



**Cosmas v Eldoret Mattresses Limited & another (Cause
66 of 2017) [2024] KEELRC 1664 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1664 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 66 OF 2017
MA ONYANGO, J
JUNE 28, 2024**

BETWEEN
IMMANUEL LOIKWANGA LOKTARI COSMAS CLAIMANT
AND
ELDORET MATTRESSES LIMITED 1ST RESPONDENT
DANIEL NGUGI T/A KAMTINGA SERVICES LIMITED 2ND RESPONDENT

RULING

1. Vide an application dated 6th February, 2024 filed under certificate of urgency, the Claimant seeks for the following orders:
 - a. That the Claimant/Applicant be granted leave to join the Official liquidator as the 3rd Respondent.
 - b. That the Claimant/Applicant be granted leave to amend the amended pleadings as set out in the draft-amended memorandum of claim herein annexed.
 - c. That the draft-amended memorandum of claim be deemed as duly filed and served.
 - d. That the costs for this Application be provided for.
2. The grounds in support of the Application are that:
 - i. That the 1st Respondent through its Directors, petitioned the court for voluntary liquidation vide High Court Commercial And Admiralty Division Insolvency Petition No. E007 OF 2018.
 - ii. That through a resolution passed on 24th September 2018, the Directors sought to liquidate the company and it was resolved that an Official Liquidator was to be appointed as Liquidator of the company.



- iii. That judgment of the Petition was delivered on 5th March 2019 and it was ordered that the Official Liquidator was to take over the management of the company immediately.
 - iv. That the presence of the 3rd Intended Respondent is necessary in order for the Honourable Court to effectually and completely adjudicate upon and settle all questions involved in the suit.
 - v. That the amendment of pleadings will not in any way prejudice the Respondents but will enable the court determine the real issues or questions raised by the proceedings.
3. The Application is not opposed. The same was disposed of by way of written submissions.
 4. In the submissions the Applicant states that Order 1 Rule 10(2) allows parties to amend pleadings at any time before judgment. That he was not aware about the Petition filed by the Respondent for insolvency in the High Court as Petition E007 of 2018 or that in the Judgment delivered in the said petition on 5th March 2019 the Respondent was placed under liquidation and an official liquidator appointed. That he learned of these facts from the application filed by counsel for the 1st Respondent to cease acting for the Respondent, dated 13th January 2023.
 5. It is submitted that section 432 of the *Insolvency Act* gives the court discretion to grant leave to commence or continue prosecuting legal proceedings filed against the company. That in the judgment delivered on 5th March 2019 the court directed the Liquidator to immediately take over the management of the Company.
 6. The Applicant, relying on the decision in *Civicon Limited v Kivu Watt Limited & 2 Other* [2015] eKLR, submitted that it is necessary to join the Official Liquidator in order to effectually and completely adjudicate upon and settle all questions involved in the instant suit.
 7. The Applicant further submits that Order 1 Rule 10 permits a party to substitute or add a party to the suit while Order 8 Rule 5 permits a party to amend proceedings.
 8. It is submitted that no prejudice would be suffered by the Official Liquidator and that the application is made in good faith.

Analysis and Determination

9. I have considered the application together with the grounds and affidavit in support thereof. I have further considered the submissions by the applicant.
10. The issues that arise for determination are whether this court has powers to join the Official Liquidator to this suit and whether the orders sought by the Applicant are merited.
11. The Applicant sought two distinct prayers in the application. The 1st is leave to join the official receiver to this suit and the 2nd is leave to amend its pleadings.
12. Joinder of parties is provided for in Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 as follows:

14(6) A party may amend pleadings before service or before the close of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.



13. The [Civil Procedure Rules](#) also provides for amendment of pleadings in Order 1 Rule 10 as follows:
[Order 1, rule 10.] Substitution and addition of parties.
10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
- (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
- (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.
14. Order 8 Rule 5 of the [Civil Procedure Rules](#) further provides for the general power to amend as follows:
- 5.
- (1) 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.
15. Suits by or against the Official Liquidator are provided for in sections 432, 444 and 445 of the [Insolvency Act](#) as follows:
- Section
432. Consequences of liquidation order
- (1) Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver.
- (2) 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.



- (3) An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them

444. Liquidator to assume control of company's property when liquidation order made When—

- (a) a liquidation order has been made; or
- (b) a provisional liquidator has been appointed, in respect of a company, the liquidator or the provisional liquidator shall assume control of all the property to which the company is or appears to be entitled.

445. Company's property to vest in liquidator

- (1) When a company is being liquidated by the Court, the Court may, on the application of the liquidator, by order direct all or any part of the property belonging to the company or held by trustees on its behalf to vest in the liquidator in that capacity.
- (2) On the making of such an order, the property to which the order relates vests in the liquidator.
- (3) After giving such indemnity (if any) as the Court may direct, the liquidator may begin or defend, or continue any legal proceedings that relate to that property or that it is necessary to begin or defend, or continue, for the purpose of effectively liquidating the company and recovering its property.

16. When a liquidation order is made and the official liquidator takes over the assets and management of a company the liquidator also takes over the liabilities of the company including the defence of any suits that are pending against the company. It further means that the company no longer has capacity to defend itself in any pending suits. It is for this reason that it is necessary for the official liquidator to be joined in the proceedings against the company.
17. In this case the Official Liquidator did not file a response to the application herein although it was properly served according to the court record. The application is thus undefended.
18. Section 432(2) of the *Insolvency Act* provides that when a liquidation order has been made 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.
19. The Act defines “court” as the High Court. The jurisdiction of this court is therefore limited to the joinder of the liquidator to this suit only. The Claimant will still have to obtain leave from the court that granted the liquidation orders before fixing a date for the hearing of this suit against the Liquidator.
20. The application is accordingly granted only in the following terms:
 - a. That the Claimant/Applicant be granted leave to amend the amended pleadings as set out in the draft-amended amended memorandum of claim herein annexed.
 - b. That the draft-amended amended memorandum of claim be filed and served within 14 days.
 - c. Costs shall be in the cause.



DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28TH DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE

