

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY PETITION NO. 007 OF 2019

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015
AND
IN THE MATTER OF THE ARBITRATION ACT
AND
IN THE MATTER OF A PETITION BY EPCO BUILDERS LIMITED
FOR THE LIQUIDATION OF KWALE INTERNATIONAL SUGAR
COMPANY LIMITED

BETWEEN

KWALE INTERNATIONAL SUGAR LIMITED.....
APPLICANT

VERSUS

EPCO BUILDERS LIMITED.....PETITIONER/
RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 10th February 2025 is brought under Sections 3 & 692 of the Insolvency Act No. 18 of 2015, Sections 6 and 10 of the Arbitration Act No. 4 of 1995 and Rule 10 of the Insolvency Act. In a nutshell, the Motion seeks a temporary injunction restraining the Petitioner and other creditors from prosecuting or publicizing

the insolvency petition, a stay of proceedings pending the outcome of Nairobi HCC Misc. Application No. E013 of 2020, or alternatively, that the petition be struck out if the matter is referred to arbitration in the said application.

2. The application is premised on the grounds on the face of it and supported by the affidavit of Benson Nzuka Musili sworn on 10th February 2025. He depones that the underlying debt is disputed, and is the subject of a contractual dispute which ought to be resolved through arbitration, and that the liquidation petition is premature, oppressive, and an abuse of the court process. It is further deponed that the Applicant has filed *Nairobi HCC Misc. Application No. E013 of 2020*, seeking reference of the dispute to arbitration.
3. The application is opposed by the replying affidavit of Ramji Devji Varsai the managing director of EpcO Builders, sworn on 17th February 2025. He avers that the matter is *res judicata*, the application is a re-litigation of previously determined issues, and that it is a calculated attempt to delay the hearing and determination of the insolvency petition.
4. The application was heard by way of written submission. The Applicant's submissions are dated 6th March 2025, while those by the Respondent are dated 24th March 2025.

Background

5. The background to this matter is pertinent. The statutory demand underlying the present petition was dated 7th June

2019, seeking payment of Kshs. 712,481,950.65 from the Applicant. Kwale International Sugar Company Ltd sought to set aside the statutory demand in an earlier application, which was dismissed by Okwany, J on 23rd April 2020. The Applicant then filed Civil Appeal No. 208 of 2020, which culminated in a judgment delivered on 7th February 2025. The Court of Appeal upheld the dismissal of the application and directed that the insolvency petition proceed for hearing.

6. Parallel to these proceedings, the Applicant filed *Nairobi HCC Misc. Application No. E013 of 2020* seeking to stay the petition and refer the matter to arbitration. That application was heard and dismissed by this Court on 5th May 2025.

Analysis and determination.

6. The issue for consideration is whether the application is merited
7. The Respondent argues that the application is *res judicata*.

Section 7 of the **Civil Procedure Act** provides that:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit... between the same parties... and has been heard and finally decided by such Court.”

8. The question of whether the statutory demand could be set aside and whether the matter should be referred to arbitration has already been conclusively determined, first by this Court and subsequently by the Court of Appeal in *Civil Appeal No. 208 of 2020*. The Court of Appeal was emphatic that the insolvency petition should proceed to hearing. The Applicant cannot re-agitate the same through this Motion. In **John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, the Court of Appeal affirmed that *res judicata* encompasses not only what was decided but also what could and should have been raised in earlier proceedings.

9. Moreover, *Nairobi HCC Misc. Application No. E013 of 2020*, which was the very basis of the current Motion, was dismissed on 5th May 2025. The reliefs sought herein are substantially premised on the pendency and outcome of that application. The dismissal of *Misc. E013 of 2020* renders the present application moot. A court cannot grant relief pegged on a process or suit that no longer exists. In **Kenya Commercial Bank Ltd v Thomas Kipkemboi & Another [2019] eKLR**, the court emphasized that:

“...an application based on a dismissed pleading cannot stand; once the foundation is gone, the superstructure must fall.”

10. On the question of injunctive relief, the Applicant seeks to restrain the publication and prosecution of this petition. It

is trite that insolvency proceedings are not commercial disputes simpliciter, but statutory processes for the resolution of insolvency. The law under **Rule 11** of the **Insolvency Rules** permits a creditor to advertise and prosecute a petition after complying with the notice requirements. An injunction in insolvency proceedings is a remedy rarely granted and only in exceptional cases. In **Mobil Oil Kenya Ltd v Multiple Hauliers (EA) Ltd [2006] eKLR**, the court held that insolvency proceedings should not be stayed where there is no *bona fide* dispute of the debt or where the application is brought merely to delay proceedings.

11. Further, in **Matic General Contractors Ltd v Kenya Power & Lighting Co. Ltd [2001] EA 205**, the court cautioned against allowing a debtor to avoid insolvency proceedings by merely asserting the existence of a dispute without credible grounds. The present application does not meet the threshold for interlocutory injunctions as set in **Giella v Cassman Brown & Co Ltd [1973] EA 358**. The Applicant has not demonstrated a *prima facie* case with a probability of success, nor has it shown irreparable harm that cannot be compensated by damages. Most significantly, the balance of convenience does not lie in favour of the Applicant who seeks to re-litigate matters already conclusively addressed by both this Court and the Court of Appeal.

12. The claim that the matter ought to be referred to arbitration under Section 6 of the Arbitration Act also fails. That avenue was already pursued in *Misc. E013 of 2020* and was conclusively rejected. The Applicant cannot repackage the same issue through this Motion. In **John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR**, the Court of Appeal clarified that the bar against re-litigation extends to issues that ought to have been raised or were substantially addressed in prior proceedings.

Disposition

11. In light of the foregoing, I find that the present application is wholly unmerited. It seeks relief that is now moot, following the dismissal of *Nairobi HCC Misc. Application No. E013 of 2020*, and it seeks to reopen issues already determined by this Court and the Court of Appeal. The proceedings must now move forward in accordance with the direction of the superior court.
12. Accordingly, the Notice of Motion dated 10th February 2025 is dismissed with costs to the Petitioner/Respondent.

It is so ordered.

RULING delivered virtually, dated and signed at **NAIROBI**

This **10th** day of **July** 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Luther h/b for Mr. Okwach for Petitioner/Respondent

Mr. Kongere for Applicant

Court Assistant: Carlos