



**Co-operative Bank of Kenya Ltd v Mutua & another (Civil Appeal
29 of 2020) [2024] KEHC 8 (KLR) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 8 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 29 OF 2020
TM MATHEKA, J
JANUARY 11, 2024**

BETWEEN

CO-OPERATIVE BANK OF KENYA LTD APPELLANT

AND

MARY NDUKU MUTUA 1ST RESPONDENT

INVESCO ASSURANCE CO. LTD 2ND RESPONDENT

RULING

1. The application for determination is dated 6th March 2023. It is the same application in the related matters that is; HCCA 30 Of 2021 Co-Operative Bank of Kenya Ltd vs Justus Mbae Willy & Invesco Assurance Co. Ltd, HCCA 31 Of 2021 Co-Operative Bank of Kenya Ltd vs Magdalene Emmanuel (Suing as the Legal Representative of the Estate of Joyce Mbithe Muasya (Deceased) & Invesco Assurance Co. Ltd, HCCA 32 of 2021 Co-Operative Bank of Kenya Ltd vs Elijah Ndambuki Nzuki (Suing as the Legal Representative of the Estate of Irene M. Ndambuki (Deceased) & Invesco Assurance Co. Ltd
2. In each of the applications the key parties are the same, i.e. the applicant and the second respondent. The applications have the same issues for determination and it was agreed that the orders made in one matter would apply to each of the other matters mutatis mutandis.
3. It is for this reason that the matters were consolidated for the purpose of this ruling.
4. The application is brought under sections 3A & 80 of the *Civil Procedure Act*, Order 45 & 51 of the *Civil Procedure Rules*, 2010 and any other enabling provisions of the law. It seeks the following orders;
 - a. That the ruling delivered by this honorable Court with respect to matters herein) on 9th December 2021 be reviewed.



- b. The Court be pleased to order that any attachment, sequestration, distress of execution against the applicant herein is void.
 - c. That the 1st Respondent do apply for compensation from the Policy Holders Compensation Fund as per the directive of the Commissioner of Insurance & Executive Chief Officer of the Insurance Regulatory Authority.
 - d. That cost of this application be provided for.
5. The application is supported by the grounds on its face and the supporting affidavit of Philip Nzyuko Musya sworn on the same day. He depones that he is the Advocate in conduct of this matter on behalf of the applicant (the Bank) hence duly versed with the facts. That through the instructions of the bank, an application dated 5th February 2021 was filed seeking the following orders;
- a. This Honorable court be pleased to stay these proceedings pending the hearing and determination of the Nairobi Commercial and Admiralty Division, Insolvency Cause No. E155 of 2019 (the insolvency cause).
 - b. This Honorable court be pleased to order that any attachment, sequestration, distress of execution against the appellant/applicant herein is void.
6. He depones that the application was dismissed by this court through a ruling dated 9th December 2021 despite the fact that there is already a judgment in the Insolvency Cause. That in the said judgment, it was pronounced that the 2nd respondent (Invesco) would be wound up and an official receiver be appointed to manage its affairs. That the provisions of the *Insolvency Act* allow for the staying of any proceedings against a company subject of liquidation proceedings after the making of a liquidation application and before liquidation order has been made.
7. He depones that he believes that this court made an inadvertent error on the face of the record by dismissing the application contrary to the provisions of the *Insolvency Act*. That the ruling by itself goes contrary to the canons of sections 428 and 430 of the *Insolvency Act* and therefore creates bad law. (emphasis mine) Further, he depones that there are already directives from the Commissioner of Insurance & Chief Executive Officer of the Insurance Regulatory Authority issued on 24th February 2023 to the effect that an official receiver has been appointed as the provisional liquidator and as such, all affected claimants ought to be compensated from the Policyholders Compensation Fund. The directives are exhibited as PNM 1.
8. He depones that the consequence of dismissing the application dated 5th February 2021 is execution contrary to provisions of the *Insolvency Act* and the directives of 24th February 2023. That it is therefore imperative to review the said ruling in order to rectify the apparent error on the judgment. That the 1st respondent should proceed to claim from the duly appointed official receiver of Invesco and have their claim processed and settled from the Policy Holders Compensation Fund.
9. The application is opposed by the 1st respondent through a replying affidavit sworn by S.M Makau Advocate on 25th April 2023. He depones that the application is frivolous, vexatious, bad in law, untenable and a gross abuse of this court's process. That the matter before court was comprehensively dealt with via a ruling delivered by this court on 9th December 2021. That the applicant had placed before the court the same material facts which it has placed before this court in the current application. That the proceedings herein are garnishee proceedings in which parties had recorded consent in the lower court for the bank to release funds held in account by Invesco in the year 2018. That instead of releasing the funds, the applicant filed an appeal and thereafter filed a similar application dated 18th August 2020, before Hon. Ong'udi J, which was dismissed. The application is exhibited as SMM 1.



