



**Thande v Co-operative Bank Limited & 2 others (Civil Suit 403 of 2010)  
[2024] KEHC 1194 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 403 OF 2010  
FG MUGAMBI, J  
FEBRUARY 9, 2024**

**BETWEEN**

**AGGREY PETER THANDE ..... PLAINTIFF**

**AND**

**CO-OPERATIVE BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MUNGAI T/A GARAM INVESTMENTS ..... 2<sup>ND</sup> DEFENDANT**

**BUERI LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Brief background**

1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants (the applicants) filed a Notice of Motion application dated 20<sup>th</sup> April 2023 brought under the provisions of Order 24 rule 6 of the *Civil Procedure Rules* 2010, section 9 of the *Bankruptcy Act* and sections 1A, 1B, & 3A of the *Civil Procedure Act*. The application seeks to strike out the plaint filed by the respondent and to declare the proceedings or orders issued in this suit as null and void and set them aside in their entirety. The application is premised on the grounds on the face of it and is supported by an affidavit sworn on the same day by Migui Mungai, the applicants' advocate on record.
2. In summary, the applicants challenge the legal standing of the respondent to file this suit based on the respondent's bankruptcy status. The applicants point out that the respondent was declared bankrupt on 18<sup>th</sup> May 2004 in Bankruptcy Cause No. 67 of 2004. The applicants argue that a receiving order, which still remains in effect, was issued in the bankruptcy cause, and the Official Receiver was appointed to manage the respondent's estate. This typically means that the Official Receiver takes control of the bankrupt individual's financial affairs and estate.



3. They further aver that the respondent filed the suit herein in his own capacity and not through the Official Receiver, and without first seeking leave of Court. For this reason, this suit cannot be sustained for want of compliance with the provisions of Order 24 rule 6 of the [Civil Procedure Rules](#) and Section 9 of the [Bankruptcy Act](#).
4. The application is opposed by way of a notice of preliminary objection and a replying affidavit sworn on 3<sup>rd</sup> May 2023 by Aggrey Peter Thande, the respondent. He raises the following grounds of objection to the application:
  - i. The application is fatally incompetent, misconceived, lacks substance, is bad in law and is an abuse of the court process.
  - ii. The application has been brought under provisions of the law that do not apply to the respondent herein.
  - iii. Order 24 Rule 6 of the [Civil Procedure Rules](#) 2010 applies to trustees or official receivers and the respondent is neither.
  - iv. Section 9 of the [Bankruptcy Act](#) bars creditors from filing proceedings against debtors, but does not bar bankrupt individuals from filing suits.
  - v. The applicant is made in faith and seeks to curtail the Plaintiff/Respondents rights under Articles 48, 50 and 159(2) of the [Constitution of Kenya](#) 2010.
5. The respondent counters by asserting that Order 24 rule 6 of the [Civil Procedure Rules](#) is not applicable in his case. He explains that these provisions dictate the expected behavior of trustees and Official Receivers in cases involving bankrupt individuals, but do not specifically pertain to his situation. He admits that while section 9 of the [Bankruptcy Act](#) discusses the implications of a receiving order, it primarily prevents creditors from initiating legal actions against debtors. However, he argues, it does not restrict bankrupt individuals from filing their own lawsuits. Therefore, the respondent maintains that the receiving order issued against him does not prohibit him from initiating the current lawsuit.
6. In line with directions issued by this Court, the application and preliminary objection will be determined concurrently by way of written submissions.
7. In their arguments, the applicants refer to sections 9, 77 (1) (a), and (2) of the [Bankruptcy Act](#). They argue that following the issuance of a receiving order concerning the plaintiff, his estate became the responsibility of the Official Receiver. Consequently, any legal dispute involving property from the debtor's estate, as in this case, should have involved the Official Receiver.
8. They cite the decision of [Stephen Cheruiyot Cheronu v Kenneth Kiptum Kandie](#), [2016] eKLR to support their claim that any lawsuit initiated by the plaintiff personally, without the involvement of the Official Receiver and without the court's permission, is fundamentally flawed, regardless of whether the defendants were aware of the receiving order.
9. The 3<sup>rd</sup> defendant draws on the *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*, [1969] EA 696 case and the Court of Appeal case of [Bashir Haji Abdullahi v Adan Mohammed Noor & 3 Others](#), [2004] eKLR. They argue that the first and second grounds of the preliminary objection raised by the respondent are too ambiguous to warrant a proper response.
10. Regarding the 3<sup>rd</sup> and 4<sup>th</sup> grounds, they contend that upon the issuance of a receiving order, the debtor's estate is vested in the Official Receiver. They refer to section 77 (1) (a), and (2) of the [Bankruptcy Act](#), acknowledging that a receiving order was indeed issued against the respondent on May 18, 2004, and



