



Cytonn Investments Partners Four, LLP v Mutua & another (Environment & Land Case E061 of 2022) [2024] KEELC 410 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E061 OF 2022
CA OCHIENG, J
JANUARY 31, 2024**

BETWEEN

CYTONN INVESTMENTS PARTNERS FOUR, LLP PLAINTIFF

AND

JOHN KIOKO MUTUA 1ST DEFENDANT

SERAH NZEMBI MUTUA 2ND DEFENDANT

RULING

1 What is before Court for determination is the Defendants' Notice of Motion Application dated the 24th May, 2023 brought pursuant to Section 234 of the [Insolvency Act](#), Order 2 and 51 of the [Civil Procedure Rules](#) as well as Sections 3A, 1A and 1B of the [Civil Procedure Act](#). The Defendants' seek the following Orders:-

1. Spent
2. That pending the inter partes hearing of this Application, this Honourable Court be pleased to stay further proceedings in this matter and the delivery of the pending Ruling in this matter.
3. That after the inter partes hearing of this Application, this case be struck out on the grounds that the Plaintiff lacks capacity to prosecute the same.
4. That in the alternative, this case be stayed to await the outcome of the liquidation process as directed by the Honourable Court in Milimani High Court Insolvency Petition No. E 063 of 2021 – [Cytonn High Yields Solutions LLP \(\(In Administration\) Vs Official Receiver](#) (2023) KEHC 16 (KLR) in the Ruling dated 6th January, 2023.



5. That the Honourable Court be pleased to give all necessary and proper directions as shall be necessary in this matter.
 6. That the costs of this Application.
- 2 The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 1st Defendant JOHN KIOKO MUTUA where he deposes that on 6th January, 2023 the High Court in Milimani delivered a Ruling in Insolvency Petition No. E 063 of 2021 – Cytonn High Yields Solutions LLP ((In Administration) Vs Official Receiver (2023) KEHC 16 (KLR) in which it directed that the Plaintiff herein be placed under liquidation because of its inability to pay its debts. He explains that the Honourable Court referred to the various ‘Cytonns’ and directed that all pending proceedings by or against them be stayed and be directed to the Official Receiver. He claims the Honourable Court further directed that all the properties by the various Cytonn SPVs amongst them Mystic Plains LLP, the SPV in the Joint Venture Transaction, the subject matter of this suit be preserved pending the liquidation process. He reiterates that in the circumstances, this Court lacks jurisdiction to proceed with this case. He insists that the Cytonn Investments Management Limited and Cytonn Real Estate LLP who are parties to the JVA dated the 18th December, 2015, the subject matter of this suit have been placed under Liquidation.
- 3 The Plaintiff opposed the instant Application by filing a Replying Affidavit sworn by its representative EDWIN H. DANDE where he avers that the Plaintiff herein is different from Cytonn High Yields Solutions LLP which is under administration. Further, that the two are separate legal entities. He insists that by law, the Plaintiff herein has powers to sue and be sued distinct from Cytonn High Yields Solutions LLP. He avers that the subject contract herein was between the Plaintiff and the Defendants and not with the purported Cytonn High Yields Solutions LLP and therefore there is no error in bringing about this suit. He admits that the Honourable Judge while delivering a Ruling in Petition E063 of 2021 deemed it fit to preserve all properties related to all the different Cytonn entities pending the Administrator’s report on the status of the debts. He confirms that the subject matter in this case was also mentioned as preserved under the impugned Ruling pending the liquidation process. He avers that they are not opposed to stay of proceedings in this matter pending the outcome of the Ruling delivered by the Court in Petition No. E063 of 2021. He contends that this case is proper before court and that the prayer by the Defendants that this case be struck out on the ground that the Plaintiff lacks capacity to prosecute the same is misplaced and dishonest. He argues that when the Plaintiff filed the Application seeking to preserve the subject property, they did not know and or anticipate what the Insolvency Petition would achieve. Further, that the preservation orders on the suit property sought in the Plaintiff’s Application has been granted in the Ruling dated the 6th January, 2023 in Insolvency Petition No. E063 of 2021 even though there is no duplication as the Plaintiff herein was not part of that Petition.
- 4 The Application was canvassed by way of written submissions.

Analysis and Determination

- 5 Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether this Court has jurisdiction to hear and determine this matter.
- 6 The Defendants in their submissions contend that this court does not have jurisdiction to hear and determine this matter as the Plaintiff lacks capacity to prosecute this suit. They contend that in view of the Ruling in the Insolvency Court, there is nothing more this court can deal with. Further, that the



Plaintiff is a 'Cytonn' and the SPV called 'Mystic Plains LLP's property' which is the subject matter of this suit has been preserved by the High Court which is the court of competent jurisdiction. To buttress their averments, they relied on Section 432(2) of the *Insolvency Act* as well as the following decisions: *Owner of Motor Vessel 'Lillian S' vs Caltex Oil (K) Ltd* (1999) KLR 1; *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* (2012) eKLR and *Alfred Njau & Others vs City Council of Nairobi* (1982) KAR 229.

