In re Terra Fleur Limited (Insolvency Cause E032 of 2025)
[2026] KEHC 2963 (KLR) (Commercial and Tax) (26 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E032 OF 2025

MA OTIENO, J

FEBRUARY 26, 2026

IN THE MATTER OF THE INSOLVENCY ACT, CAP 53

AND

IN THE MATTER OF TERRA FLEUR LIMITED

BETWEEN

TERRA FLEUR LIMITED ..... PETITIONER

AND

SWANI COFFEE ESTATES LIMITED ..... RESPONDENT

RULING

Introduction

1. Before this Court are two applications: -

    i. The Petitioner/Debtor's Notice of Motion dated 21st May 2025 seeking stay of execution of the decree in Milimani HCCC No. 202 of 2008 pending the determination of its insolvency petition.

    ii. The Respondent/Creditor's Notice of Motion dated 25th November 2025 seeking to set aside the ex parte stay orders granted on 22nd May 2025.

2. The application was canvassed by way of written submissions. The Applicant filed submissions dated 9th February 2026, whilst the Respondent (Creditor) filed submissions dated 18th December 2025.

3. The Petitioner's application is premised on the contention that it is insolvent, has ceased operations, and has invoked the insolvency jurisdiction of this Court to allow orderly liquidation proceedings to

take place without the disruption of execution. The Petitioner contends that the denial of a stay would render the insolvency process nugatory.

4. The Respondent opposes the application and urges the Court to set aside the ex parte stay orders. It contends that the application is procedurally defective, seeks no substantive relief capable of sustaining interim orders, is founded on inapplicable and repealed provisions of law, and was obtained through material non-disclosure and deliberate non-service. The Respondent further argues that the application is a stratagem to defeat the execution of a valid decree delivered on 8th May 2025.

Analysis and Determination

5. Having considered the rival submissions, the affidavits on record, and the applicable law. The Court finds the following issues as requiring determination of this Court: -

   i. Whether the Petitioner's application dated 21st May 2025 is competent and merited.

   ii. Whether the stay orders issued ex parte on 22nd May 2025 should be set aside.

   iii. Who should bear the costs of the applications?

6. The substantive prayer in the Petitioner's Motion seeks stay of execution pending the hearing and determination of the application itself. The application does not seek stay pending the hearing and determination of the liquidation petition.

7. The Respondent correctly points out that such a prayer is vague and self-defeating. That a stay pending determination of the application itself is spent once the application is heard. That the proper prayer ought to have been stay pending determination of the liquidation petition.

8. The High Court in H.M v S.K [2015] KEHC 6803 (KLR) emphasized that prayers must be substantive, precise, and grantable. A defective prayer cannot be salvaged by affidavit evidence. I agree with the Respondent that the Petitioner's application is misconceived and lacks a substantive prayer.

9. In Kahora v Ng'ang'a [2025] KEHC 11888 (KLR), the Court held that parties are bound by their pleadings. Certainty and precision are indispensable in applications seeking discretionary relief.

10. In the present case, the Court finds that formulation is not a mere technical lapse. Once the interim prayer was granted ex parte on 22nd May 2025, the application effectively exhausted itself. No substantive relief remains capable of determination. The Court is not permitted to re-craft a party's pleadings or presume relief that was never sought.

11. Further, the application is premised on Order 42 Rule 6 of the Civil Procedure Rules and the repealed Companies (Winding Up) Rules. As correctly pointed out by the Respondent, Order 42 governs stay pending appeal, yet no appeal exists. Equally, the Companies (Winding Up) Rules were repealed upon enactment of the *Insolvency Act*, 2015.

12. The correct statutory foundation for stay of proceedings upon presentation of a liquidation application ought to have been the *Insolvency Act* 2015 and the Insolvency Regulations 2016. Section 428 of the *Insolvency Act* specifically provides for stay of proceedings once a liquidation petition is lodged. However, this provision was neither expressly invoked nor substantively addressed.

13. A court of law must be moved under the correct legal framework. Relief cannot be founded on repealed or inapplicable provisions. Accordingly, the Court finds and holds that reliance on repealed law by the Petitioner renders the application incompetent.

14. Regarding the Respondent's prayer to have the orders issued herein set aside, the Court notes that despite the ex parte stay orders having been granted on 22nd May 2025, with express directions on service, the Respondent, however, demonstrated, without contradiction, that service was not effected for several months, and that it only became aware of the proceedings while taking steps towards execution. This conduct amounts to material non-disclosure and abuse of process.

15. The Court agrees with the Respondent's submissions that ex parte orders obtained without full and frank disclosure must be set aside, as was stated in Mwangi v Machakos County Land Registrar [2023] KEELC 15938, where the Court stated that: -

> " It is perfectly well settled that a person who makes an exparte application to court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, when an Applicant comes to the court to obtain relief on an exparte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not, misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement. In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include, (i) the duty of the applicant is to make full and fair disclosure of the material facts (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materially is to be decided by the court and not the assertions of the applicant or his legal advisors (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) the extent of the inquiries which will be held to be proper, and therefore necessary must depend on all the circumstances of the case."

16. Here, the stay orders issued on 22nd May 2025 were granted ex parte on the basis of incomplete disclosure. The Respondent was not served despite directions. The right to be heard is constitutional. Orders made without service are a nullity and must be set aside ex debito justitiae – see Munguti v Kinuthia [2022] KEELC 15070).

17. I am satisfied that the Respondent has demonstrated material non-disclosure and non-service. The stay orders cannot stand.

18. Even assuming the application was procedurally sound and competent, the Court finds that the Petitioner has not demonstrated substantial loss or prejudice that would justify an order for stay. The decree was not under execution when the application was filed. The apprehension that its director may be committed to a civil jail is speculative. No evidence of imminent execution was placed before the Court.

19. Further, the Petitioner's insolvency petition may be properly prosecuted, but it cannot be used as a shield to defeat a valid decree. The timing of the petition – filed immediately after judgment- suggests

an attempt to evade lawful obligations. As observed was rightly stated in Belladonna Pharmacy Limited v Belmont Pharmaceutical Limited [2023] KEHC 23651 (KLR), insolvency proceedings should not be invoked as a scheme to run away from debts. Here, the balance of convenience, in the circumstances, tilts in favour of allowing lawful execution to proceed unless and until properly stayed under the *Insolvency Act*.

20. Accordingly, having considered the matter, I make the following final orders: -

    i. The Petitioner/Debtor's Notice of Motion dated 21st May 2025 is hereby dismissed for being incompetent and lacking merit.

    ii. The ex parte stay orders issued on 22nd May 2025 are hereby set aside.

    iii. The Respondent/Creditor's Notice of Motion dated 25th November 2025 is allowed.

    iv. Costs of both applications shall be borne by the Petitioner/Debtor.

21. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS 26TH FEBRUARY 2026

ADO MOSES

JUDGE

In the presence of: -

C/A – Moses

.....for the Petitioner