that the Official Receiver was appointed to manage his estate. Therefore, they argue, managing the plaintiff's estate, including filing this lawsuit, falls under the Official Receiver's responsibilities unless the court directs otherwise.

11. On the other hand, the respondent argues that the current application is *res judicata*, as the issues therein had been addressed in previous grounds of opposition filed by the applicants on 21<sup>st</sup> July 2010, and the court had made a ruling on these matters. He references Order 24 rule 6 of the [Civil Procedure Rules](#) and section 9 of the [Bankruptcy Act](#), suggesting that if the legislature had intended to prevent a debtor with a receiving order from initiating a lawsuit like the current one, it would have been explicitly stated.
12. The respondent takes the view that the laws do not shield the public from a debtor who seeks to protect his property through legal action. The plaintiff cites the case of [Surjit Singh Hunjan & Another v The Deposit Protection Fund Board \(sued as The Liquidator of The Prudential Building Society\)](#), [2012] eKLR to assert that a debtor is not prohibited from filing a suit after a receiving order is made against him.
13. He maintains that at the time of filing this suit, he had not been formally declared bankrupt. He points out that no adjudication order under section 20 of the [Bankruptcy Act](#) had been made against him at that time, meaning he was merely a debtor with a receiving order, with the Official Receiver acting as the manager of his estate, but not divesting him of his property rights.

### Analysis

14. I have carefully considered the pleadings, evidence, submissions and evidence presented by respective parties. The following three (3) issues arise for determination:
  - i. Whether the plaintiff's preliminary objection is merited;
  - ii. Whether the issues raised in the instant application are *res judicata*;
  - iii. Whether the plaintiff has the requisite *locus standi* to institute this suit.
15. I will start by determining the first issue, on whether the respondent's preliminary objection is merited. The legal ambit of what constitutes a preliminary objection was set out in the celebrated case of [Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors](#) where it was held that:

“.... 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.”
16. The required threshold for distinguishing between questions of law and fact for purposes of sustaining a preliminary objection as is also a point that is well crystalized. In the case of [George Oraro v Babak Eston Mbaja](#), [2005] eKLR the court held that:

“ A preliminary objection is ... declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...”
17. Against this background, I have perused the respondent's grounds of preliminary objection dated 3<sup>rd</sup> May, 2023. It is clear that the application and interpretation of the provisions of Order 24 rule 6 of the



Civil Procedure Rules and section 9 of the Bankruptcy Act, on which the objection is based, are deeply contested and lies at the center of the application. The correct interpretation and application can only be properly determined upon further investigation by this Court.

18. In light of the foregoing, this Court holds that the preliminary objection raised by the respondent is not merited and it therefore fails.