7 The Plaintiff in its submissions reiterate the averments as per the Replying Affidavit and insists that the parties in the insolvency Petition are distinct from the parties herein. Further, that the insolvency Petition does not in any way affect the parties in this suit. It avers that this court has jurisdiction to deal with this matter as the Sale Agreement falls squarely within the purview of this court. To support its averments, it relied on the following decisions: *Shidva Mohamed Mbarak v Lesbego Kenya Limited & Another* (2018) eKLR and *Ken Kasingia v Daniel Kiplagat Kirui & 5 Others* (2015) eKLR.

8 In the Plaint dated the 4th August, 2022, the Plaintiff claimed they entered into two contracts dated the 18th December, 2015 with the Defendants in respect to land parcel numbers LR 13208/2, 28055 and 28056 Athi River. It confirmed that there was a joint venture contract with the Defendants whose purpose was to develop the aforementioned suit lands through a Special Purpose Vehicle (SPV) called 'Mystic Plains.' The Plaintiff hence sought for the following Orders:

- a. A conservatory order restraining the Defendants from wasting the properties known as LR 13208/2, 28055 and 28056 Athi River.
- b. An order restraining the Defendants from advertising, selling, leasing, alienating, renting, charging or in any other manner whatsoever interfering with all and or any portion of the properties known as LR 13208/2, 28055 and 28056 Athi River.
- c. Costs of this suit.
- d. Any other relief that the court may deem fit and just to grant.

9 The Defendants have sought for the suit to be struck out contending that this court lacks jurisdiction to determine the dispute herein since the Plaintiff is under insolvency. The Defendants have referred to a Ruling delivered on 6th January, 2023 in Insolvency Petition No. E 063 of 2021 – *Cytonn High Yields Solutions LLP ((In Administration) Vs Official Receiver* (2023) KEHC 16 (KLR).

10 I note in the impugned Ruling, the Court observed that:-

The SPVs are under the control and direction of Edwin H Dande, the Chief Executive Officer of the company? They are all "Cytonns".... The applicants have also sought for preservation orders of the assets/projects disclosed as Kilimani Asset, the Alma, Applewood/Miotoni, Riverrun, Wasini/Cysuites, Superior Homes, Athi River Asset, the Alpha and Taraji and have them put under the custody of the official receiver. This has been opposed on the grounds that those projects belong to other entities and that it would be against the rules of natural justice. It was the respondent's contention that the SPVs were registered under different entities and were not under the control of the company. From the administrator's statement of proposal, dated 28/2/2022, he disclosed that CHYS was owed a total of Kshs 5,808,831,300 from the following SPVs as at 6/10/2021.... Newtown Mystic Plains, – Kshs 60,534,764.... In the present case, it is not in dispute that CHYS is seriously ailing and the creditors have suffered and continue to suffer as CHYS is unable to pay what it owes them. The administration has not worked and the court is of the view that the viable option would be to liquidate the company. Apart from the prayer by the creditors to place the CHYS under the official receiver, there is before me an application for extension of the administration. I would treat the same as an application under section 533 of the Act and make an order for liquidation. Section 533 of the *Insolvency Act* gives



the court the power to treat an administration application as a liquidation application and make any order that the court would make under section 426 of the Act. In the premises, I find merit in the application by the creditors dated 19/5/2022 and I allow the same to the extent that: -

- a. The administration of CHYS is hereby terminated and is hereby placed under liquidation.
- b. Since the current administrator has shown to be very accommodative to the promoters of CHYS to the detriment of the creditors, I hereby appoint the official receiver as the liquidator of the company. The administrator to forthwith surrender to the official receiver all the properties and belongings of CHYS as well as the documents relating to the administration.
- c. The properties set out in the motion dated 19/5/2022 are hereby ordered to be preserved until the liquidation is concluded.
- d. In view of what I have found above, the application dated 5/10/2022 for extension of the administration is hereby declined and dismissed with costs.
- e. The pending ruling on all applications for leave to proceed with executions and/or other legal proceedings is hereby arrested to await the process of liquidation. All those claims be lodged with and be proved before the liquidator.”

11 From the excerpt of this Ruling alone, it is evident that the ‘Cytonns’ including the Plaintiff herein, have been placed under liquidation, which fact the Plaintiff has not denied. Further, the Plaintiff has admitted that the fulcrum of the dispute herein has also been preserved in the impugned Ruling. It is trite that under Section 432(2) of the *Insolvency Act*, it provides that where there is a liquidation Order as in this instance for the ‘Cytonns’, and a provisional liquidator appointed, any legal proceedings against the company can only be commenced or continued with approval of the Court.

12 On dealing with jurisdiction of a Court, the Court of Appeal in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 held as follows:-

13 By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

14 Based on the facts before me, I find that since the Plaintiff has been placed under liquidation by virtue of the impugned Ruling while relying on the legal provisions I have cited above as well as the decision quoted, I hold that the Plaintiff lacks capacity to proceed to prosecute the instant suit. Further, that by dint of Section 13 of the *Environment and Land Court Act*, this Court lacks jurisdiction to handle this matter and will proceed to strike it out.

15 In the foregoing, I find the instant Notice of Motion Application partially successful and will only allow prayer No. 3 and 5 since this suit had been commenced before a liquidation order was made in the impugned Ruling.



16 I make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF
JANUARY, 2024**

CHRISTINE OCHIENG

JUDGE