10. That the applicant filed another application dated 5th February 2021 before Hon. Dulu J but it was also dismissed. The application is exhibited as SMM 2. That after the transfer of Hon. Dulu J, the applicant has filed the current application seeking similar orders as in the other two mentioned applications. That the application as drawn offends the mandatory provision of Order 43 of the Civil Procedure Rules.
11. Directions were given that the application be canvassed by way of written submissions. The applicant did not wish to file any submissions, the 2nd respondent did not file any hence only the submissions by the 1st respondent are on record in each file.

1st Respondent's Submissions

12. The 1st respondent has reiterated the contents in the replying affidavit and added that the applicant has not fulfilled the grounds for review to wit;
 1. That there is a new important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed.
 2. That there is a mistake on the face of the record.
13. It is submitted that the application is fatally defective as the applicant has failed to extract the decree/ ruling sought to be reviewed.
14. Having looked at the application, response and submissions, the only issue for determination is whether the application is merited.

Analysis & Determination

15. The right to apply for review is provided for in Section 80 of the [Civil Procedure Act](#) and elaborated by Order 45 of the [Civil Procedure Rules](#) as follows;

Order 45, rule 1: Application for Review of decree or order.

- (1) any person considering himself aggrieved;
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.
16. There are three limbs which are discernible from part (b) above i.e.;
 - a. Discovery of new and important matter or evidence.
 - b. Mistake or error apparent on the face of the record.
 - c. Any other sufficient reason.



17. The applicant's position in this application is that the court made an error on the face of the record by dismissing the application dated 5th February 2021 as that was contrary to the provisions of s. 428 of the *Insolvency Act*.
18. I have perused the ruling of my brother Hon. Dulu J and in dismissing the application he states as follow;
- “6. Having considered this application, and the submissions of counsel for the parties and the law, I am of the view that this application lacks merits and has to be dismissed.
7. The first reason is that a consent entered into by counsel in this matter is still effective and an earlier attempt to set it aside was dismissed by the court. That consent thus still subsists and cannot be impeded by insolvency proceedings in another court, in which not all parties herein are parties.
8. Secondly, no moratorium or restraining order has been shown to have been issued in Nairobi Commercial and Admiralty Division Insolvency Cause No. E155 of 2019 as required by law. In this regard section 428(1) and (2) of the *Insolvency Act* relied upon by the applicant's counsel states as follows –
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- (1) At any time after the making of a liquidation application and before a liquidation order has been made the company, or any creditor or any contributory may –
- a. If legal proceedings against the company are pending in court – apply to the court for the proceedings to be stayed; and
- b. If proceedings relating to a matter are pending against the company in another court, apply to the court to restrain further proceedings in respect of the matter in the other court
- (2) On the hearing of an application under sub-section 1(a) or (b), the court may make an order staying or restraining the proceedings on such terms as it considers appropriate
9. My understanding of the above provisions of the law especially section 428(1) (b) is that the application for moratorium or restraining of other proceedings has to be made in the cause in which there is a liquidation application, not in those other proceedings. The moratorium or restraining orders have to be obtained in that cause. Thus the present application has been made in the wrong case, and is for dismissal.” (emphasis mine)



19. It is evident from the record that the learned Judge had s. 428 of the *Insolvency Act* in sight when he made the ruling, and interpreted it to mean that any application in the nature of the application under review ought to have been made in the insolvency cause. I can confirm from the exhibit PNM 1 (Liquidation Order – Invesco Assurance Company Limited) that in this case the insolvency cause was Insolvency Petition No. E155 of 2019- in the matter of Winding Up Invesco Assurance Company Limited in Nairobi Commercial Court where Prayer ‘A’ was; ‘That Invesco Assurance Company limited be liquidated by an order of this court and in accordance with the *Insolvency Act* 2015’
20. According to Hon Dulu J, the application for stay ought to have been filed in that cause and not in this or the other cases cited herein above case, as that would have been the rightful place to obtain the orders of stay or restraint. The applicant instead of following the court’s direction has brought this application. The argument that the ruling sets out bad law cannot be an issue for review but an issue for appeal.
21. That said, nothing has been placed before me to demonstrate what the error on the face of the record with respect to s. 428 is. The law appears to speak clearly. For the avoidance of doubt I reiterate the provisions here

At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may—

 - (a) if legal proceedings against the company are pending in the Court—apply to the Court for the proceedings to be stayed; and
 - (b) if proceedings relating to a matter are pending against the company in another court—apply to the Court to restrain further proceedings in respect of that matter in the other court (emphasis added)
22. It is my considered view that in the light of the foregoing the application for review is not merited. The so called new evidence only goes to amplify the court’s interpretation of the application of S. 428 of the *Insolvency Act*. It emphasizes that fact that there is no error on the face of the record. My considered view from what is placed before me is that it is the applicant who was in error in bringing the application to the wrong forum.
23. In the circumstances I agree with the position taken by Hon Dulu J.
24. The application is dismissed with costs to the respondent.
25. The order applies to the other applications cited hereinabove.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 11TH DAY OF JANUARY 2024

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MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Applicant’s Advocates

B.M Mung’ata & Co.

1st Respondent’s Advocates

Annie W. Thoronjo & Co.

