

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
MACHAKOS LAW COURTS  
HCCOMMIC NO. E002 OF 2025

SAMUEL  
KOMBO.....APPLICANT

-versus-

ADMINISTRATORS, ARM CEMENT PLC  
(FORMERLY KNOWN AS ATHI RIVER MINING  
LIMITED.....RESPONDENT

**RULING**

1. This Ruling is on the Applicant's application dated 8<sup>th</sup> April 2025 ('Application') and the Amended application dated 13<sup>th</sup> May 2025 ('Amended Application').
2. The Application seeks the following Orders;
  - a. Spent.
  - b. There be a temporary stay of proceedings in the Chief Magistrate's Court at Mavoko Civil Suit No. 535 of 2017 pending the hearing and determination of this Application.
  - c. The Respondent files its Responses to the Petition and Application within three (3) days of service and that the parties file submissions limited to two pages each to enable the Court to expeditiously dispose the matter or other orders and is direction this Court may deem fit and just to grant.
  - d. Special leave of the High Court be and is hereby granted to the Applicant to constitute the suit against the Respondent Anthony Muniu Thoiti and George Muriithi Weru be joined co-defendants in Civil Suit No. 535 of 2017 at the Chief Magistrate's Court at Mavoko continuation of such suits.
  - e. The costs of this application be provided for.

3. The Application was supported by the Affidavit of Samuel Kombo sworn on an even date premised on the grounds inter alia:
- a.** The Applicant filed Civil Suit No. 535 of 2017 on 7<sup>th</sup> June 2017 at the Chief Magistrate's Court at Mavoko seeking damages for a work injury against a company which remained unresolved due to jurisdictional delays.
  - b.** Throughout the pendency of this suit, the Defendant did not provide any credible or timely evidence of its alleged liquidation to this Honourable Court or me as the Plaintiff.
  - c.** It was only recently on 3<sup>rd</sup> April 2025, the Defendant, through its new advocates tendered a newspaper cutting dated 14<sup>th</sup> December 2021 and insolvency cause No. 18 of 2018 at Nairobi High Court as evidence of its administration and alleged liquidation.
  - d.** The suit filing predates the alleged liquidation and the Mavoko Court had jurisdiction to entertain the case and therefore this amounts to exceptional circumstances under Section 560 (1) of the Insolvency Act, warranting leave from this Honourable Court for the matter to proceed to its logical conclusions.
  - e.** The alleged liquidation was never formally brought to the attention of the Court or the Plaintiff and his Advocates and it seems the previous Advocates Mose and Mose were also not in the dark, as they never had any instructions and left in frustration.
  - f.** There is no prejudice to the Respondent or any other party apart from the technical objection to hinder the Applicant's justice, only technical objections stand in the way.
4. In response to the Application, the Respondent filed a Grounds of Opposition dated 13<sup>th</sup> May 2025 and filed on an even date premised on the grounds inter alia:
- a.** The Application is incompetent and bad in law as it is premised on Section 560(1) of the Insolvency Act, a provision that exclusively applies to companies that

are under administration. The said provision is wholly inapplicable to ARM CEMENT PLC, which is under liquidation.

- b. ARM CEMENT PLC ceased to be under administration when it transitioned to liquidation on 1<sup>st</sup> October 2022.
  - c. The Application improperly refers to and seeks orders against the "Administrators" of ARM CEMENT PLC including special leave to continue with proceedings against a company under administration, despite there being no Administrators currently in office.
  - d. The Applicant has failed to invoke or cite the applicable law which governs applications for leave to proceed against a company under liquidation.
  - e. This Court cannot invoke rules on its own and continue to make a finding without its jurisdiction being properly invoked by a party who seeks the court's intervention.
5. The matter subsequently came up for Mention on 13<sup>th</sup> May 2025 for directions on the Application during which the Court allowed prayer (b) of the Application pending further orders. The Court also granted the Respondent leave to file a response to the Application and scheduled the matter for Mention on 9<sup>th</sup> July 2025 for further directions.
6. In compliance with the Court's directions, the Respondent filed a further response to the Application by way of a Replying Affidavit of **Ellam Kweya** sworn on 27<sup>th</sup> May 2025.
7. Following the foregoing, the Applicant filed the Amended Application on 30<sup>th</sup> June 2025. The Amended Application sought to cure the initial defect by citing Section 432 of the Insolvency Act while still relying on Section 560 (1) of the Insolvency Act to seek leave to continue proceedings during administration and or insolvency.
8. When the matter came up for Mention for further directions on 9<sup>th</sup> July 2025, the Respondent's Counsel prayed that the Amended Application be expunged from the record, citing that it had been filed without leave of the Court. The Court however directed parties to proceed with filing and exchanging Submissions on all pending Applications.

