

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO. 403 OF 2011**

**JULIUS MWAKONDO MWABORA.....1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**

**BENSON MLAMBO MWAKINA.....2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**(Suing as Personal Representatives of the estate of**  
**CHRISTINA KOKUMARAMARA RUTA MWAKONDO)**

**-VERSUS-**

**NAKUMATT HOLDINGS**  
**LIMITED.....DEFENDANT/RESPONDENT**

**AND**

**KENYA POWER AND**  
**LIGHTING**  
**CORPORATION.....THIRD**  
**PARTY**

**RULING**

**The Background**

1. This suit was filed by **Julius Mwakondo Mwabora** and **Benson Mlambo Mwakina** (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicants) in their respective capacities as personal representatives of the estate of **Christina Kokumaramara Ruta Mwakondo** (the deceased) vide a plaint dated 15<sup>th</sup> September 2011 and amended on 30<sup>th</sup>

May 2012. In that Plaintiff, they are seeking various reliefs against **Nakumatt Holdings Limited** (hereafter the Respondent) arising from a fire incident which occurred at the Respondent's Downtown Supermarket (as it was then) on 28<sup>th</sup> January 2009, resulting in the death of the deceased as well as other persons. The claim is founded on the tort of negligence.

2. Upon service of summons, the Respondent entered appearance and filed a statement of defence denying liability. Hearing of the main suit commenced with several witnesses giving evidence before various judges of the High Court.
3. The record shows that the respective advocates for the Applicants and the Respondent herein, as well as advocates for the Plaintiffs in other similar suits mentioned below, entered into a consent dated 16<sup>th</sup> May 2012 on the terms, *inter alia*, that the present suit would act as the test suit on liability in relation to 12 other suits arising from the same circumstances as in this suit and that the suits be stayed pending determination of the test suit.

4. The following list consists of the 12 suits referenced in that consent:

- (i) Nairobi HCCC No. 53 of 2010 (Sarah Mutheu Kivuvo & James Mutua (Suing as Personal Representatives and Administrators of the estate of PETER SERRY ODERA HWENY'S) v Nakumatt Holdings Limited)**
- (ii) Nairobi HCCC No. 54 of 2010 (Nicholas Wainaina Ndungi (Suing as the Personal Representative and Administrator of the estate of ANGELA WAMAITHA WAINAINA) v Nakumatt Holdings Limited)**
- (iii) Nairobi HCCC No. 125 of 2010 (Willy Kim Chesbol & Alex Cheprot Hesbon (Suing as Personal Representatives and Administrators of the estate of LOYCE NEHEMIAH) v Nakumatt Holdings Limited)**
- (iv) Nairobi HCCC No. 126 of 2010 (Haron Sitati Wanjala & Nabwana Rose Sikuku (Suing as Personal Representatives and Administrators of the estate of BEATRICE LIHAVI) v Nakumatt Holdings Limited)**

- (v) Nairobi HCCC No. 222 of 2010 (Irene Ncabira Riungu & John Muriungi Mutungi (Suing as Personal Representatives and Administrators of the estate of TERRY GACHERI RIUNGU) v Nakumatt Holdings Limited)**
- (vi) Nairobi HCCC No. 398 of 2011 (Dinar Stephen Kapanat & Wilson P. Kapanat (Suing as Personal Representatives and Administrators of the estate of STEPHEN KASACHON TULIAPUS) v Nakumatt Holdings Limited)**
- (vii) Nairobi HCCC No. 437 of 2011 (Joseph Munyao Maithya & Rhoda Nthambi Maithya (Suing as Personal Representatives and Administrators of the estate of RUTH KASIVA MAITHYA) v Nakumatt Holdings Limited)**
- (viii) Nairobi HCCC No. 489 of 2011 (Fredrick Ndiri Mukolwe (Suing as Personal Representative and Administrator of the estate of EVERLYNE REBECCA MUKOLWE) v Nakumatt Holdings Limited)**

