



REPUBLIC OF KENYA



**Mbithi v Xplico Insurance Company Limited (Insolvency Petition E020 of 2022)
[2024] KEHC 11944 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E020 OF 2022**

PM MULWA, J

OCTOBER 3, 2024

BETWEEN

SAMUEL KANYETE MBITHI PETITIONER

AND

XPLICO INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. On 29th June 2022, the petitioner filed a petition seeking a liquidation order against the respondent and that the court appoints the Official Receiver as the provisional liquidator. The petitioner claims that the respondent is indebted to him in the aggregate sum of Kshs. 1,634,253.00 being the decretal sum together with costs awarded to him in Milimani Civil Suit No. 354A of 2019. In response, the respondent has filed inter alia a preliminary objection dated 25th September 2023 where it seeks the dismissal of the petition for being res judicata by dint of dismissal of Nairobi High Court Insolvency Notice No. E057 of 2021. As such, it terms the petition as being bad in law, vexatious and an abuse of the court process.
2. The petitioner has responded to the objection through the grounds of opposition dated 26th September 2023. It avers that Nairobi High Court Insolvency Notice No. E057 of 2021 was a peremptory statutory demand notice under Section 384 of the *Insolvency Act* which was issued by the court giving the respondent 21 days to pay the decree of the court and that upon lapse of the 21 days, the respondent did not settle the debt and therefore the petitioner filed this petition. For these reasons, the petitioner urges that the objection is bad in law for failing to raise a point of law. In addition to the grounds of opposition, the petitioner has also filed written submissions to supplement his arguments.



Analysis and determination

3. In determining whether a preliminary objection is merited, the Supreme Court in *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* SCOK Petition No. 10 of 2013 [2014] eKLR, endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 and the apex court restated the relevant principle from the precedent-setting case, as follows:

“... 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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.”

4. Therefore, for one to succeed in putting up a preliminary objection, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the Court to exercise discretion.
5. For res judicata to be invoked in a civil matter the following elements must be demonstrated: There is a former judgment or order which was final; the judgment or order was on merit; the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and there must be between the first and the second action identical parties, subject matter and cause of action (see *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR))
6. In as much as the respondent states this suit is res judicata E057 of 2021, it has not presented the pleadings or judgment of the former suit for the court to determine whether the current suit is res judicata. Whereas there is no legal provision barring the respondent from raising the doctrine of res judicata by way of a preliminary objection, there is also none barring it from ventilating the same by way of a formal application. The advantage of an application is that the applicant has the luxury and liberty of presenting evidence as opposed to a preliminary objection. It would have been prudent for the respondent to raise the challenge of res judicata by way of a formal application where it could have annexed the pleadings and judgment of the former suit and such other evidence that would have guided the court in its determination.
7. In any case, going by the petitioner’s explanation about the former suit, which argument has not been controverted by the respondent, it is my finding that the two suits are not identical as they deal with different causes of action. I find nothing to indicate that the subject of the respondent’s liquidation has previously been raised in the former suit involving the parties herein and that a determination was made on the said subject, in order for the principle of res judicata to become applicable herein.

Disposition

8. For these reasons, I find no merit in the respondent’s preliminary objection dated 25th September 2023 and the same is dismissed. Costs in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 3RD DAY OF OCTOBER 2024.



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P. MULWA

JUDGE

In the presence of:

Ms. Matata for petitioner

N/A for respondent

Court Assistant: Carlos