9. The court has carefully considered the two applications, affidavits, grounds of opposition and submissions respectively filed by the Counsel for the Parties herein. The pertinent issues for determination by this court are:

**a. *Whether the Amended Application dated 13<sup>th</sup> May 2025 is properly on record, having been filed without prior leave of the Court.***

**b. *Whether the Application dated 8<sup>th</sup> April 2025 is merited.***

**a. Whether the Amended Application dated 13<sup>th</sup> May 2025 is properly on record, having been filed without prior leave of the Court.**

10. The Applicant instituted these proceedings by way of an application dated 8<sup>th</sup> April 2025 ("Application") filed under Certificate of Urgency and a Petition of an even date. In response, the Respondent filed a ground of opposition which raised the issue inter alia that the Application is incompetent and bad in law as it is premised on Section 560(1) of the Insolvency Act, a provision that exclusively applies to companies that are under administration. The said provision is wholly inapplicable to the Respondent, which is under liquidation.

11. The Application came up for mention for directions before the Court on 13<sup>th</sup> May 2025 wherein directions were given as follows:

a. The Respondent's Counsel is granted leave of 7 days to seek instructions and to file and serve a response to the Application dated 8<sup>th</sup> April 2025.

b. Upon service, the Applicant is granted leave of 7 days to file and serve a Supplementary Affidavit if need be.

c. Prayer (b) of the Application dated 8<sup>th</sup> April 2025 is allowed temporarily pending further orders of this Court.

d. Mention on 9<sup>th</sup> July 2025 for further directions on the Application dated 8<sup>th</sup> April 2025.

12. The Respondent filed a Replying Affidavit dated 27<sup>th</sup> May 2025 in further response of the Application and this seems to have prompted the Applicant to file the Amended Application dated 13<sup>th</sup> May 2025 ('Amended Application') to cure the anomalies raised by the Respondent and attempt to regularize the Application and Petition. The Amended Application was filed on 30<sup>th</sup> June 2025 as per the Judiciary Case Tracking System portal.

13. The general power to amend pleadings is provided for under Section 100 of the Civil Procedure Act which states as follows:

*“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”*

14. Order 8 of the Civil Procedure Rules expounds on the process and requirements for amendment of pleadings. Under Order 8 Rule 1, a party may amend his pleadings without leave of the court at any time before the pleadings are closed. However, even after the close of pleadings, a party may still amend his pleading with the leave of the court. This is prescribed under Order 8 Rule 3 of the Civil Procedure Act.

15. The general power to amend is also provided for under Order 8 Rule 5 which provides as follows:

*“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on **the application of** any party order any document to be amended in such manner as*

*it directs and, on such terms, as to costs or otherwise as are just.”*

16. It is trite law that unless expressly provided for in law, a party who wishes to amend his pleadings shall do so **with leave of the Court.**
17. A cursory perusal of the record reveals that the Applicant herein never sought leave of the court to file the Amended Application and hence no leave whatsoever was granted for the filing of the amended Application and Petition.
18. While a party is allowed to make such amendments as maybe necessary, the Applicant ought to have followed the appropriate procedure and filed an application seeking leave to amend the Application and Petition.
19. In striking out the Amended Plaintiff as well as the witness statements filed alongside without leave, Hon. Justice Mwangi Njoroge in **Emmanuel Freudenthal & Another v Sonia Rylie & Another (2025) eKLR**, held that:

*"9. This court is of the view that the amended plaintiff having been filed out of time ought to be struck out. It is crucial that the other parties be granted a chance to scrutinize the amendments proposed before they are deemed as effected, and if necessary, raise any proper objections which the court may either uphold or overrule. I think that the defendants have been denied an opportunity to comment on the purported amended plaintiff before it was filed That in itself is irregular.*

.....

