



Abdi & another v African Banking Corporation Limited & 3 others (Commercial Case E226 of 2022) [2023] KEHC 3318 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E226 OF 2022**

DAS MAJANJA, J

APRIL 20, 2023

BETWEEN

ALI NOOR ABDI 1ST PLAINTIFF

HAMZA ALI NOOR 2ND PLAINTIFF

AND

AFRICAN BANKING CORPORATION LIMITED 1ST DEFENDANT

ANTHONY MAKENZI MUTHUSI 2ND DEFENDANT

JULIUS MUMO NGONGA 3RD DEFENDANT

AND

**MIDLAND ENERGY LIMITED (UNDER ADMINISTRATION) NOMINAL
DEFENDANT**

RULING

1. The parties are agreed that the only question the court is called upon to decide is whether the court should grant approval to institute this suit in accordance with section 560(1) of the *Insolvency Act, 2015*.
2. By way of background, the Plaintiffs are shareholders and directors of the Nominal Defendant (“the Company”) which was placed under Administration by the 1st Defendant (“the Bank”). The 2nd and 3rd Defendants (“Administrators”) are the duly appointed Administrators of the Company and their terms have been extended from time to time in ML COMM IN No E014 of 2018.
3. The Plaintiffs have filed this suit by the Plaint dated June 21, 2022 seeking, inter alia, a declaration that the Bank’s appointment by the Deed of Appointment of Joint Administrators dated November



16, 2018 of the Administrators of the Company was irregular, unlawful, illegal, null and void ab initio. They also seek consequential damages for their unlawful and irregular appointment, an order for accounts, costs and interest. The plea for leave is contained in the application dated June 21, 2022. It is supported by the 1st Plaintiffs affidavit sworn on the same date. The Bank and Administrators have also opposed the application. The parties filed written submissions on the issue of approval.

4. The necessity for approval, commonly referred to as leave, is grounded on section 560(1)(d) of the [Insolvency Act](#) which states as follows:

560(1) While a company is under administration –

- a.
- b.
- c.
- 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.

5. Although several issues have been raised by the parties, it is not in dispute that there exists a live matter; ML COMM IN No E014 of 2018 which concerns the administration of the Company. It is also not in dispute that the tenure of the Administrators has been extended from time to time in that suit. The Defendants are therefore correct to observe that any issue of administration or indeed challenge of the Administrators must be addressed in that cause. What the Plaintiffs seek in this suit is to invalidate the appointment of the Administrators, whose appointment, has been approved by the court from time to time in the pending matter. This issue can only be determined in that cause and not in a separate suit.

6. Further, “the court” referred to in section 560(1)(d) is the court exercising insolvency jurisdiction which has authority to grant such approval thus the application for approval should be made in the cause of and concerning the administration of the Company. The Judge granting approval would have a global view of the affairs of the Company when considering the factors set out in section 560A of the [Insolvency Act](#) in order to decide whether or not to approve filing of the proceedings against the Company. The court in this case, exercising ordinary civil jurisdiction, cannot usurp the mandate of the court exercising insolvency jurisdiction.

7. Having concluded that the issue whether or not to approve the filing of a suit against a company under administration is reserved for the court exercising insolvency jurisdiction, I now make the following dispositive orders:

- a. The application dated June 21, 2022 is dismissed with costs to the Defendants.
- b. The Plaintiffs shall file the application in the appropriate cause within 21 days from the date hereof in default of which this suit shall stand struck out with costs to the Defendants.
- c. These proceedings be and are hereby stayed pending the grant of approval to proceed with this suit whereupon the Plaintiffs shall show cause on a date fixed why the suit should not be struck out.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023.

D S MAJANJA

JUDGE



Court Assistant: Mr M Onyango

Mr Rene instructed by Rene and Hans LLP Advocates for the Plaintiffs.

Mr Gakunga instructed by Kimani and Michuki Advocates for the 1st Defendant.

Mr Mugisha instructed by Nyaanga and Mugisha Advocates for the 2nd, 3rd and Nominal Defendants.

