



**Crispus v RT (East Africa) Limited (Cause E1071 of 2021)
[2024] KEELRC 25 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 25 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1071 OF 2021
JK GAKERI, J
JANUARY 25, 2024**

BETWEEN

DAVID MWANGANGI CRISPUS CLAIMANT

AND

RT (EAST AFRICA) LIMITED RESPONDENT

RULING

1. Before the court for determination is the Respondent's Notice of Motion dated 20th April, 2023 seeking orders that:-
 - i. The claim against the Respondent be dismissed with costs.
 - ii. The costs of this claim and this application be borne by the Claimant in any event.
2. The Notice of Motion is expressed under Article 159 of *the Constitution* of Kenya, 2010, section 560(d), 560A and 561(3), (4) and (6) of the *Insolvency Act*, 2015 and is based on the grounds set out on its face and the Supporting Affidavit of Ponangipalli Venkata Ramana Rao sworn on 20th April, 2023.
3. The affiant depones that he is the Administrator of the Respondent and the Respondent was placed under Administration on 11th June, 2021 by debenture holders and the same was published in the Kenya Gazette under Gazette Notice No. 5917 on 18th June, 2021 and published in the Daily Nation Newspaper on 15th June, 2021.
4. That the administration was extended by the High Court effective 9th June, 2022 and the Claimant has neither obtained the Consent of the Administrator nor sought the court's leave to commence the suit.
5. In his grounds of opposition, the Claimant avers that Prayer 1 is not available to the Respondent as no cogent evidence has been availed to demonstrate the 'purported' administration of the Respondent is still in progress.



6. That Prayer 2 of the Notice of Motion is discretionary and not available to the Respondent and the Preliminary Objection dated 31st March, 2022 was disallowed.
7. According to the Claimant, the Notice of Motion dated 20th April, 2023 is incompetent, bad in law and fatally defective and ought to be dismissed.

Claimant's Submissions

8. Counsel submitted that parties are bound by their pleadings which set the agenda for the trial. That a party cannot raise a different or fresh case without an amendment.
9. As regards the burden of proof, counsel submitted that he who alleges must prove as ordained by section 107 of the *Evidence Act*. That the party suing is bound to adduce evidence to prove litigated facts.
10. Counsel submitted that the dismissal of the suit sought by the applicant was unavailable as the suit is yet to be heard and the Notice of Motion fails.
11. Counsel submitted that the applicant tendered no evidence to prove that the purported Administration of R.T. (East Africa) Ltd was still continuing as the applicant did not show that the administration had been extended for 12 months.
12. That Prayer No. 2 is discretion and not available to the applicant.

Respondent's Submissions

13. Counsel isolated one issue for determination, namely; whether the Claimant's case ought to be struck out for want of Consent of the Administrator or approval by the court.
14. Counsel relied on the provisions of the *Insolvency Act*, 2015 to submit that legal proceedings can only be commenced or continued against a company in administration with Consent of Administrator or approval of the court. That once an Administrator is appointed, a moratorium comes into effect as held in *Nakumatt Holdings Ltd & another v Ideal Locations Ltd* (2019) eKLR.
15. Reliance was also made on the decision in *George Mureithi & 5 others v Kenatco Taxis Ltd (in Receivership)* (2016) eKLR among others.
16. Finally, counsel submitted that the Respondent enjoyed a legal moratorium by virtue of being in administration and can neither be sued nor legal proceedings continued without the requisite consent or authority.
17. Counsel urged the court to grant the prayers sought.

Determination

18. The singular issue for determination is whether the Respondent's Notice of Motion is merited.
19. According to the applicant's counsel, since Justice Okwany extended the term of Administration of the Respondent for a further period of 12 months' in Petition No. E046 of 2021, the Claimant's suit is incompetent and should be struck out.
20. The Claimant's defense is simply that since the Respondent's Preliminary Objection filed earlier was dismissed and the orders sought in the Notice of Motion are unmerited.



21. It is common ground that the Respondent filed a Preliminary Objection dated 31st March, 2022 which the court found unmeritorious for want of supportive evidence.
22. Needless to belabour, the Respondent is now using a different route in an endeavour to attain a similar outcome and has now attached the requisite documentation.
23. The pith and substance of the Respondent's case is that the Claimant has not complied with the provisions of Section 560 of the Insolvency Act, 2015 in that he has neither obtained the Administrator's consent to institute the suit nor the court's leave to do so.
24. For purposes of context, the Claimant's suit was filed on 8th January, 2022 and records reveal that the Respondent was placed in Administration effective 11th June, 2021.
25. It therefore follows that Claimant's suit was commenced when the process of Administration was already underway and consent of the Administrator or leave of the court was a prerequisite.
26. Section 560 of the Insolvency Act, 2015 provides that during Administration, 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 approval of the court.
27. It requires no emphasis or belabouring that the Claimant has neither of the above and has not demonstrated the effort made or expended to obtain the same.
28. The essence of administration in company law was captured by Tuiyott J. in Midland Energy Ltd v George Muiruri t/a Leakeys Auctioneers & another (2019) eKLR as follows;

“The devise of Administration as an alternative to Insolvency is a new feature in our insolvency laws. It is provided for under Part VIII of the Insolvency Act No. 180 of 2015. These proceedings demonstrate tensions that can arise between creditors of a company under Administration. The design of our current Insolvency laws is to give a second chance to financially distressed companies. A break from the past where the fate of an ailing company would invariably be a winding up or liquidation order. Administration is one of the alternatives to liquidation and is provided for in Part VIII of the Act . . . so as to achieve that objective of a company must be insulated from aggressive creditors who could cause a run of the company assets. The statute contemplates that upon such protection, a company will not be distracted from precipitate action and so the Administrator will be able to perform his function in the interest of all the company's creditors. The insulation of the company is provided by way of a moratorium from other legal processes.”
29. Onguto J. expressed similar sentiments in In re Nakumatt Holdings Ltd (2017) eKLR.
30. Finally, in Cook v Mortgage Debenture Ltd (2016) EWCA Civ. 103, the court expressed the view that;

“ . . . the moratorium prevents any creditor from obtaining priority and thereby undermining the paripassu basis of distribution . . . the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation.”
31. The court is in agreement with the foregoing sentiments on administration and the import of the moratorium.
32. Although the Respondent has evidentiary demonstrated that the Respondent is indeed in Administration and has been since Mid-2021, for unexplained reasons, it withheld the evidence in its



Preliminary Objection which would have enabled the court to arrive at a just determination of the Preliminary Objection as it failed for want of supportive evidence.

33. In effect, the Respondent is seeking a second bite at the cherry.
34. In the circumstances, the court is not persuaded that the orders sought are merited as they would drive the Claimant from the seat of judgement before the suit is heard on merit.
35. In the upshot, the Respondent's Notice of Motion dated 20th April, 2023 is disallowed.
36. There shall be no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JANUARY 2024.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