- (ix) Nairobi HCCC No. 24 of 2012 (Janet Wambuku Kamau & Patrick Kamuyu Wakaba (Suing as Legal Representatives of the estate of SAMUEL KAMAU WAKABA) v Nakumatt Holdings Limited)**
- (x) Nairobi HCCC No. 25 of 2012 (Susan Wanjiku Kamau & Philip Wakaba Kamau (Suing as Legal Representatives of the estate of JANE WAIRIMU WAKABA) v Nakumatt Holdings Limited)**
- (xi) Nairobi HCCC No. 397 of 2010 (Fredrick Onyango Orondo (Suing as Administrator of the estate of MONICA ACHIENG WAMRONO) v Nakumatt Holdings Limited)**
- (xii) Nairobi HCCC No. 538 of 2010 (Beryl Ouma & Francis Odhiambo Ouma (Suing as Administrators of the estate of JANET LILIAN ODERA OUMA) v Nakumatt Holdings Limited)**

5. The record shows that the abovementioned consent was adopted as an order of the court on 17<sup>th</sup> May 2012. Court record shows that the Respondent subsequently took out third party

proceedings against **Kenya Power and Lighting Corporation** (hereafter the Third Party) and served a Third-Party Notice dated 28<sup>th</sup> May 2012 upon the latter. The Third Party filed a statement of defence dated 11<sup>th</sup> March 2013.

6. In the course of the hearing of this test case, this court was notified, on 12<sup>th</sup> June 2018, that the Respondent had been placed under Administration. Further, counsel for the Applicants informed the court that he had applied for typed proceedings in this case. The matter was thereafter mentioned on several occasions to await the typing of the proceedings until 26<sup>th</sup> November 2019 when it was confirmed that the proceedings had been typed and the parties were consequently directed to take another date at the registry for directions. The record shows that no further action was taken by the parties leading to the order dated 13<sup>th</sup> October 2022 dismissing the suit for want of prosecution, under Order 17, Rule 2(1) of the Civil Procedure Rules.

### **The Application**

7. The order dismissing the suit triggered the Notice of Motion dated 29<sup>th</sup> April 2025 (the Application) filed by the Applicants. The Application is supported by grounds stated on the face of the Application and in the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant and the affidavits of **Irene Ncabira Riungu, Willy Kim Chesobol, Sarah Mutheu Kivuvo, and Beryl Anyango Ouma.**

8. The Application seeks the following orders:

**(i) Spent.**

**(ii) THAT this Honourable Court be pleased to set aside or vary the Orders made on 13.10.2022 or Orders of similar import made on 21.09.2018 or any other date, dismissing the Plaintiffs'/Applicants' suit for want of prosecution.**

**(iii) THAT this Honourable Court be pleased to reinstate the suit and allow the same to proceed for hearing and determination.**

**(iv) THAT this Honourable Court be pleased to issue an order granting leave to proceed with the suit against Nakumatt Holdings Limited (under administration).**

**(v) THAT the costs of the Application be provided for.**

9. The Application is anchored on Sections 1A, 1B and 3A of the Civil Procedure Act (CPA); Order 17, Rule 2(2) and Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Article 159(2)(d) of the Constitution of Kenya, 2010.
10. The 1<sup>st</sup> Applicant has deposed that the Applicants herein took all reasonable steps to prosecute the test suit and that the same is partly heard. That the delay in conclusively prosecuting the suit was unintentional and was occasioned by the fact that the Learned Judges who had been handling the suit at all material times, namely **Aburili, J.** and **Mwongo, J.**, were both transferred to other divisions of the High Court at different times during the course of the proceedings and that the process of typing proceedings took a prolonged period of time, despite several follow-ups by his advocates.
11. The 1<sup>st</sup> Applicant has deposed, further, that Respondent herein was put under administration vide a ruling delivered on 22<sup>nd</sup> January 2018 in ***Insolvency Cause No. 10 of 2017***, with one Peter Kahi being appointed as Administrator. That consequently, all proceedings against the Respondent were suspended and a

Moratorium was effected. That the Applicants' advocate wrote to the Administrator vide a letter dated 1<sup>st</sup> September 2022 seeking consent to proceed with the present test suit pursuant to Section 560 (1)(d) of the Insolvency Act, but the said letter did not elicit a response.

12. The 1<sup>st</sup> Applicant has stated that it came to his notice that the suit had been dismissed through an order made on 21<sup>st</sup> September 2018 followed by a subsequent dismissal order made on 13<sup>th</sup> October 2022. That no notice had been served upon the Applicants' advocates prior to the initial order of dismissal, while notice of the subsequent order was only served upon them following the said order being made.

13. The 1<sup>st</sup> Applicant has claimed that the respective orders of dismissal were made in error given the status of the Respondent at all material times. That, the dismissal orders, if sustained, will affect the rights of the various Plaintiffs in the related suits thereby causing them prejudice.

