



REPUBLIC OF KENYA



**Aguko v Thika School of Health Sciences (Miscellaneous Civil Application
E140 of 2024) [2024] KEHC 4992 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E140 OF 2024**

RE ABURILI, J

MAY 15, 2024

**IN THE MATTER OF THE INSOLVENCY ACT
IN THE MATTER OF APPLICATION FOR LEAVE TO INSTITUTE SUIT
AGAINST A COMPANY UNDER ADMINISTRATION PURSUANT TO
SECTION 560 OF THE INSOLVENCY ACT**

BETWEEN

ROSELYNE ANYANGO AGUKO APPLICANT

AND

THIKA SCHOOL OF HEALTH SCIENCES RESPONDENT

RULING

1. The applicant herein Roselyne Anyango Aguko by her Notice of motion dated 3rd April, 2024 seeks from this court orders that leave be granted to her to commence suit against the respondent former employer for recovery of her terminal dues following her termination of employment in January, 2022 and that such leave so granted do operate to revive her suit filed in Kisumu ELRC Cause No. E077 of 2023 between the applicant and the Respondent.
2. The application which was not opposed by the respondent was supported by an affidavit sworn by the applicant wherein she deposes materially, inter alia, that when she filed the suit which she seeks to be revived, she was not aware that the respondent was under administration hence the application herein as required by law.

Determination

3. Section 560(1) of the *Insolvency Act* provides that:



While a company is under administration—

- a) A person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;
- b) A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;
- c) A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and
- d) A person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court."

4. From the above-mentioned Section, it is clear that while a Company is under Administration, for one to take steps to enforce, begin or continue legal proceedings against the Company, one has to obtain Consent of the Administrator or act with approval of the court.
5. In the instant case, there is no doubt that Applicant had initiated proceedings vide Kisumu Employment and Labour Relations Court, [ELRC] Cause No. E077 of 2023 against the respondent which was already under administration. That suit was filed without consent of the administrator or with approval of the court and the Court, under the *Insolvency Act* is the High Court.
6. That suit was struck out by the ELR Court for having been filed without first seeking and obtaining leave of court as required under the *Insolvency Act*.
7. On whether this court can in granting approval to institute suit revive a suit that was struck out, is in my view, a tall order because that suit was not instituted prior to the respondent being placed under administration.
8. The Applicant can only correct the defect by obtaining approval of this court to institute fresh proceedings, assuming that she is not barred by the statute of limitation. In addition, it is worth noting that where there is provision in law for resort to alternative modes of dispute resolution between the applicant and her former employer, the respondent, the leave even if granted, would not be a license for her to bypass that procedure.
9. The applicant has not sought and obtained the consent of the administrator to bring suit and therefore this court will refer to Section 560(1)(d) of the *Insolvency Act*. The section provides that a person may begin or continue legal proceedings against the company under administration only with the consent of the administrator or with the approval of the court. It follows that such person need not to seek the Consent of the Administrator if the court approves the commencement of the suit.
10. From the submissions before this court, I find no ground to deny the Applicant Leave to institute suit against the Respondent, subject to the law on limitation of action and exhaustion of remedies that may be available and provided for in law.
11. Accordingly, the prayer No. 2 of the application dated 3rd April, 2024 is found to be meritorious and the same is hereby allowed subject to the reservations contained in this ruling. Prayer No. 3 on revival of suit that was struck out on account of having been instituted without leave of court is declined.



12. I make no orders as to costs.

13. It is so ordered.

14. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF MAY, 2024

R.E.ABURILI

JUDGE

