



Karithi & 5 others v Africa Merchant Assurance Company Ltd (Insolvency Cause E004 of 2020) [2023] KEHC 19208 (KLR) (Commercial & Admiralty) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 19208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
INSOLVENCY CAUSE E004 OF 2020
DO CHEPKWONY, J
MAY 19, 2023**

BETWEEN

**ELIZABETH WAWIRA KARITHI 1ST PETITIONER
ANISIA MUTHONI NJERU 2ND PETITIONER
FAITH MUTHONI MWENDIA 3RD PETITIONER
SILAS MURIUKI KINOTI 4TH PETITIONER
ABEL MWANGI 5TH PETITIONER
JOHN MWANGI 6TH PETITIONER**

AND

AFRICA MERCHANT ASSURANCE COMPANY LTD RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion application dated 23rd June, 2022 filed by Africa Merchant Assurance Company Ltd seeking for the following orders:-
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the Insolvency Petition herein, the Honourable Court be pleased to issue an order of stay against any and all proceedings in all matters subject of the Insolvency



Petition herein, namely, Embu CMCC No.91 of 2018, Embu CMCC No.24 of 2019, Embu CMCC No.90 of 2018, Runyenjes SPMCC No.53 of 2017, Kiambu CMCC No.115 of 2019 and Ngong CMCC. No.39 of 2019.

- d. That this Honourable Court be pleased to issue any other orders in the interest of justice and to preserve the subject matter of the Insolvency Petition herein; and
 - e. That the costs of this application be provided for.
2. The grounds adduced in support of the application are that the Petitioners filed the present application on 12th February, 2020 on basis of an alleged non-payment of decrees obtained in the above listed matters. The Applicant has also filed a response contesting debts owed. That whereas the Petitioner and the Claimant in the Embu CMCC No.24 of 2019 case have commenced garnishee proceedings which the Applicant has a pending application seeking to stay the said garnishment, In the PMCC No.53 of 2017, there is a declaratory suit against the Applicant which is also pending. The Applicant avers that unless those matters and proceedings therein are stayed, execution may proceed and defeat the substratum of the Insolvency Proceedings given that the same matters are subject of the present Insolvency Proceedings. Thus, for orderliness, the stay orders sought should be granted and in turn, the Applicant be accorded an opportunity to address the Petitioner's allegations in the Insolvency Petition herein.
 3. The application is further supported by an application filed by the Applicant's Assistance Legal Manager, Grace Njuguna wherein, besides reiterating the grounds of the application, she adds that unless the proceedings which are subject of the Insolvency proceedings are stayed, the Insolvency Proceedings will be rendered nugatory and cause the Applicant to suffer double jeopardy.
 4. The Petitioners opposed the application vide Grounds of Opposition dated 5th July, 2022 citing the following grounds: -
 - a. That the application is brought by a stranger to the proceedings contrary to the provisions of Order 9 Rules 5 and 6 of the *Civil Procedure Rules*.
 - b. That the application is misguided and unattainable as the company is not under liquidation as purported.
 - c. That the present application is an abuse of the court process.
 - d. That the Application is an afterthought and is lacking in substance, unnecessary, vexatious and frivolous.
 - e. That the application is only meant to scuttle the process and further engage the Petitioners in endless litigation.
 5. As per court's directions the application was canvassed by way of written submissions and as the record shows, parties complied by filing their respective submissions. For the Applicant, its submissions are dated 21st July, 2022 while the Petitioner's submissions are dated 25th July, 2022. The same will be factored in the analysis and determination herein.



Analysis and Determination

6. I have carefully considered the application by Africa Merchant Assurance Company dated 23rd June, 2022, the submissions made, and the case law relied on. In this Court's view, there are two issues arising for determination,
 - a. Whether the application should be dismissed for being filed by an advocate not properly on record.
 - b. Whether the Applicant has made a case for stay of proceedings in the primary suits as sought.

A. Whether the application should be dismissed for having been filed by an advocate not properly on record

7. It has not been disputed that the Firm of M/S Mburugu & Kanyonge Associate, advocates first came on record for the Respondent/Applicant and filed among other pleadings, the answer to the present Petition. Kiskan Law Africa LLP Advocates later came on board and filed the present application on behalf of the Respondent/Applicant but no Notice of Change of Advocates was ever filed. The Respondent/Applicant argues that failing to file such Notice of Change is a procedural technicality which does not interfere with the orderliness of the pleadings filed and instead the court ought to focus on the merit of the application. The Petitioners on the other hand maintained that before a Notice of Change is filed under Order 9 Rule 5 of the Civil Procedure Rules, the former advocate is considered to be the proper advocate on record. The decisions cited by the parties are also divergent on the subject. Whereas one school of thought express is that the failure to file a Notice of Change is a technicality which can be cured by subsequent filing of Notice of Appointment. The other school of thought is adamant that for orderliness, an advocate is considered to be properly on record only when the Notice of Change is filed.
8. Order 9 Rule 5 of the Civil Procedure Rules, 2010 which provides for change of Advocates states as follows:-

“ A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”
9. What is gathered from the above provision is that unless and until a Notice of Change of Advocate is filed and duly served, an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.
10. In addition, Order 9 Rule 7 of the Civil Procedure Rules states that:-

“ Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”



11. It is therefore evident from the above provision that a Notice of Change or Notice of Appointment of Advocate has to be filed before such advocate who wishes to come on record for a party or replace another advocate who is on record can properly be said to be on record. That is the only way for an advocate to be considered to be formally on record for a party. Finding otherwise, would trash the intent and purport of Order 9 Rule (5) and (7) above.
12. Representation must be procured within the law, and it was the court's overriding objective that was never intended to be a panacea for such procedural short falls as intimated by the Applicant herein. Thus, the only recourse available to Kiskan Law Africa LLP Advocates, was to file a Notice of Appointment of Advocates stating that they were acting jointly or in collaboration with the advocates on record or file a Notice of Change of Advocates given that the Firm of M/S Mburugu & Kanyonge Associates advocates was already in record for the Respondent. Further, this Court is persuaded to agree that were newly appointed advocates allowed to assume legal representation of parties without notifying the court, the other parties in the suit and advocates already on record for the party in question, this would create total confusion and chaos in the conduct of court proceedings. It would also be unclear as to whom the proper advocate for service of pleadings on behalf of such party would be and, in the Court's view, that was not the intent of the law.
13. It then follows that the application dated 23rd June, 2022 is incompetent for having been filed by an advocate not properly on record for the Applicant.
14. Consequently, the application is struck out with costs to the Petitioner/Respondents.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBUTHIS 19TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