14. The 1<sup>st</sup> Applicant has urged this court to exercise its discretion in the interest of justice and allow the application.

15. **Irene Ncabira Riungu, Willy Kim Chesobol, Sarah Mutheu Kivuvo and Beryl Anyango Ouma**, filed their affidavits in support of the application. They associated themselves with the grounds relied on by the 1<sup>st</sup> Applicant.

### **Grounds of Opposition**

16. The Application is opposed by the Third Party through the following Grounds of Opposition dated 3<sup>rd</sup> June 2025:

- (i) ***THERE is no sufficient cause or any cause at all to warrant this Court to exercise its discretion in favour of the Applicant.***
- (ii) ***THAT there is no consent filed by the Administrator to the Defendant for the proceedings to continue.***
- (iii) ***THAT the Plaintiffs have not obtained leave and/or approval of the Court to continue with and/or file suit against the Defendant noting that the Defendant is still under administration.***
- (iv) ***THE Plaintiffs are barred under the doctrine of laches as the Application has been brought after 6 years since the Order dismissing the suit was issued on 21<sup>st</sup> September, 2018.***
- (v) ***THE Application herein is therefore an abuse of the court process of this Honourable Court.***

**(vi) THE Application has no merit.**

**Parties' Submissions**

17.The Application was argued through written submissions. In support of the Application, the Applicants anchored their submissions on the decision in **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] KEHC 6789 (KLR)** where the Commercial and Admiralty Division of the High Court acknowledged that the decision whether or not to set aside an order of dismissal and to reinstate a suit lies with the court's discretion., which must be exercised judicially.

18.The Applicants submitted that they have presented sufficient material and a reasonable explanation as to why there was delay in prosecuting the test suit and that they have a constitutional right to be heard, which if denied, will occasion grave prejudice to them and the plaintiffs in the other similar cases.

19.The Applicants have argued that pursuant to Section 560(1)(d) of the Insolvency Act, the court may grant leave to enable a party commence or continue with legal proceedings against a

company under administration. That in the present instance, the Applicants tried in vain to obtain the consent of the administrator to proceed with the test suit, thereby causing the instant application to be competently before this court. The Applicants relied on **Gerald Katana Mwamumba & 3 others v ARM Cement PLC (Under Receivership) [2022] KEELC 1069 (KLR)** where the Environment and Land Court (ELC) allowed a preliminary objection which sought to have an application by the plaintiff therein struck out for want of leave under Section 560 of the Insolvency Act.

20. In contrast, the Third Party argued that this court lacks jurisdiction to hear and determine this application by dint of Section 2 of the Insolvency Act which provides thus:

***“the Court” means the High Court, and if there is an insolvency division of that Court, means that division.”***

21. To further its argument above, the Third Party submitted that the Insolvency Court is the proper forum for entertaining the application. To buttress this point, the Third Party relied, *inter alia*, on **Julius M Mulumbi v Arvid Engineering Limited**

**[2021] KEELRC 342 (KLR)** in which the court faced with an application seeking leave to proceed with the suit against the Respondent therein and further seeking to enjoin the Administrator as a Respondent in the proceedings, reasoned that premised on the Insolvency Act, the High Court is the proper forum for bringing such application, and not the Employment and Labour Relations Court (ELRC).

22. The case of **Seyani Brothers & Company Kenya Limited & 4 others v Green Square Limited [2023] KEHC 1439 (KLR)** was also relied upon, where it was held that in the absence of leave of the Insolvency Court being sought and obtained, a party cannot institute a claim against a company in liquidation and that in the absence of a consent by the Administrator and/or leave of the Insolvency Court, the instant application is incompetently before this court and therefore ought to be dismissed.

23. In their rejoinder submissions, the Applicants have submitted that the authorities relied on by the Third Party are distinguishable from the circumstances of this case. The

Applicants have held the view that in the absence of a special court established to deal with insolvency matters, the High Court-Civil Division, is clothed with jurisdiction to entertain the instant application.

24. The Applicants have equally submitted that the present test suit, alongside the related suits, were ongoing proceedings against the Respondent, prior to the latter being placed under administration and that one of the prayers sought in the Motion is for leave of this court to enable the Applicants proceed with the present suit.

25. On its part the Respondent, through its counsel, indicated that it would not be filing any documents in respect of the Motion but nonetheless stands in support of the Grounds of Opposition lodged by the Third Party.

