



REPUBLIC OF KENYA



**Seyani Brothers & Company Kenya Limited & 4 others v Green Square Limited (Civil Case 253 of 2017) [2023] KEHC 1439 (KLR) (Commercial and Tax) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1439 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 253 OF 2017  
A MABEYA, J  
MARCH 3, 2023**

**BETWEEN**

**SEYANI BROTHERS AND COMPANY KENYA LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
NORKUN INTAKES LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
ENGPLAN CONSULTING ENGINEERING LTD ..... 3<sup>RD</sup> PLAINTIFF  
TEAM 2 ARCHITECTS ..... 4<sup>TH</sup> PLAINTIFF  
HAROLD R. FENWICK & ASSOCIATES ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**GREEN SQUARE LIMITED ..... DEFENDANT**

**RULING**

1. This is an application dated May 6, 2022. It was brought under sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* and Orders 22 rule 22(1) of the *Civil Procedure Rules, 2010* and Section 51(2) of the *Advocates Act*.
2. The application sought several orders including an order for stay of execution, orders directing the 1<sup>st</sup> respondent to refund Kshs 1,362,260/= to the applicant, orders finding that the applicant only owed Kshs 4,837,740/= to the respondents; or in the alternative, an order for accounts to be taken to ascertain the amount due to the 1<sup>st</sup> respondent.
3. The grounds for the application were set out on the face of the motion and on the Supporting and Supplementary Affidavits sworn by Elizabeth Chepkirui Ngeny on 6/5/2022 and 27/6/2022 respectively. It was contended that vide a ruling delivered on 4/10/2019, this Court dismissed the



- applicant's application with costs to the respondents and also allowed the respondents application with costs and issued the decree produced as ECN 1.
4. That the respondent's advocates M/s Kale Maina & Bundotich filed a bill of costs dated 15/10/2019 and the same was taxed at Kshs 1,637,740/=. That however, the said advocates demanded payment of Kshs 3 million which the applicant paid. That demands to justify the excess amount of Kshs 1,362,260/= were un-responded to by the respondent's advocate and refund of that amount was now being demanded.
  5. That the 1<sup>st</sup> respondent also demanded 12% interest on the principal debt despite that the court had found in the aforesaid ruling that the applicant had already fully paid the principal debt. That the respondent also claimed interest on interest in attempt to unjustifiably enrich itself thus the prayer for accounts to be taken.
  6. That the respondent's advocates filed an application for Notice to Show Cause dated 22/11/2021 before the Deputy Registrar and pursued the matter. The application was annexed as ECN 4 a and b, and the matter came up for NTSC on 24/3/2022 and 21/4/2022 thus there was a need for orders staying execution until accounts were taken.
  7. The applicant further contended that the respondent was estopped from claiming that the applicant was under liquidation and only the official receiver could institute a suit on its behalf as the respondent had itself initiated the NTSC against the applicant and sought execution against it despite having knowledge of its liquidation. It was also contended that the respondent did not deny unjustifiably receiving Kshs 1,363,260/= from the applicant and that upon taking of accounts, the applicant was ready to pay any outstanding balances.
  8. The 1<sup>st</sup> respondent opposed the application vide a Notice of Preliminary Objection dated 23/5/2022 on grounds that the applicant company was in liquidation pursuant to a liquidation order made in HC Insolvency Petition No E004 of 2020 Seyani Brothers & Company Limited v Green Square Limited. That by virtue of Section 432(2) of the *Insolvency Act, 2015*, all proceedings subsequent to liquidation could only be commenced by the official receiver and with the approval of court. That by virtue of Section 411 of the *Insolvency Act*, the directors of the company could not file such an application thus the same ought to have been struck out.
  9. The 1<sup>st</sup> respondent also filed a Replying Affidavit sworn by Hirji Khimji Seyani on 2/6/2022. It was contended that Majanja, J made an order on 27/8/2021 liquidating the defendant and appointed the official receiver as liquidator. That the directors were the defendants in the liquidation and had no power under the *Insolvency Act, 2015* to file the application on the company's behalf. That taxation matter could only be heard by a taxing master or through a reference which was not the case. That the application was therefore defective and suffered material non-disclosure on the applicant's part for failing to disclose that there was a settlement agreement dated 31/8/2020 produced as HKS-3.
  10. The application was canvassed by way of written submissions. The applicant's were dated 27/6/2022 whereas those of the respondents were dated 3/8/2022. This court has considered those submissions.
  11. The Court will first determine the preliminary objection dated 23/5/2022. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 to consist 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.
  12. A Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.