*12. I do not think a separate standard should be applied to any of the documents . that ought to have been filled with the plaintiff in this case. Leave ought to have been sought. As the plaintiff never sought leave, they too are irregular. The court can not refer to*

*them. It is as though they were never filed in the first place. "*

20. Also, in the case of **Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 13 others [2019] KECA 868 (KLR)** wherein the Court in striking out the Amended Notice of Motion cited the case of **Boniface Mutinda Kabaka vs. David Mutua Kamonde Katua & 51 others [2018] eKLR**, where the trial judge expressed:

*"28. Having filed the Amended Defence and Counter-claim without the leave of the court, I find that the Amended Defence and Counter-claim dated 10<sup>th</sup> May, 2016 and filed on the same day is a nullity."*

21. In **Public Trustee v Pius M. Katambo [2018] KEELC 2937 (KLR)** Judge A. A. Omollo held that:-

*".....secondly that the amendment was undertaken without leave of the Court, I find the amended notice of motion dated 24<sup>th</sup> January 2018 as void ab initio & misconceived thus a candidate for striking out. Although the applicant cited article 159 of the Constitution, the defect herein cannot be treated as procedural technicality. Consequently, I hereby strike it out for being an abuse of the Court process"*

22. The court record shows that the Respondent's counsel on 9<sup>th</sup> July 2025 objected to the Applicant filing submissions to the Amended Application and Petition which were amended without the leave of the court. However, the Court directed the parties to file their respective Submissions addressing the said concern.
23. This court has now had the opportunity to internalize on the Amended Application dated 13<sup>th</sup> May 2025 and clearly the same is not properly on record having been filed without leave of the court.

24. For this reason, I make a finding that the amendment carried out was irregularly done and, on this account, the Amended notice of motion application dated 13<sup>th</sup> May 2025 ought to be expunged from the Court record as it is done in contravention of the rules of procedure put in place to create order and fairness.
25. The Applicant argued that the amendment dated 13<sup>th</sup> May 2025, aligns the application and Petition for clarity of the orders sought as Article 159(2)(d) mandates justice without undue regard to technicalities.
26. It is a mandatory requirement that an amendment after service of an application or after closed of pleadings ought to be done with the leave of the court. Having found that the amendment dated 13<sup>th</sup> May 2025 to the application and Petition cannot stand.
27. This is not a defect which can be cured under **Article 159 (2) (d)** of the **Constitution** which deals with procedural technicalities. It has been stated in **Zacharia Okoth Obanado -V- Edward Akong’o Oyugi & 2 Others:-**
- “Article 159 (2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”***
28. Accordingly, the Amended notice of motion application dated 13<sup>th</sup> May 2025 is expunged from this court record.

**b. Whether the Application dated 8<sup>th</sup> April 2025 is merited.**

29. Having expunged the Amended Application dated 13<sup>th</sup> May 2025 from this court record, the court will proceed to determine whether the application dated 8<sup>th</sup> April 2025 is merited. In this application, the Applicant seeks Special leave of the High Court to be granted to the Applicant to constitute the suit against the Respondent and Anthony Muniu Thoiti and George Muriithi Weru be joined as Co-defendants in Civil Suit No. 535 of 2017 at the Chief Magistrate's Court at Mavoko for continuation of such suits.
30. The Application is brought under Article 165 (6) of the Constitution of Kenya, Section 1A, 3 and 3A of the Civil Procedure Act, Section 560 of the Insolvency Act No. 18 of 2018 and Order 51 Rule 1 of the Civil Procedure Rules.
31. **Section 560(1)** of the Insolvency Act provides:-

*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."*

32. From the above-mentioned section, it is clear while a company is under Administration, for one to take steps to enforce a security over the company's property one has to obtain a consent of the administrator or act with approval of the court. This includes even attachments and executions.
33. The Respondent has stated that it ceased to be under administration when the Company (ARM Cement PLC) transitioned to liquidation on 1<sup>st</sup> October 2022. The subsequent liquidation was duly gazetted and published in the daily newspaper, placing them firmly in the public domain. Further, the publication of the Notices was made in compliance with statutory requirements under the Insolvency Act and serves as formal confirmation of the Company's legal status which then becomes public record. The Respondent attached documents in proof of the same. The Respondent submitted that the timing or form of disclosure does not alter the legal status of the company, which has been under liquidation since 2021.
34. It is trite law that no claim can be brought or continued against a company under liquidation without leave of Court. To continue with the proceedings, a party must seek leave and to do so, the Applicant ought to have moved this Court under **Section 432 (2)** of the Insolvency Act which provides that:
- "When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate. "*
35. The above section provides that whenever a liquidation order has been made or a provisional liquidator has been appointed

in relation to a company, leave of the court ought to be obtained before commencing or continuing with legal proceedings against the company under liquidation.