### **Analysis and Determination**

26. I have considered the Application and the Grounds of Opposition by the Third Party. The issue raised by the Third Party is that this Court lacks jurisdiction to determine whether a party can commence or continue with legal proceedings against

a company under administration. The argument by the Third Party on this issue is that the Insolvency Court and not the High Court-Civil Division, is seized with the jurisdiction to hear and determine this matter. This argument was opposed by the Applicants who have maintained that this court, being a High Court, is clothed with jurisdiction to determine this matter.

27. I am guided by the decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989)** that jurisdiction is everything and without it, a court cannot continue handling the matter before it. However, the jurisdiction of the court is not the only issue before me for consideration and determination.

28. Starting with the issue of jurisdiction of this court, I have noted that there is no dispute that the Respondent was placed under Administration by the Court vide a ruling delivered on 22<sup>nd</sup> January 2018 in **Insolvency Cause No. 10 of 2017**, and one Peter Kahi was appointed as the Administrator. No material has been placed before the court by any of the parties to indicate that the administration status of the Respondent has changed.

29. Section 2 of the **Insolvency Act Cap. 53 Laws of Kenya** defines ***“the Court”*** as:

***“the High Court, and if there is an insolvency division of that Court, means that division.”***

30. **Section 560** of the said Act provides for a moratorium on legal processes while an order on administration is in effect as follows:

***“(1) While a company is under administration—***

***(a) a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;***

***(b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval, subject to such conditions as the Court may impose;***

***(c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and***

**(d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.**

***...” (emphasis added).***

31. From the above provisions, it is clear that a consent of the Administrator or approval by the Court is a requirement for any party who wishes to commence or continue with proceedings against a Company under administration. Section 2 of the Insolvency Act defines “Court” under that Act as the High Court or the Insolvency Division, if such Division exists.

32. The High Court of Kenya is divided into Divisions, although these Divisions are practicable in Nairobi or any other High Court Station that fits the purpose under Section 11 of the High Court (Organization and Administration) Act, Cap. 8C Laws of Kenya (the Act). Disputes relating to Insolvency in High Court of Kenya at Nairobi are handled by the Commercial and Tax Division.

33. Section 11 provides the purpose for the creation of the divisions of the High Court as follows:

## **11. Establishment of Divisions**

**(1) For purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions— (emphasis added)**

**(a) the Family and Children Division;**

**(b) the Commercial Division;**

**(c) the Admiralty Division;**

**(d) the Civil Division; (e) the Criminal Division;**

**(f) the Constitutional and Human Rights Division;**

**(g) the Judicial Review Division; and**

**(h) any other division as the Chief Justice may, on the advice of the Principal Judge determine.**

34. There is no Insolvency Division of the High Court. The practice is that insolvency matters are handled in the Commercial and Tax Division of the High Court at Milimani for expediency purposes given the nature of the commercial disputes handled in that Division.

35. Going by the provisions of Section 2 of the Insolvency Act and the practice that the Commercial Divisions handles insolvency disputes, it would be easy to quickly dismiss the instant application by reasoning that this court, being a Civil Division Court, is not clothed with jurisdiction to handle this matter. However, it is my considered view, that the Applicants are raising more than just the issue touching on the jurisdiction of this court to grant approval to them to continue with these proceedings.

36. The circumstances of this case are concerning. It is an old matter. It is a test suit for about 12 other cases, all arising from the same fire incident that gave rise to this suit. I have taken time to read, carefully, the record of the court in this matter. The record shows that the matter has passed through the hands of several judges. It is a partly heard matter. Hon. Lady Justice Aburili and Hon. Mr. Justice Mwongo substantially heard the witnesses before the Respondent was placed under Administration and the proceedings stalled before this matter being dismissed. The two judges are no longer in the Civil

Division, having been transferred to other High Court Stations and Divisions. Thereafter the matter has been mentioned by other judges and Deputy Registrars serving in the Civil Division.

37. Secondly, there are two dismissal orders on record. There is a dismissal order dated 21/09/2018. The record does not show the Notice to Show Cause relating to that dismissal order. The record of the court shows that on 31/08/2018, the firm of Muthoga, Gaturu & Co. Advocates fixed the matter for mention on 05/11/2018 in the Registry. On 05/11/2018, during the mention, counsel who attended court requested for typed proceedings. The DR ordered the Executive Officer of the Court to follow up the typing of proceedings and placed the matter for mention on 05/12/2018. There is no record for proceedings on 05/12/2018.