13. The respondents contend that the applicant's directors have no locus standi to bring the application as the applicant company was liquidated vide orders issued on 27/8/2021. In the case of Law Society of Kenya v Commissioner of Lands & others, Nakuru High Court Civil Case No464 of 2000, the Court held that :-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

14. It is therefore evident that *locus standi* is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the applicant has no locus standi, then the applicant cannot be heard and that point alone may dispose off the application.

15. The preliminary objection thus meets the required ingredients. This court has seen that judgment and resultant orders dated 27/8/2021 that placed the applicant company under liquidation and appointed the official receiver as liquidator. The applicant did not deny that the company was under liquidation, but cried fowl on the respondent's part for filing recovery proceedings vide a Notice To Show Cause (herein NTSC) dated November 22, 2022 against it. That the 1<sup>st</sup> respondent revealed the information about the liquidation at this stage to defeat the company's defence and allegations.

16. According to Section 411 of the Insolvency Act, once a liquidator is appointed, powers of the company's directors cease immediately. Further, Section 432(2) of the Act provides that once a liquidation order is made, legal proceedings can only be brought against the company only with the approval of the court.

17. In Republic v Official Receiver and Liquidator & Another Ex Parte Transmatter Kenya Company Limited [2020] eKLR, it was held that:-

“When a winding up order has been made or an interim liquidator has been appointed under Section 235, no action or proceedings shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.”

18. The court to grant such leave is the Insolvency Court. Without leave, no suit against the liquidated company can be instituted against the company. In the same way the company cannot commence proceedings except through the liquidator.

19. In the present case, the applicant contested that it filed the application only as a reaction to the NTSC filed by the respondent before the Deputy Registrar. The NTSC was annexed as ECN 4 and was dated November 22, 2021. Though the 1<sup>st</sup> respondent blamed the applicant for non-disclosure, it did not itself disclose that it had brought execution proceedings against the company under liquidation. This Court has seen the proceedings before the Deputy Registrar of 13/6/2022 and notes that the NTSC was stayed pending the determination of the instant application.

20. As evidenced in annexure ECN 2, The liquidation petition was brought by the 1<sup>st</sup> respondent against the applicant for the same debt sought to be recovered in the NTSC. The liquidation order was made on 27/8/2021, whereas the NTSC was dated November 22, 2021, indicating that the 1<sup>st</sup> respondent was very much aware that the applicant was under liquidation when it brought the recovery proceedings against it.

21. It is the 1<sup>st</sup> respondent that lacked locus to bring the NTSC against the applicant without leave of court. All that the directors did, albeit without the requisite powers, was to defend the company against the



militant action of the respondents. The respondents had abused the Court process. Undoubtedly, the recovery proceedings were a non-starter for lack of leave. They were to say the least, brought extremely in bad faith.

22. This court doubts whether the 1<sup>st</sup> respondent acted in good faith owing to the fact that it instituted the liquidation proceedings and instead of prosecuting the debt issue before that Court, attempted to execute against the company in this matter without leave.
23. This court finds that the preliminary objection is merited, but the same will work against the 1<sup>st</sup> respondent. The Notice To Show Cause dated November 22, 2021 is hereby struck out with costs to the applicant.
24. This court notes that the 1<sup>st</sup> respondent did not respond to or challenge the prayer for refund of Kshs 1,362,260/= which was allegedly overpaid to the 1<sup>st</sup> respondent's advocate on record. There was also no response or challenge to the prayer for accounts based on the dispute of the amount owed to the 1<sup>st</sup> respondent allegedly being Kshs 4,837,740/= as against the claimed sum of Kshs 19,966,214/= in the decree forming the basis of the liquidation. The allegations raised in the instant application remain uncontested. It was also admitted that the official receiver has at liberty to bring such an application on behalf of the company. This Court leaves it to the liquidator to make the appropriate decision on the matter.
25. In the end, the application is hereby struck out. Since the same was caused by the unnecessary action of the respondents, they shall bear the costs of the application.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