36. To buttress the above position, Honourable Justice Peter Mulwa in the case of **Jatomy Supermarkets Limited aka Jatomy Enterprises Limited v Kenafic Industries Limited & 2 others [2025] eKLR**, stated that:

*"This provision is clear, once a liquidation order has been made, any legal proceedings against the company cannot proceed without first obtaining the court's approval. The requirement is meant to protect the integrity of the liquidation process and prevent unnecessary or improper interference in the administration of the company's assets".*

37. There is a clear distinction in the Insolvency Act between Liquidation under Section 432 and Administration under Section 560, each providing a distinct procedural framework. Section 432 (2) of the Insolvency Act governs matters pertaining to the liquidation of companies, whereas Section 560 (1) of the Insolvency Act is concerned specifically with companies under administration. In the instant case, there is nothing in the pleadings before the Court to show that the Company ARM Cement PLC is under administration. On the contrary, the Applicant's own annexures SK-2 is a copy of the newspaper cutting dated 14th December 2021 which clearly acknowledges that the company is currently in liquidation.

38. In the case of **Ismail Rahimtulla Trustees Registered & Another v Joint Administrators - Spenco Kenya Limited (Under Administration) & 2 Others [2020] eKLR** Honourable Justice Eboso held that orders of liquidation and administration cannot be both in force simultaneously. The Court went ahead in great length to discuss the differences in both provisions as follows:

*"14. The framework in Section 432 of the Insolvency Act relates to liquidation of companies. It provides that whenever a liquidation order has been made or a provisional liquidator has been appointed in relation to a company, leave of the court ought to be obtained before commencing or continuing with legal proceedings against the company.*

*16. The framework in Section 560 of the Insolvency Act relates to administration of companies. It provides for a moratorium on legal processes when an administration order is in force. It provides that a person may begin or continue legal proceedings against the company only with the consent of the administrator or with the approval of the court.*

*17. There is nothing in the pleadings before court to suggest that Spencon Kenya Limited is in liquidation. In any event, orders of liquidation and administration cannot both be in force simultaneously. There is therefore nothing to support the contention that the framework in Section 432 is applicable to this suit. "*

39. The Applicant's assertion that throughout the pendency of the suit, the Respondent did not provide any credible or timely evidence of its alleged liquidation to the Court and Applicant is misplaced. It is common ground that the Respondent's liquidation is a matter of public notoriety. The liquidation was publicly gazetted and widely published and it is improper for the Applicant to allege that it was first disclosed through the newspaper cutting. The Applicant and his Counsel had a duty to verify the Company's legal status even at the Company's Registry before instituting the Application and Petition herein.
40. The Applicant in placing reliance on Section 560 of the Insolvency Act has failed to invoke or cite the applicable law which governs applications for leave to proceed against a

company under liquidation. This Court cannot therefore invoke rules on its own and continue to make a finding without its jurisdiction being properly invoked by a party who seeks the court's intervention.

41. The Court of Appeal when faced with an instance where the Applicant filed an application under the wrong provisions of the law in the case of **Ann Wangeci Mariga & 2 Others v Margaret Waniiru Mariga & Another [2024] eKLR**, cited with approval the Supreme Court case of **Daniel Kimani Njihia v Francis Mwangi Kimani & Another [2015] eKLR**, which stated:

*"In the Hermanus case, this Court had indicated how it should be moved, thus [paragraph 23]: "...It is trite law that a Court of law has to be moved under the correct provisions of the law." Hence, without thus identifying the proper legal framework for the motion, an application is liable to be struck out. "*

42. Similarly, in the case of **Michael Munqai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR** the court held thus:

*"In the case of **Hermanus Phillipus Stevn v. Giovanni Gnnechi-Rusccone, Supreme Court, Application No. 4 of 2012**, this Court was categorical that a Court has to be moved under a specific provision of the law. The Court stated that: it is trite law that a Court of law has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is the Constitution, the Supreme Court Act and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the Supreme Court Act. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No*

*court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: none".*

43. The Court of Appeal therefore found that the Application was fatally defective and incompetent and proceeded to strike it out.
44. This court similarly finds the Applicant's Application dated 8<sup>th</sup> April 2025 to be incompetent and bad in law having been brought under the wrong provisions of the law. The Application also improperly refers to and seeks orders against the "**Administrators**" of the Respondent including special leave to continue with proceedings against a company under administration, despite there being no Administrators currently in office as demonstrated by the Respondent.
45. Guided by the above Court of Appeal decisions, this court finds that the Application dated 8<sup>th</sup> April 2025 lacks merit and is liable to being struck out having been hinged on the wrong provisions of the law.
46. The upshot is that the Applicant's Applications dated 8<sup>th</sup> April 2025 and 13<sup>th</sup> May 2025 respectively are hereby dismissed with costs assessed at Kshs.20,000/= for each application.

It is so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 3RD MARCH 2026

**NOEL I. ADAGI  
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 3RD MARCH 2026

**In the presence of:-**