



REPUBLIC OF KENYA



**Murango & another v Muhoteu Farmers Co Ltd & another (Civil Appeal
E003 of 2022) [2023] KEHC 18821 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E003 OF 2022
CM KARIUKI, J
JUNE 15, 2023**

BETWEEN

CYRUS WAIHENYA MURANGO 1ST PLAINTIFF

WACHIRA NDIRANGU 2ND PLAINTIFF

AND

MUHOTEU FARMERS CO LTD 1ST RESPONDENT

THE OFFICIAL RECEIVER OF MUHOTETU FARMERS 2ND RESPONDENT

RULING

1. By plaint dated 20/4/2022. The plaintiffs seek an order for the defendant to be directed to register plaintiffs as members of 1st defendant and that they be declared entitled to benefits accrued from the sale of the properties of 1st defendant listed and also rent accruing from 1st defendant LR Nyeri Municipality Block 1157 in Nyeri Town and costs of the suit.
2. In a quick rejoinder, defendant No. 2 lodged on Preliminary Objection to the plaint seeking the same to be struck out on the ground; –
 - i. The suit offends Provisions of section 397(b) of the *Insolvency Act* 2015; thus, the suit is fatally defective as the attempt to alter the status of the Company's Members is void where it is made after the commencement of voluntary liquidation of a Company.
3. Therefore, the substratum upon which the plaintiffs' suit can be initiated against the defendants is non-existent; thus, the suit is on abuse of the court process.
4. The court directed the Preliminary Objection to be canvassed via submissions that parties filed and exchanged.



Defendants No. 2 submissions

5. The cause of action herein commenced vide a plaint dated April 20, 2022, where the plaintiffs are seeking,

“An order do issue against the defendants that they do register the plaintiffs as members of the 1st defendant....”

6. The plaintiff's demand for registration as a member of the 1st defendant under the determination of the court in Nyahururu CMCC 119 of 2013 and Nyahururu CMCC 160 of 2013.
7. The 1st defendant is under voluntary liquidation under a resolution passed on October 5, 2018, whereas the 2nd defendant herein is the Liquidator of the 1st defendant under the appointment in the said resolution.

Preliminary objection

8. From the above and the notice of Preliminary Objection raised in the matter, the defendants wish to submit on the following issue;

Whether the suit contradicts and offends the provisions of section 397 (b) of the Insolvency Act, 2015.

9. Section 397(b) of the Insolvency Act, 2015 states that;

“... An alteration in, or an attempt to alter, the status of the company's members after the commencement of a voluntary liquidation is void.”

10. The Insolvency Act 2015, which is the guiding and supreme law on matters of Insolvency, has couched the above section in mandatory terms and prohibits anyone from altering the status of the members of a company upon commencement of liquidation.

11. This means that no members or perceived shareholders may add to the current list of removed, for the alterations themselves are void. The effect of the above acts being void does not allow the courts to be flexible or interfere with the member's register. Additionally, no special conditions or exemptions are provided in law that the plaintiffs may invoke through the suit herein.

12. The term “void is defined as “having no legal effect from the start”; further, the Black's Law dictionary defines it as “null, ineffectual, nugatory; having no legal force or binding effect, unable in law to support the purpose for which it was intended; or so nugatory and ineffectual that nothing can cure it.”

13. This court, by the decision in Macfoy v United Africa Company Limited (1961) 3 All ER 1169 (PC) at 1172, where Lord Denning stated that;

“If an act is void, it is law a nullity. It is not only bad but incurably bad. There is no need for an order to court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on anything and expect it to stay there. It will collapse.”

14. The mischief that the law intended to cure by including this section is because, upon placing the company under liquidation, that company intends to wind up its affairs, dissolve it and have it struck



off from the register of companies. Therefore, the prohibition's purpose is to maintain the company's status as of when the Liquidator took over.

15. For the plaintiffs to demand the defendants to alter the list of members after the commencement of the liquidation is not only nugatory but an irregularity that would contravene the law, amounting to a fatal defect that cannot be cured.
16. Additionally, the alteration sought is beyond the mandate/outside the scope of the 2nd defendant, who does not have powers to perform such acts, expressly or impliedly, from the *Insolvency Act* 2015.
17. The substratum upon which the plaintiff's suit is initiated against the defendants' is non-existent due to the mandatory prohibition under section 397 (b) of the *Insolvency Act* 2015. In the making of this decision, we humbly urge the court to be guided by the provisions of section 3A of the *Civil Procedure Act*, which provides;

“Nothing in this Act shall limit or otherwise affect the inherent power to the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.” And dismiss this action as it is baseless, an abuse of the court process, and void.

plaintiff submissions

18. The contention that the Preliminary Objection on the grounds found in section 397 (b) of the *Insolvency Act* 2015 is also misplaced in the circumstances of this case based on Share Certificates issued to each of the plaintiffs that form number 3 and 4 of the plaintiff's List of Documents dated April 20, 2022.
19. In the judgment in Chief Magistrate Court Civil Case Number 119 of 2013 Cyrus Waihenya Murango – Vrs- Muhotetu Farmers Company Ltd in a judgment delivered on the May 14, 2018, the Honourable Court did raise seven (7) issues as the issues for determination in the said suit. Issue Number 1 which is of relevance to this suit, was;-

“Whether the plaintiff is a shareholder of the defendant company.”