19. The second issue is whether the issues raised in the instant application are *res judicata*. Section 7 of the Civil Procedure Act states 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, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

20. The elements of *res judicata* as spelt out in section 7 of the stated Act were further enunciated by the Court of Appeal in the decision of the Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR). The Court stated as follows:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

- i. The suit or issue was directly and substantially in issue in the former suit.
- ii. That former suit was between the same parties or parties under whom they or any of them claim.
- iii. Those parties were litigating under the same title.
- iv. The issue was heard and finally determined in the former suit.
- v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

21. In this context, the respondent points out that the primary issue in the current application, concerning his legal capacity to initiate this lawsuit, was previously raised by the applicants in their grounds of opposition dated 21<sup>st</sup> July 2010. This matter was conclusively addressed in a ruling by Njage, J, which was delivered on his behalf by Mutava, J on November 4, 2011. Regrettably, the respondent did not include a copy of this ruling in his replying affidavit, which would have helped this Court verify his statement's accuracy.

22. In order to ensure a fair resolution of this matter, I took the initiative to review the court records and located a copy of the ruling dated 4<sup>th</sup> November, 2011.

23. The Court at paragraph 2 acknowledges the grounds of opposition filed by the applicants herein and reproduces those grounds. It is a fact that one of the grounds before the Court then was that the respondent herein lacks the locus to institute this suit having filed for bankruptcy and obtaining a receiving order. Upon careful examination of the ruling, I observe that the Court did not explicitly address this specific issue. Consequently, the necessary condition that requires that an issue ought to



have been conclusively resolved in an earlier case has not been satisfied. For these reasons the claim of *res judicata* fails.

24. In concluding the discussion on whether the respondent has the necessary legal standing to pursue this lawsuit, it is noted that the applicant has provided the Receiving Order dated May 18, 2004, in Bankruptcy Cause No. 67 of 2004. The applicants contend that this order is indicative of the respondent being declared bankrupt.
25. The respondent's bankruptcy proceedings commenced under the now-repealed *Bankruptcy Act*, Cap 53. It is not contested that there is a receiving order issued against the debtor's estate. It is however important to distinguish between a receiving order and a bankruptcy order and the effects of each. A receiving order is a pivotal step in bankruptcy proceedings. It initiates the management of the debtor's estate but does not equate to an adjudication of bankruptcy. The Court observes that the applicants have not submitted any formal order declaring the respondent bankrupt.
26. The primary function of a receiving order is to safeguard the debtor's property during the bankruptcy process, indicating that the assets are under a receiver's control and the debtor is limited in handling their assets. As per Section 5 of the *repealed Act*, a receiving order can be made to protect the estate following a bankruptcy petition.
27. I might add that in my view, it is the issuance of a bankruptcy order that significantly impacts a debtor's legal standing, particularly concerning their capacity to sue and be sued. Once a bankruptcy order is made, the debtor is generally restricted from initiating legal proceedings without the permission of the court or the Official Receiver. This limitation is in place to prevent the bankrupt individual from incurring further legal expenses that could diminish the estate available to creditors.
28. The applicants have cited Section 9 of the *Act* concerning the implications of a receiving order. The Court finds alignment with the respondent's position and the judicial precedents they cited. In the case of *Surjit Singh Hunjan & Another V The Deposit Protection Fund Board*, [2012] eKLR, Mabeya, J interpreted the section as barring creditors, not debtors, from commencing proceedings post-receiving order, indicating that a debtor retains the right to initiate legal action.
29. In HCCC No. 20 of 2005 *Aggrey Peter Thande v ABN AMRO Bank and 2 Others*, Waweru, J noted that the plaintiff, who had not yet been declared bankrupt and whose property was under the Official Receiver's control, retained the capacity to file a lawsuit. Finally, in *Wambulwa v Pius*, [2022] eKLR, the Court rejected a similar objection, clarifying that section 9(1) applies to creditors and does not prevent debtors from initiating legal proceedings.
30. Based on these findings, it is my finding that the respondent possesses the requisite *locus standi* to file and proceed with this lawsuit having not been declared bankrupt.
31. Top of Form

#### **Determination**

32. Consequently, the application dated 20<sup>th</sup> April 2023 is dismissed with costs to the plaintiff/respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

