



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**INSOLVENCY PETITION NO. 25 OF 2018**  
**IN THE MATTER OF UCHUMI SUPERMARKETS LIMITED**  
**AND**  
**IN THE MATTER OF THE INSOLVENCY ACT**  
**R U L I N G**

1. Githunguri Dairy Farmers Co-operative Society (**the Petitioner**) petitioned, in this matter for Uchumi Supermarket Limited (**Uchumi**) to be wound up. The Petition is based on the ground that Uchumi has failed to pay its debts. Other companies have appeared in this Petition.

2. This Ruling is on a **Preliminary Objection** filed by Kasarani Mall Limited (**Kasarani Mall**), objecting to a Notice of Motion (**the Application**) dated 12<sup>th</sup> November 2018. That application was filed by UBA Kenya Limited (**UBA**) one of the parties that has appeared in this Petition.

3. By that Application UBA seeks the following prayers;

- a) That Kasarani Mall Limited (a subsidiary of Uchumi Supermarket Limited) and Jewel Complex Limited be enjoined in these proceedings as Interested Parties;
- b) That pending the hearing and determination of this application inter parties, all sums paid to Kasarani Mall Limited by Jewel Complex Limited on account of sale and purchase of Land Reference Number 255544, Nairobi (including the deposit of Kshs.330,000,000) be transferred to the Court;
- c) That an order be and is hereby issued that the entire purchase price of Kshs 2,800,000,000.00 (Kenya shillings Two Billion Eight Hundred Million) paid or to be paid by Jewel Complex Limited, purchaser of property Land Reference Number 255544, Nairobi owned by Kasarani Mall Limited be Paid to Court and be applied to pay all the creditors herein;
- d) That the order of injunction issued on the 2<sup>nd</sup> day of October, 2018 restraining UBA Kenya Bank Limited, its assignees, agents or servants from exercising its statutory power of sale over L.R. No. 209/12593 Langata area Nairobi belonging to Uchumi Supermarkets Plc be vacated.

4. Uchumi's two pronged objections are as follows:

- a) Kasarani Mall Limited is a separate Legal entity from Uchumi Supermarket PLC and the intended application is a misjoinder;
- b) The Application is bad in Law and should be struck out in limine with costs to Kasarani Mall Limited.

5. By oral submissions of Learned Counsel **Mr. Makau**, for Kasarani Mall, it was submitted that Kasarani Mall was a separate entity from Uchumi Supermarket Limited (**Uchumi**). It is therefore the submissions of Kasarani Mall that the prayers to join it in this action was a misjoinder. It needs to be mentioned that UBA seeks to join Kasarani Mall because, as it alleges, Uchumi fully owns Kasarani Mall and UBA further alleges that Kasarani Mall was a subsidiary of Uchumi. Further, UBA relies on the ground that Kasarani Mall has entered into an agreement for the sale of **Land reference No. 255544**, Nairobi to an entity called Jewel Complex Limited for **Kshs 2.8 billion**.

6. Kasarani Mall, in support of its objection, relied on the case; Omondi –Vs- Nationa Bank of Kenya Ltd and Others [2001]IEA page 83, viz:

***“As regards whether the Plaintiff’s have locus standi to institute this suit, I am in complete agreement with the submissions made by the Defendants’ advocates that they do not. It is a basic principle of Company Law that the company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders (see Solomon v Solomon and Co. Ltd [1897]AC 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights.”***

7. The submissions of Kasarani Mall were supported by Learned Counsel **Mr. Havi**, for Uchumi and by **Mr. Muchoki** for Jewel Complex Ltd.

8. It is deponed, through the affidavit of **Judith Matata**, Legal Manager of Uchumi, that Uchumi does not own the property **L. R. No. 255544**. That Kasarani Mall is a separate legal entity from Uchumi.

9. Mr. Nyaaga, Learned Counsel for UBA, in his oral submissions confirmed that Kasarani Mall is a separate entity to Uchumi but that UBA was seeking to join Kasarani Mall as Interested Parties. Counsel further submitted that Uchumi owned **99.99%** of shares in Kasarani Mall meaning that Kasarani was a wholly owned subsidiary of Uchumi. It is on that basis UBA seeks to join Kasarani Mall as Interested Party.

### **ANALYSIS AND DETERMINATION**

10. All parties agree that Uchumi is a separate entity to Kasarani Mall. That being so UBA cannot seek to join Kasarani Mall in this action which action seeks to have Uchumi declared insolvent. It is clear in actions of Insolvency the parties that have audience are the company and those it is indebted to. Essentially the Court is called upon to determine whether Uchumi should be declared insolvent. If that is so what part would Kasarani Mall play in this action? In my view Kasarani, since it is a separate entity to Uchumi, cannot have audience in this matter unless it is a creditor.

11. The Court of Appeal in the case Hannah Maina T/A Taa Flower –vs- Rift Valley Bottlers Limited[2016]eKLR had to decide an appeal on similar fact, to those before me. In that case **Hannah Maina**, the Appellant, supplied flowers to **Riva Flora Limited**, a company which was subsidiary of **Rift Valley Bottlers Limited**, the Respondent in the appeal. Riva Flora Limited was declared insolvent. Hannah Maina sought to enforce the debt of Riva flora Limited against the Respondent. The Court of Appeal held as follows:

***“As regards the issue of privity of contract, it is true the Appellant had contracted with Riva and not the Respondent. In the circumstances, the Respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities. We are in agreement with the holding of the learned Judge. The authority that she cited, RE: SOUTHARD LIMITED [1979]3 ALL ER565 is quite apt:***

***“...a parent company may spawn a number of subsidiary companies, all directly or indirectly controlled by the shareholders of the parent company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent company and the subsidiary companies may prosper to the joy of the share holders without any liability for the debts of the insolvent subsidiary.”***

12. The Court also expressed itself in similar vein in the case; Imranali Chandbhai Abdulhussein –vs- Bamburi Portland Cement Company Ltd [1994] eKLR viz:

***“It is said herein that KENCEM Ltd. is either a sister company or a subsidiary company or a marketing company of the Bamburi Portland Cement Co. Ltd. (the Defendant in this suit). But no evidence was led to show the actual working or operational relationship between the two companies. Even if it is so close-knit each company, being a limited liability company must operate within the ambit of the Companies Act which confers upon such companies the status of a separate legal entity. (see the Principles of Modern Company law 3<sup>rd</sup> Edn. by L.C.B. Gower on the consequences of incorporation).”***

13. From the above discussion it follows that the **Notice of Motion** dated **12<sup>th</sup> November 2018** is misplaced and without merit. It is dismissed.

14. In my view it is only just that UBA does pay the costs of Kasarani Mall, who was put to an expense to defend itself.

15. The orders of the Court are as follows:

**a) The Preliminary Objection filed by Kasarani Mall ltd dated 27<sup>th</sup> November 2018 is upheld. Accordingly the Notice of Motion dated 12<sup>th</sup> November 2018 is hereby struck out with costs;**

**b) The costs of the Notice of Motion dated 12<sup>th</sup> November 2018 and the Preliminary Objection dated 27<sup>th</sup> November 2018 shall be paid to Kasarani Mall Limited by UBA Kenya Bank Limited.**

**RULING DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of MARCH, 2019.**

**MARY KASANGO**

**JUDGE**