20. In the body of the judgment, the court determined that issue thus;-

I am satisfied that the plaintiff was a member of the defendant company.”

21. In the judgment in Chief Magistrate Court Civil Case Number 160 of 2013 Wachira Ndirangu – vrs - Muhotetu Farmers Company Limited also delivered on May 14, 2018, the Honourable court did also raise issues for determination which were seven (7) numbers of which the 1st issue was:

Whether the plaintiff is a shareholder of the defendant herein.”

22. In determining that issue which determination is in the body of the judgment, the honourable court stated.

“I am satisfied that the plaintiff has established on a balance of probabilities that he is a shareholder of the defendant company.”

23. The defendants had not brought forth any evidence of the reversal of the above judgments such that as of May 14, 2018, a court of competent jurisdiction had declared the plaintiffs as Members of the defendant Company way before the commencement of Liquidation of the defendant which came about five months later in October 2018.



24. With a valid court judgment that still stands and was appealed against, the plaintiffs in this suit are bonafide members of the defendant Company under liquidation.
25. The preceding being the position are the plaintiff's entitled to the 2nd and 3rd limb of prayer (a) of the Plaint dated April 20, 2022? Which the 2nd and 3rd of prayer (a) of the Plaint pray for.

“A further order does issue that the plaintiffs are entitled to benefits accrued from the sale of properties in paragraph 7 hereabove and further order that the plaintiffs are entitled to rent accruing to the 1st defendant from the Property Nyeri Municipality block 1/37 within Nyeri Town.

26. Given the judgments above that have yet to be reversed and the nature of prayers sought in the plaint, the Court is urged to find that the preliminary Objection is unmerited and should be dismissed with costs.

Determination

27. The issues discerned here are whether the suit offends the provision of section 397(1) of the *Insolvency Act* 2015, if in the negative, what are the appropriate orders and costs.
28. The cause of action herein commenced vide a plaint dated April 20, 2022, where the plaintiffs are seeking,

“An order do issue against the defendants that they do register the plaintiffs as members of the 1st defendant....”

plaintiff's demand for registration as a member of the 1st defendant under the determination of the Court in Nyahururu CMCC 119 of 2013 and Nyahururu CMCC 160 of 2013.

The 1st defendant is under voluntary liquidation under a resolution passed on 5th October 2018, whereas the 2nd defendant herein is the Liquidator of the 1st defendant under the appointment in the said resolution.

29. Thus, the suit attracted the notice of Preliminary Objection raised in the matter, with core ground hinged on the issue; Whether the suit contradicts and offends the provisions of section 397 (b) of the *Insolvency Act*, 2015.

30. The provisions of the *Insolvency Act* cited are to the effect that;

Share transfers and attempts to alter member's status after liquidation resolution to be void. The following are void if made after the commencement of a voluntary liquidation of a company —

- (a) any transfer of the company's shares (other than a transfer made to or with the sanction of the liquidator);
- (b) an alteration in, or an attempt to alter, the status of the company's members.

31. .. The *Insolvency Act* 2015, which is the guiding law on matters of Insolvency, has prescribed the above section in mandatory terms and prohibits anyone from altering the status of the members of a company upon commencement of liquidation.

32. This means that no members or perceived shareholders may add to the current list of members, for the alterations themselves are void. The effect of the above acts being void does not give the court's



discretion or room to be flexible or interfere with the member's register. Additionally, no special conditions or exemptions are provided in law that the plaintiffs may invoke through the suit herein.

33. The term "void is defined as "having no legal effect from the start"; further, the Black's Law dictionary defines it as "null, ineffectual, nugatory; having no legal force or binding effect, unable in law to support the purpose for which it was intended; or so nugatory and ineffectual that nothing can cure it."
34. This court, by the decision in *Macfoy V United Africa Company Limited* (1961) 3 All ER 1169 (PC) at 1172, where Lord Denning stated that;

"If an act is void, it is law a nullity. It is not only bad but incurably bad. There is no need for an order to court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on anything and expect it to stay there. It will collapse."
35. The mischief that the law intended to cure by including this section is because, upon placing the company under liquidation, that company intends to wind up its affairs, dissolve it and have it struck off from the register of companies. Therefore, the prohibition's purpose is to maintain the company's status as of when the Liquidator took over.
36. For the plaintiffs to demand the defendants to alter the list of members after the commencement of the liquidation is not only nugatory but an irregularity that would contravene the law, amounting to a fatal defect that cannot be cured.
37. Additionally, the alteration sought is beyond the mandate/outside the scope of the 2nd defendant, who does not have powers to perform such acts, expressly or impliedly, from the *Insolvency Act* 2015.
38. Thus, the court finds merit in the PO and therefore strikes out the suit with no orders as to costs.

THEY ARE DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 15TH DAY OF JUNE 2023.

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CHARLES KARIUKI

JUDGE

