



**Kibe v Old Mutual Holdings PLC (Insolvency Petition E061 of 2024)
[2024] KEHC 16309 (KLR) (Commercial and Tax) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E061 OF 2024
JWW MONG'ARE, J
DECEMBER 16, 2024**

BETWEEN

JOEL KAMAU KIBE PETITIONER

AND

OLD MUTUAL HOLDINGS PLC RESPONDENT

RULING

1. This Ruling determines the Preliminary Objection (PO) dated 16th September 2024 against the Petitioner's Petition and Notice of Motion all dated 20th August 2024.
2. The preliminary objection is premised on the following grounds:-
 1. The application is misconceived and bad in law.
 2. The Petitioner is not a member of the Company within the meaning of Section 92, as read together with Section 780(1) and (2) of the *Companies Act* (Cap 486) and therefore lacks locus standi to file the petition or seek the orders sought in the Petition or the Notice of motion dated 20th August 2024.
 3. The Petitioner lacks locus standi under Section 425 as read together with Section 383(1) of the *Insolvency Act*, 2015 to apply for liquidation of the Company.
 4. In the circumstances, this Honourable Court lacks jurisdiction to hear and determine the application and Petition filed herein and to grant the orders sought.
 5. The Petition is frivolous, vexatious and an abuse of the court process.



3. The preliminary objection was canvassed through written submissions. The Respondent filed primary and supplementary written submissions dated 4th and 11th October 2024 respectively. The Petitioner filed written submissions dated 8th October 2024.
4. The Respondent submitted that the Petitioner lacks the locus standi to file and prosecute the Liquidation Petition and the Application seeking injunctive reliefs because he is not a member of the company or a contributory in terms of section 385(1) of the *Insolvency Act*. The Respondent submitted that since the Petitioner was not a member of the Company as at the date of the Petition, he has no right to file and prosecute the liquidation Petition or the Application. It relied on the decision of the Malaysia Court of Appeal in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 Maj 113 - 24 October 1995 and *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) to support their arguments in the preliminary objection and urged the court to find the decision persuasive.
5. In responding to the preliminary objection the Petitioner argued that the preliminary objection does not raise pure points of law. He also argued that he has the locus standi to file and prosecute the Petition as he is a shareholder of the Company. He asserted that he is a member of the Company, having purchased 1,544,900 shares in the secondary market on diverse dates between 22nd July 2014 and 29th June 2015 using nominee account No. 17 at Genghis Capital Limited. He again asserted that the locus to lodge and prosecute the Petition is established vide his Replying Affidavit sworn on 13th September 2024 and Supplementary Affidavit of Rose Wambui Maina sworn on 7th October 2024.
6. The Petitioner claimed that the *Owen* and *Atlasview* (*supra*) decisions cited by the Respondents were distinguishable and rendered after consideration of applications for striking out and the rest at their conclusion of matters.

Analysis and Determination

7. I have considered the preliminary objection and the parties' respective submissions. From my understanding I note that the only issue for determination by this court is whether the preliminary objection is merited.
8. In the locus classicus case of *Mukisa Biscuits Manufacturing Co. Limited v. West End Distributors Ltd.* [1969] EA 696, Law JA observed as follows: -

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as preliminary objection may dispose of the suit.

In other words, for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion.”
9. From the pleadings filed before the court the Petitioner has filed the Petition as a minority shareholder seeking protection under sections 780 and 782 of the *Companies Act*, 2015 or in the alternative the liquidation of the company under section 424 and 425 of the *Insolvency Act*. The Petitioner claims that there has been oppressive conduct against him and other minority shareholders by the majority shareholders through exclusion from management and decision-making, dilution of shares, mismanagement and misappropriation of company assets, denial of access to company records, removal from a position of authority, unfair allocation of benefits and fraudulent and unauthorized borrowing, among others.



10. The Respondent's gravamen is that while the Petitioner is a beneficial owner, he is not a registered member of the company and he was not a member of the company at the time the Petition was made.
11. Having considered the arguments put forward by all the parties, I note that the issues raised by the Respondent are not pure points of law suitable for determination at this juncture. To my mind, the issues raised whether the Petitioner was or was not a member of the company as at the time of filing the petition require the Court to consider facts and evidence in order to ascertain the true position. This can only be determined after full evaluation of evidential matter and not at a preliminary stage as sought herein by the Respondents. It is therefore the court's position that this matter should be considered within the application dated 20th August 2024 when all matters are put forward and weighed against the evidence made available to the court.
12. Accordingly, I am satisfied that the Preliminary Objection has failed the test set out in *Mukisa Biscuit (supra)* and the same is therefore found to be unmerited and dismissed forthwith. The Court will therefore at the appropriate time consider the Application filed by the Petitioner herein. Costs are in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF DECEMBER 2024

J.W.W. MONG'ARE

JUDGE

In the presence of:-

1. Mr. Gichuki King'ara for the Petitioner/Applicant.
2. Mr. Karori Kamau SC and Ms. Kindari for the Respondent.
3. Mr. Ndungu for the Interested Party.
4. Amos - Court Assistant

