvency Act* and the Regulations have set out the procedure by which the court has to be approached and, in my view, that procedure is not merely technical, it is meant to achieve substantive justice. I find that Nazir did not err in commencing these proceedings by way of a Notice of Motion as the same is provided for by the law and the regulations in respect of insolvency proceedings. This objection by the Respondents therefore fails.
11. In the foregoing, I find that the court has the jurisdiction to hear Nazir's application and that the Respondents' preliminary objections have no merit and they are hereby dismissed. Costs shall be in the cause. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF JUNE 2025**

.....

**J.W.W. MONGARE**

**JUDGE**

In the presence of:-

Mr. Mwirigi for the Applicant.

Mr. Amaleba for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

N/A for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

N/A for the Interested Parties.

Amos- Court Assistant

