



**Kwicha v Africa Merchant Assurance Company Limited (Insolvency
Petition 09 of 2022) [2024] KEHC 6486 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
INSOLVENCY PETITION 09 OF 2022**

SM GITHINJI, J

JUNE 3, 2024

BETWEEN

MOHAMED SALIM KWICHA CREDITOR

AND

AFRICA MERCHANT ASSURANCE COMPANY LIMITED DEBTOR

RULING

1. The Debtor instituted the Notice of Motion dated 21st June 2023 brought under Section 428 of the *Insolvency Act*, 2015, Rule 10, 15 and 17 of the Insolvency Regulations of 2016 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased and do hereby review, quash, set aside, vacate all the Gazettment Notices; Kenya Gazette Notices Nos. 7191, 7192, 7193,7194, 7195, 7196, 7197, 7198,7199 and 7190 in relation to all the petitions herein.
 4. That upon consolidation of the aforementioned Insolvency petitions, this honourable court be pleased to issue an injunction, pending the hearing and determination of this Application, restraining the Petitioners from further advertising the petitions or issuing any other public statements regarding the petitions or the intended liquidation of company.
 5. That the honourable court be pleased stay all proceedings in the subject petitions until hearing and determination of the instant application and subsequent directions thereto.
 6. That the costs of this application be provided for.



2. The Application is founded on the grounds set out on its face and the supporting affidavit of Grace Nyambura the Company's Legal Manager who deponed that the Petition was gazetted on 26th May 2023 while the other consolidated petitions were gazetted on 2nd June 2023. It was stated that the petitions are fatally defective for want of both procedural and substantive law thus should be struck of. Further, that the company is a going concern and has by all means been in business, meeting all its obligations and shall continue to do so. It was additionally stated that the advertisement of the petitions have resulted in adverse consequence of irreparably damaging the business reputation of the Company.
3. The application was opposed vide the replying affidavit sworn by Mr. Geoffrey Kilonzo counsel for the Petitioner who deponed that judgment was entered in favour of the petitioner and consequently a declaratory suit which the Applicant has failed to honour. It was also stated that the Applicant was served with a statutory demand on 11th March 2022 which the Applicant did not set aside within the statutory period and failed to pay the decretal sum due and owing. Mr. Kilonzo further deponed that prayer seeking stay suspending the advertisement of the petition is overtaken by events since the same was already advertised and slotted for hearing, thus the application is defective and incompetent.
4. The Debtor also filed a preliminary objection in response to the petition under the following grounds;
 1. That the petition dated 29/6/2022 is superfluous, incompetent and an abuse of the court process and the same is fatally defective for want of both procedural and substantive law.
 2. That the statutory demand of 29/09/2022 and attached to the petition offends section 384 (1) of the [Insolvency Act](#) as the same is not signed by the creditor hence invalidating the Notice.
 3. That the petition seeks liquidation of an Insurance Company yet the creditor unjustifiably and maliciously failed to notify the Commissioner of Insurance to enable the Commissioner's participation in the proceedings as required by section 121 of the [Insurance Act](#). Such failure makes the petition incurably defective and the same should be struck out in limine.
 4. That an Insolvency petition seeking to liquidate an Insurance Company cannot be prosecuted under the [Insolvency Act](#) in isolation and in exclusion of the [Insurance Act](#), which puts in place certain measures to protect policy holders who must be considered before a liquidation order is issued against an Insurance Company.
 5. That the creditor failed to plead breach of section 41 as read with section 122 of the [Insurance Act](#) hence the petition herein is incurably defective and the same should therefore be struck out in limine.
 6. That the declaration of insolvency of an insurance company is a process spelt out in the [Insurance Act](#) which the creditor herein has violated and disregarded.
 7. That no proof of the debtor's inability to pay the debt or in other words insolvency has been attached by the creditor as is necessary before such an order is issued.
 8. That the appropriate orders for such a matter cannot be issued by this honourable court without contribution, participation and input of the Commissioner of Insurance.

Determination

5. The court directed that both the application and the Preliminary objection be canvassed by way of written submissions. At the time of writing this ruling the Applicant's submissions were not in the court file. I have considered the Petitioner's submissions as well as the authorities relied upon. The issues arising for determination are;



1. Whether the P. O is merited.
2. Whether the orders sought for review, setting aside and quashing of the gazette notices are merited.
6. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”
7. The Court went further to note that: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”
8. Similarly, the Court in the case *Oraro v Mbaja [2005]* eKLR 141, on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and 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 process 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection; anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
9. I have gone through the grounds raised in the preliminary objection. The same are not points of law but facts that invite the need for evidence to ascertain. In my view, those grounds are a response to the petition which cannot summarily dismiss the petition. As such therefore, I find that the preliminary objection does not meet the threshold as discussed above and the same thus fails.
10. On the issue of review, Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“Any person who considers himself aggrieved—

 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



11. Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#) provides as follows:-

“ 1.

- (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.”

12. In *Republic v Public Procurement Administrative Review Board & 2 others [2018]* e KLR it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

13. In *Pancras T. Swai v Kenya Breweries Limited [2014]* eKLR the Court of Appeal held: -

“Order 44 rule 1 (now Order 45 rule 1 in the 2010 [Civil Procedure Rules](#)) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.....”

14. *Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793* where the High Court held that Section 80 of the [Civil Procedure Act](#) conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.



15. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

16. In *Tokesi Mambili and others vs Simion Litsanga* the Court held as follows: -

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

17. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019]* eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.



- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
18. The above provisions of statute and case law, define what a review is and the instances in which one can seek review. In the instant application, the Applicant seeks review of the Gazette Notices issued in respect of the petitions. The sought orders do not fall under the ambit of review as the same do not emanate from a decision of this court. The Gazette notices are part of a liquidation process which liquidation is yet to be determined. In short, there is nothing for me to review. Consequently, this prayer fails as well. The upshot is that the application fails and the same is hereby dismissed with costs to the Petitioner. Similar orders shall apply in respect of all related files no. 39 of 2022, 40 of 2022, 43 of 2022, 37 of 2022, 2 of 2023, 10 of 2023, 6 of 2023, 9 of 2023, 7 of 2023, 3 of 2023, 1 of 2023, 5 of 2023, 4 of 2023 and 8 of 2023.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 3RD DAY OF JUNE, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Oloo for the Company/Applicant

Ms Nyambuto holding brief for Mr Kilonzo for the Respondents

