



**Owino Kojo & Co Advocates v Sifa Insurance Brokers Ltd (Miscellaneous Application E378 of 2022) [2024] KEHC 2691 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E378 OF 2022**

**FG MUGAMBI, J**

**MARCH 15, 2024**

**BETWEEN**

**OWINO KOJO & CO ADVOCATES ..... APPLICANT**

**AND**

**SIFA INSURANCE BROKERS LTD ..... RESPONDENT**

**RULING**

**Background**

1. The applicant filed a Notice of Motion application dated 3<sup>rd</sup> March 2023 pursuant to the provisions of Section 51(2) of the *Advocates Act*, Order 51(2) of the *Civil Procedure Rules*, Article 159(2) of the *Constitution* and all other enabling provisions of the law seeking the following orders:
  - i. This Honourable Court be pleased to enter judgment for the applicant against the respondent for a sum of Kshs. 185,924 being the sum of costs taxed by the Taxing Master on 31.10.2022 and certified through Certificate of Costs dated 08.11.2022.
  - ii. The Applicant be awarded interest at the rate of 14% per annum on the said amount of Kshs. 185,924 from 04.05.2022 till payment in full.
  - iii. Pursuant to the entry of judgment hereinabove, a Decree be issued in respect of the said amounts and the applicant be at liberty to execute for recovery of the same in such manner as a Decree of this Honourable Court; and
  - iv. Costs of this application together with incidental costs of executing the Decree be borne by the respondent.
2. The application is premised on the grounds on the face of the motion and is supported by an affidavit sworn on the same day by Owino Kojo, an Advocate of the High Court of Kenya and a partner at the



applicant law firm. In opposition thereto, the respondent filed a replying affidavit sworn by Paul Gogo the former Director of the respondent company, on 5<sup>th</sup> April, 2023.

3. The applicant's case is that it was instructed by the respondent to represent it in Nairobi Misc. No. E894 of 2020 which suit gave rise to the Advocate-Client Bill of Costs dated 13<sup>th</sup> May 2022. The said bill was taxed at Kshs. 185,924/= in favour of the applicant against the respondent on 31<sup>st</sup> October 2022.
4. Thereafter, a Certificate of Costs dated 8<sup>th</sup> November 2022 was issued to the applicant. The applicant contended that the respondent was served with the Advocate-Client Bill of Costs via email on 4<sup>th</sup> May 2022. It asserted that there is no dispute on retainer and the Taxing Master's ruling delivered on 31<sup>st</sup> October 2022 has not been challenged to date. Thus, the orders sought herein should be granted.
5. The respondent in response thereto deposed that the respondent company does not exist since it was wound up vide a winding up order issued on 3<sup>rd</sup> December 2010 in Winding Up Cause No. 31 of 2009; In the Matter of Sifa Insurance Brokers Company Limited. Accordingly, the applicant ought to have first complied with the provisions of Section 432(2) of the *Insolvency Act* 2015 by seeking leave of Court before instituting any proceedings against the respondent. The respondent averred that no leave has been sought prior to filing of the instant application against it, hence the application herein ought to be dismissed.
6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 26<sup>th</sup> June 2023, while the respondent's submissions were filed on 7<sup>th</sup> August 2023. I shall not reproduce the contents of the said submissions but will refer to them in my determination.

### **Analysis**

7. Upon consideration of the pleadings, the evidence presented, the written submissions and authorities cited by Counsel for parties, I am of the considered view that the issue that arises for determination is whether the instant application is merited.
8. In buttressing the point that the respondent company no longer exists, the respondent produced a copy of the winding up order issued under the now repealed Companies Act Cap 486 (now repealed). The order was issued in Winding Up Cause No. 31 of 2009 on 21<sup>st</sup> December 2010, appointing the official receiver as receiver manager of the respondent company. The authenticity of this order has not been challenged. The applicants only blame the respondent for bad faith in not having registered the said order and for continuing to flout the provisions of the Companies Act.
9. The issuance of a liquidation order (winding up order under the repealed Act), typically results in an automatic stay on all ongoing civil proceedings against the company, except with the leave of the court or the consent of the liquidator. This means that any existing lawsuits or legal actions against the company cannot proceed without the court's approval. This provision is intended to ensure that the assets of the company are not dissipated through individual lawsuits, allowing for an orderly distribution of the company's assets among its creditors.
10. The process of leave allows the Court to consider factors such as the stage of the proceedings, the potential impact on the liquidation process, and the interests of all creditors before granting such leave.



11. Section 432 of the [Insolvency Act](#) states as hereunder:
- “ 1. Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver.
  2. When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.
  3. An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them.”
12. The applicant in its submissions relied on the case of [Kagwimi Kang'ethe & Co. Advocates V Nairobi Mamba Village Limited](#), [2017] eKLR and submitted that the issue of winding up does not lie at this stage. It further submitted that in any event, the liquidation order referred to by the respondent was not registered with the Registrar as required under section 432(1) of the [Insolvency Act](#) which explains why the company is actively trading and does not disclose that it was liquidated, even to its Advocates.
13. Counsel for the applicant referred to the provisions of Section 485 of the [Insolvency Act](#) and asserted that a company in liquidation is obligated to state that it is in liquidation in all its letters, invoices and other communications. The applicants confirm that the respondent has never stated in any of its communications or pleadings that it is in liquidation. In addition, since 2010, the respondent has sued and has been sued in over 20 cases and the issue of liquidation has never been raised.
14. The respondent on the other hand relied on the Court of Appeal case of [Kenya Power & Lighting Company Limited V Benzene Holdings Limited T/A Wyco Paints](#), [2016] eKLR and submitted that once a Winding Up Order is issued by a Court of competent jurisdiction against a company such as is the case herein, any suit brought against it cannot stand without leave of Court.
15. I note that while the applicants fault the respondent company for flouting the law, the suit in respect of which the Bill of Costs herein arises was in fact filed during the pendency of the liquidation. The applicants themselves exhibited acquiescence towards the aforementioned contravention. They now seek to derive advantage from their erstwhile disregard for statutory compliance. This Court refuses to serve as a vehicle for perpetuating any form of legal transgression. The statutes governing liquidation procedures are clear on the ramification's attendant upon the issuance of a liquidation order.
16. There is a reason as to why the [Insolvency Act](#) provides for offences relating to conduct before and during liquidation and criminal proceedings relating to those offences under sections 498 to 510 of the [Act](#). This Court shall refrain from elaborating further on these provisions, except to underscore the necessity of holding accountable any entities found to be in contravention thereof.
17. Having so found, this Court is bereft of the jurisdiction to entertain the other matters since it is not controverted that in fact, no leave was sought to begin or proceed with these proceedings against the respondent Company. The fact that the respondent has flouted the law is not reason for this Court to acquiesce the same.



### **Determination**

18. For the reasons that I have stated, the application dated 3<sup>rd</sup> March 2023 is struck out for being contra statute. The respondent is not entitled to the costs of this application because of their conduct.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH 2024.**

**F. MUGAMBI**

**JUDGE**