38. The record shows that thereafter, on 25/09/2019, parties took a date at the Registry for mention of the matter on 26/11/2019 during which mention Mr. Mugambi for the plaintiffs informed the court that the Defendant (Respondent) had been placed under Administration. The DR confirmed that proceedings had

been typed and directed the parties to take a date at the Registry to appear before a judge for directions. The record shows that there is no other record of proceedings from that date to 13/10/2022. On that date, there is an order dismissing the proceedings under Order 17(2) of the Civil Procedure Rules.

39. What perturbs me is the two orders dismissing this suit, as the court file record shows. A printout from the CTS Portal attached to the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant and marked Annexure “**JMM5**” shows that on 21/09/2018, the suit was dismissed. There are no proceedings on the court record to show this dismissal order.

40. There is also a dismissal order issued on 13/10/2022. This order is found in the court file. Further reading of the court file record disclosed that there is a Notice to Show Cause issued on 03/08/2022. The Applicants have stated that the Notice to Show Cause dated 03/08/2022 was not served on them or their advocates and that the DR was not aware of any order of dismissal dated 21/09/2018 when the case was mentioned on

26/11/2019, yet the CTS printout shows there was a dismissal order issued on 21/09/2018.

41. I have read the record and I have not come across any record showing service of Notice to Show Cause in respect of the two orders dismissing the suit. No evidence has been placed before me by any of the parties to show any affidavit of service to the effect that the parties, specifically the Plaintiffs/Applicants, were served with the notices. It is the above circumstances of this case that disturb me.

42. The practice of the court is that before a Notice to Show Cause is issued to the parties, there is an order from the judge or judicial officer handling the matter. This is what I would do in matters that stay without action being taken by the plaintiff. If I am wrong on this, I stand to be corrected. But it is my firm belief that to guard against prejudicing any party or to avoid denying a deserving litigant justice, it is prudent to issue a notice to show cause, have the same properly served and where the said party fails to attend court, then the court should proceed and dismiss

the matter. This is a court of record and any action taken on a matter must appear on record.

43. After carefully considering the circumstances of this case as narrated in this ruling and considering that there is no Insolvency Division of the High Court, and being aware that Insolvency matters are handled by the Commercial and Tax Division, I am persuaded that the Commercial and Tax Division of the High Court, as opposed to the Civil Division, constitutes the proper forum for determining the issue of commencement and continuation of legal proceedings against the Respondent, in the absence of a consent by the Administrator. In finding so, I am persuaded by the following reasoning adopted by the Court in the case of **Joel Mwanzia Velela T/A Betabase Auctioneers V Savannah Cement Limited [2025] eKLR**:

***“Some courts have held that, application for approval of the court should be made in the Insolvency Court dealing with the company’s insolvency proceedings. Because, any other court:***

***“...will be acting with minimal or insufficient information regarding the company which might***

***defeat the legislative intention in sections 522 and 560 of the Act.” Ng’ang’a v Cytonn High Yield Solutions LLP (Miscellaneous Application E616 of 2021) [2022] KEHC 3368 (KLR) (Commercial and Tax) (26 May 2022) (Ruling) and Lambart Lwanga Ogochi & 4 Others v Ponginangipalli Venkata Ramana Rao [2022] eKLR.”***

44. This finding only affects part of the orders sought in the Notice of Motion dated 29/04/2025, specifically prayer No. 4 of that application. In my considered view, prayers No. 2 and No. 3 are properly before this court. Consequently, the Notice of Motion partly succeeds. In that regard, I hereby grant prayers 2, 3 and 5 as follows:

- (i) That this Honourable Court hereby sets aside the orders made on 21/09/2018 and on 13/10/2022 dismissing this suit for want of prosecution.***
- (ii) That this Honourable Court hereby reinstates this suit, being HCCC No. 403 of 2011.***
- (iii) Costs of this application shall follow the event.***

45. Prayer No. 4 is declined for reasons that it is not competently before this court. The Applicants are at liberty to pursue prayer No. 4 in the Commercial and Tax Division.

46. Orders shall issue accordingly.

**Dated, signed and delivered this 15<sup>th</sup> January 2026.**

**S. N. MUTUKU  
JUDGE**

**In the presence of:**

1. ....for the Applicants
2. ....for the Respondents
3. ....for the Third Party