



REPUBLIC OF KENYA



**Wambugu v Ngumi (Insolvency Notice E014 of 2022)
[2023] KEHC 17365 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E014 OF 2022**

A MABEYA, J

MAY 12, 2023

BETWEEN

NJAMA WAMBUGU PETITIONER

AND

WINFRIDA WANJIKU NGUMI RESPONDENT

RULING

1. Before Court is the applicant's application seeking to set aside the statutory notice taken out by the petitioner on February 9, 2022 and the consequences thereof.
2. The application was brought, inter-alia, under Order 36 Rule 1, Order 40 Rules 1, 2 & 8 of the *Civil Procedure Rules*; Section 18 of the *Insolvency Act* and Rules 16 and 17 of the *Insolvency Regulations 2016*.
3. The grounds for the application were set out on the face thereof and in the supporting affidavit of the applicant. They include that; a Statutory Notice was issued by this Court on February 9, 2022 and that the respondent approached this court mischievously without making full and proper disclosure of the circumstances prevailing between the parties.
4. That contrary to the respondent's allegations, the applicant fulfilled her obligations in the agreement signed by the parties on August 20, 2020. That the respondent frustrated the conclusion of the sale transaction by failing to respond to a request for negotiation of a supplemental agreement for the settlement of legal fees incurred due to numerous suits filed by him in an attempt to escape his obligations under the Term Sheet signed between them on January 20, 2018.
5. That due to the respondent's default, completion of the sale agreement was adversely affected and failed to materialize upon which the respondent continued to retain 5,742 shares. That the respondent had



suffered no quantifiable loss nor delivered any consideration that can be construed as constituting a recoverable debt.

6. Further, that the petitioner has no court order, declaration or decree of any form to support his claim of a debt owed by the respondent to the tune of the alleged sum of Kshs 34,235,033/-. That in light of the foregoing, the respondent was dishonest and had come to Court with unclean hands without disclosing his past conduct seeking to evade his obligations under the written Term Sheet and Loan Agreement.
7. That the respondent had not disclosed to the Court that the intended supplemental agreement would have paved the way for him to receive any balance that would be due to him from the proceeds of the final instalment payable on April 30, 2021.
8. The respondent opposed the application vide his replying affidavit sworn on May 6, 2022. He averred that the issues raised by the applicant in the present application had already been litigated before Majanja J who found the case to be lacking merit and dismissed it with costs. That pursuant to the judgment, the parties had negotiated a Share Sale Agreement dated August 20, 2020 which implemented all issues concerning the Term Sheet dated January 20, 2018.
9. He further contended that the Share Sale Agreement provided the liquidated financial consideration that the applicant owed him for the share transfer to her and the timelines within which it would be paid. That the applicant paid him the first three instalments for the shares and set off a sum of Kshs 4,700,000/- towards Party and Party costs in Milimani HCC E039/2020.
10. In the premises, he averred that he did not owe the applicant any legal fees. That the applicant was indebted to him under the Share Sale Agreement in the sum of Kshs 34,205,033/- in consideration for his 5,743 ordinary shares and has remained indebted since April 31, 2021.
11. That he filed the statutory notice in this matter having failed to obtain the money owed to him by the applicant and that this bankruptcy cause under the *Insolvency Act* is his last resort in the recovery of the said debt.
12. The applicant responded with a supplementary affidavit sworn on June 20, 2022. She denied that the issues raised in the application had ever been adjudicated upon as alleged. That the payment of Kshs 34,205,033/- was contingent on the respondent signing the supplementary agreement to enable closure of outstanding cases filed or caused by him.
13. Both parties herein filed their respective submissions which the Court has considered. This is an application to set aside a statutory notice dated February 9, 2022 taken out by the respondent.
14. The statutory notice was issued by the Court consequent upon the respondent demanding from the applicant a sum of Kshs 34,235,033/-. The said sum constituted Kshs 34,205,033/- allegedly due under the Share Sale Agreement entered into by the parties and Kshs 30,000/- awarded as costs in HCC E039/2020. The notice was to the effect that if the applicant failed to pay the said sum, the respondent would proceed to with bankruptcy proceedings against her.
15. The respondent submitted that the applicant was re-litigating matters that had already been adjudicated upon by Majanja J in HCC E039/2020 which essentially made the entire application res judicata. The applicant asserted otherwise.
16. In the present application, the applicant sought to have the statutory notice set aside on the grounds, inter-alia, that the respondent had failed to disclose to Court that he frustrated the conclusion of the sale agreement of shares. That he had failed to enter into a supplemental agreement for the settlement of legal fees incurred. That the intended supplemental agreement would have paved the way for him



to receive any balance that would be due to him from the proceeds of the final instalment payable on April 30, 2021.

17. I have looked at Majanja J’s ruling made on December 21, 2021 in HCC E039/2020. It was in respect of a notice of motion filed by the applicant seeking: -

“2. That pending the hearing and determination of this application, the Honourable Court be pleased to stay enforcement of clause 3.3.4.2(iii) of the Agreement for Sale of Shares dated August 20, 2020 (the Principal Agreement) entered into by the parties in compliance with the Court’s Judgement of May 20, 2020 requiring that the Applicant pays, on or before April 30, 2021, Kshs 34,205,033/-

3. That the Honourable Court be pleased to issue an order of mandatory injunction to compel the Respondent to execute a ‘Supplementary Agreement’ as contemplated by the parties at the time of negotiation and execution of the Principal Agreement of August 20, 2020.”

18. In the ruling, the Court dismissed the application with costs of Kshs 30,000/- to the respondent. The Court held that the draft supplementary agreement was not acceptable to the respondent and the Court could not compel him to execute it.

19. From the foregoing, it is clear that the applicant is relitigating issues that were raised and determined in HCC E039/2020. The issue of refusal by the respondent to enter into a supplemental agreement for the settlement of legal fees incurred is a matter already decided upon.

20. In HCC E039/2020, the court already found that the respondent did not need to execute the supplementary agreement and it was not binding on him. The issue therefore is res judicata.

21. The applicant is indebted to the respondent to the tune of Kshs 34,205,033/-. The notice was not wrongly issued. There are no grounds for setting aside the said notice.

22. Accordingly, the Court finds the application to be without merit and dismisses the same with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A MABEYA, FCIarb

JUDGE

