



**Crispus v R.T (East Africa) Limited (Cause E1071 of 2021)
[2022] KEELRC 3985 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3985 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1071 OF 2021
JK GAKERI, J
SEPTEMBER 27, 2022**

BETWEEN

DAVID MWANGI CRISPUS CLAIMANT

AND

R.T. (EAST AFRICA) LIMITED RESPONDENT

RULING

1. This is a preliminary objection dated March 31, 2022 by the respondent seeking the striking out of the entire suit filed by the claimant on the grounds that;
 - i. The suit was filed in violation of section 560 of the *Insolvency Act*, 2015 which provides for a commencement or continuation of legal proceedings against a company in administration only with the consent of the administrator or with the approval of the court.
 - ii. The respondent was placed under administration on June 11, 2021 upon the debenture holders compliance with sections 534 and 537 of the *Insolvency Act*.
 - iii. The notice of placement under administration was duly published in the Kenya Gazette Volume CXXIII No 133 under Gazette Notice No 5917 on June 18, 2021.
 - iv. The notice of placement under administration was also widely shared in the Daily Nation Newspaper dated June 15, 2021.
 - v. The general public including the claimant was duly notified of the respondent's placement under administration.
2. The claimant opposes the preliminary objection on the premise that as was drawn and lodged by the respondent, it does not raise a pure point of law.



3. That it is general, speculative, academic and requires production of cogent evidence in support thereof including evidence in chief and cross examination and re-examination of witnesses.
4. It is the claimant's case that the respondent has not filed a notice or motion or chamber summons application and the issues raised in the notice of preliminary objection cannot be successfully prosecuted as presented.
5. It is submitted that the notice of preliminary objection dated March 31, 2022 should be dismissed with costs.
6. The respondent/applicant relies on the decisions in *Bake 'N' Bite Mombasa Ltd (Under Administration) V Janendra Raichand Shah & 3 others* (2018) eKLR, *Kenya Union of Commercial Food and Allied Workers Union V Peter Opondo Kabi & Nakumatt Holdings Ltd* (2018) eKLR and *Midland Energy Ltd V African Banking Corporation Ltd & another* (2020) eKLR to demonstrate circumstances in which suits were struck out for non-compliance with the provisions of section 560 of the *Insolvency Act*.

Respondent's Submissions

7. The respondent submits that the preliminary objection is rightfully before the court and relies on the decisions in *JN & 5 others V Board of Management St G School, Nairobi & others* (2017) eKLR and *David Nyekorah Matsanga & another V Philip Waki & 3 others* (2017) eKLR to urge that the issue raised is well founded in law and raises points of law.
8. It is submitted that this is a pertinent issue to be determined at the preliminary stage as it is determinative of the direction of the suit.
9. It is urged that non-compliance with section 560(1)(d) of the *Insolvency Act*, 2015 renders the suit amenable to being struck out.
10. The decision in *Nakumatt Holdings Ltd & another v Ideal Locations Ltd* (2019) eKLR is relied upon to urge that an action against a company or the property of a company in administration can only be commenced or continue with leave of the court.
11. Reliance is also made on the decision in *George Muriithi & others v Kenatco Taxis Ltd (in receivership)* (2016) eKLR to urge that leave of the court is necessary where a winding-up order or appointment of interim liquidated has taken place.
12. It is submitted that the respondent enjoys a moratorium afforded to companies under administration which bars any action against it during administration.

Claimant's submissions

13. The claimant did not file submissions.

Determination

14. The issues that commend themselves for determination are;
 - i. Whether the preliminary objection dated March 31, 2022 meets the threshold of a preliminary objection.
 - ii. Whether the claimant's suit should be struck out for non-compliance with section 560 of the *Insolvency Act*, 2015.



15. As to whether is a preliminary objection before the court, the starting point is the nature of a preliminary objection as enunciated in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1967) EA 696 where Law JA stated as follows;

“So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
16. Newbold P expressed himself as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . .”
17. The respondent submits that the fact that the claimant has not complied with the provisions of section 560 of the *Insolvency Act*, 2000 is a pure point of law and thus a preliminary objection as defined in the Mukisa Biscuit Manufacturing Ltd case.
18. Section 560 of the *Insolvency Act*, 2015 provides that while a company is under administration –
 - a. . . .
 - b. . . .
 - c. . . .
 - 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 approval of the court.
19. This section is explicit that commencement or continuation of proceedings against a company in administration requires approval of the court or the administrator.
20. The salient issue for determination is whether the absence of approval is a question of law to qualify as a preliminary objection.
21. The court is persuaded that the issue at hand constitutes a competent preliminary objection the procedure of bringing it before the court notwithstanding.
22. Puzzlingly, the respondent furnished no evidence to demonstrate the fact that indeed it was in administration effective June 11, 2021.
23. Neither the alleged Gazette Notice No 5917 dated June 18, 2021 nor the notice published in the Daily Nation of June 15, 2021 were produced as evidence in support of the preliminary objection.
24. It is the finding of the court that the contention that the respondent is in administration has not been established on a balance of probability.
25. Having found that the respondent has not demonstrated that it is in fact in administration in accordance with the provisions of the *Insolvency Act*, 2015, it requires no gainsaying that the preliminary objection is destined for dismissal which the court proceeds to do.



26. In the final analysis, the notice of preliminary objection dated March 31, 2022 is dismissed with no order as to costs.
27. For the avoidance of doubt, the respondent is at liberty to file an application for the striking out of the suit herein for want of the requisite approval as provided by section 560 of the [Insolvency Act](#), 2015.
28. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2022

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.

DR. JACOB GAKERI

JUDGE

