



**Cytonn Investment Management Plc v Muriithi (Insolvency Cause E036 of 2020)
[2021] KEHC 254 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 254 (KLR)

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

INSOLVENCY CAUSE E036 OF 2020

WA OKWANY, J

NOVEMBER 11, 2021

RE: IN THE MATTER OF THE INSOLVENCY ACT (NO 18 OF 2015)

AND

**IN THE MATTER OF THE LIQUIDATION OF
CYTONN INVESTMENTS MANAGEMENT PLC**

BETWEEN

CYTONN INVESTMENT MANAGEMENT PLC APPLICANT

AND

HUMPREY MURIMI MURIITHI RESPONDENT

RULING

1. Before the court for determination is the application dated 10th August 2020 wherein the applicant seeks the following orders.
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. THAT any person who is not a party to these proceedings shall not be permitted to access the records in these proceedings without the permission of the presiding judge.



6. That the respondent must not disclose the name of the Applicant in these proceedings any documents served upon him for purposes of these proceedings or any information from which the documents served upon him for purposes of these proceedings or any other information from which the applicant could be identified as connected with these proceedings or the nature of these proceedings or relief sought and granted.
 7. THAT the respondents be strictly enjoined and restrained whether by himself, his servants and/or agents in manner howsoever from filing, serving and/or advertising any liquidation proceedings against the applicant whether in terms of the statutory demand dated 21st July 2020 or at all pending the hearing and determination of this application.
 8. THAT costs of and occasioned by these proceedings be paid by the respondent on an indemnity basis.
2. The application is brought under Section 692 of the *Insolvency Act*, Rule 10 of the insolvency Regulations and Rules 16 & 17 of the *High Court Organizational and Administration) (General Rules 2016)*
 3. The application is supported by the affidavit of the applicant's Company Secretary Ms. Patricia Njeri Wanjama and is based on the grounds that: -
 - a. Unless service of the application is dispensed with in the first instance, and relief granted, the application which seeks to prevent the abuse of the liquidation process by strong-arming the applicant into yielding to the respondents extortionate demands will be rendered otiose without a hearing as it is the essence the avoidance of negative publicity would have taken place by time of the inter parties hearing.
 - b. On 30th July 2020, the respondent herein effected service of a statutory demand in respect to an alleged debt of Kshs 34,363,835/- a sum the applicant does not and has never owed the respondent.
 - c. Consequently, the respondent is not a creditor of the applicant and has got no standing whether in terms of the statutory demand dated 21st July 2020 or at all to institute the liquidation proceedings as he has threatened to do.
 - d. The respondent and the applicant are two of the 3500 partners/investors of Cytonn High Yield Solution LLP (the CHYS) a limited liability partnership and a legal entity separate and distinct from the applicant. The applicant is the Principal partner while the respondent is an Investment partner by virtue of his investment with CHYS in terms of its agreement with it. The respondent is improperly using these liquidation proceedings as an extortionate mechanism for collection of sums not due from the CHYS, and bringing improper pressure to bear upon the applicant to pay.
 - e. In the premises, the presentation/filing of these liquidation proceedings, are a gross abuse of the process of this Honourable Court and their service which any advertisement and/or their publication in any form of proceedings would only compound.



- f. Unless, the annexed application seeking to prevent such gross abuse of the process of this Honourable Court is certified as urgent, admitted for hearing during the current vacation of this Honourable Court, and appropriate injunctive relief granted the respondent will proceed with the institution of liquidation proceedings by virtue of this wrongful statutory demand with obvious consequences including;
- i. Freezing the operations of the applicant with the inevitable domino effect of all its operations. The applicant is an independent Investments Company that administers various asset classes through itself or its affiliates, including but not limited to structured investment solutions and real estate.
 - ii. Irreparable reputational damage
 - iii. The loss of jobs to over 400 employees and agents of the Principal partner of the applicant
 - iv. Its loss of business as no one will deal with an insolvent investment vehicle and/or an investment vehicle that is fighting insolvency proceedings.
 - v. Adverse knock-on effects on the ongoing projects in which the applicant has commenced.
 - vi. Collapse of the applicants subsidiaries and affiliates including CHYS risking the investment amounts of over 3500 investors
- g. It is just and equitable to grant relief.

4. The respondent opposed the application through his replying affidavit dated 8th October 2020 wherein he states that the application is incompetent and fatally defective as the prayers sought impede the respondent's right of access to justice and demonstrates a clear avoidance of liability. He contends that he is an investor of the applicant and that as at June 2020 Kshs 34,363,835 remained outstanding which is a debt payable on demand within 3-5 days from the date of maturity according to clause 5 of the roll over and withdrawal form of the agreement. He avers that the debt was admitted by the applicant in numerous correspondences exchanged between the parties.
5. The application was canvassed by way of written submissions which I have considered.
6. The main issue for determination is whether the applicant has made out a case for the granting of orders to restrain the respondent from filing or serving any liquidation proceedings against the applicant. The applicant contends that it does not owe the respondent any debt as the documents signed were between the respondent and CHYS and that the debt cannot therefore be enforced or recovered from the applicant.
7. The respondent, on the other hand, argued that while it is true that the contribution agreement was made between the respondent and Cytonn Cash Management solutions, the contribution agreement ought to be read together with the partnership agreement. According to the respondent, clause 2.6



of the Partnership Agreement confers the applicant with the capacity to be sued on behalf of the partnership. The said clause stipulates as follows: -

In carrying out the purpose of this agreement, subject to any applicable law, the principal partner is authorized by all partners on behalf of the partners to

- (g) bring, sue, prosecute, defend, settle or compromise actions at law related to the purpose of the assets.

8. It was not disputed that the contribution agreement was made between the respondent and Cytonn Cash Management Solutions which is a limited liability entity capable of suing and being sued in its own name. The respondent however maintains that the applicant has the capacity to be sued in relation to the partnership agreement wherein the respondent holds them accountable for non-payment of the debt due.

9. The doctrine of privity of contract stipulates that the rights and obligations under a contract are only conferred or imposed on the parties to the contract. This is the position that was taken in *Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another* [2015] eKLR where it was held that: -

“...the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party.”

10. I have perused the pleadings filed herein together with the annexures and I note that the purpose of the Partnership Agreement was to enable the principal partner invest the funds provided by the partners in various investment opportunities which, in turn, would guarantee each partner their capital contribution as well as the pre-agreed return of investment. The investment would then be distributed according to the terms of their contribution agreement.

11. It was not disputed that the respondent invested his funds with the applicant and further, the applicant does not deny that the respondent is entitled to his investment of Kshs 34,363,835/-. The point of departure however, is whether the respondent can recover the debt from the applicant.

12. I have examined the two agreements in contention and I am of the view that they form part and parcel of the same chain of transactions as the contribution agreement is based on the partnership agreement and neither can stand on its own. I am also of the view that the court cannot, at this juncture delve into determining the question of whether or not the applicant is a creditor as that is an issue that can only be determined at the hearing of the insolvency petition and not at this interlocutory stage.

13. I however I note that from the pleadings, the principal partner had the exclusive responsibility to manage and control the business of the partnership for the purpose of the partnership and this includes payment of the money or interest that ought to have been made to the respondent. In my humble view, it would then defeat justice to drive out the respondent from pursuing his claim against the applicant at this stage of the proceedings. In the case of *Mbaki & Others v. Macharia & Another* (2005) 2 EA 206, the Court of Appeal held that: -

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

14. For the above reasons, I find that the application dated 10th August 2020 is premature and lacks merit. I therefore dismiss it with costs to the respondent.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Gico for Amoko for Company/Applicant.

Mr. Khadija for Asli for the Respondent.

Court Assistant: Margaret

