



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ongondo & 29 others v Athi River Mining Cement Co Ltd (Cause  
1870 of 2017) [2022] KEELRC 12753 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12753 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1870 OF 2017  
L NDOLO, J  
OCTOBER 6, 2022**

**BETWEEN**

**JAMES NYACHIEO ONGONDO ..... 1<sup>ST</sup> CLAIMANT  
DANIEL KIOKO MWENDWA ..... 2<sup>ND</sup> CLAIMANT  
WELLINGTON OMUMIA KASIMIRI ..... 3<sup>RD</sup> CLAIMANT  
EVANS OGETO ..... 4<sup>TH</sup> CLAIMANT  
SIMON MUTUA KAKELE ..... 5<sup>TH</sup> CLAIMANT  
MUSA NYONGESA MUDOGO ..... 6<sup>TH</sup> CLAIMANT  
NELSON KIBET MILGO ..... 7<sup>TH</sup> CLAIMANT  
ISAAC MWANZIA MWAKE ..... 8<sup>TH</sup> CLAIMANT  
ERIC SIMAJO MASAI ..... 9<sup>TH</sup> CLAIMANT  
WILSON KIPNG'ETICH BETT ..... 10<sup>TH</sup> CLAIMANT  
JOHN GAWO OWINO ..... 11<sup>TH</sup> CLAIMANT  
ROBERT MAINGI NGIEMA ..... 12<sup>TH</sup> CLAIMANT  
VINCENT OKOIT EKALAN ..... 13<sup>TH</sup> CLAIMANT  
ISAAC LAGAT ..... 14<sup>TH</sup> CLAIMANT  
SYLVESTER RUTOH ..... 15<sup>TH</sup> CLAIMANT  
THOMAS KITUR OLE RASHA ..... 16<sup>TH</sup> CLAIMANT  
HERMAN MANDE MASABA ..... 17<sup>TH</sup> CLAIMANT  
JOSEPH NYAKAMBA ANARI ..... 18<sup>TH</sup> CLAIMANT  
JACOB SANKAIRE OLE LUYIANA ..... 19<sup>TH</sup> CLAIMANT**



<b>JAPHETH NGARE MAATO .....</b>	<b>20<sup>TH</sup> CLAIMANT</b>
<b>PETER MALIKA MUTUA .....</b>	<b>21<sup>ST</sup> CLAIMANT</b>
<b>LANGAT KIPKEMOI .....</b>	<b>22<sup>ND</sup> CLAIMANT</b>
<b>JULIUS MAILU NGOYO .....</b>	<b>23<sup>RD</sup> CLAIMANT</b>
<b>STEPHEN GACHUNGU WANJIRU .....</b>	<b>24<sup>TH</sup> CLAIMANT</b>
<b>VICTOR KINYENZE MWENGI .....</b>	<b>25<sup>TH</sup> CLAIMANT</b>
<b>EMUKULE ETYANG NOAH .....</b>	<b>26<sup>TH</sup> CLAIMANT</b>
<b>SHADRACK RUTOH .....</b>	<b>27<sup>TH</sup> CLAIMANT</b>
<b>ELIJAH MWANGI GATHI .....</b>	<b>28<sup>TH</sup> CLAIMANT</b>
<b>VICTOR WAMBUA KYANGA .....</b>	<b>29<sup>TH</sup> CLAIMANT</b>
<b>MOSES MAINA MATHENGE .....</b>	<b>30<sup>TH</sup> CLAIMANT</b>

**AND**

<b>ATHI RIVER MINING CEMENT CO LTD .....</b>	<b>RESPONDENT</b>
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**RULING**

1. The subject of this ruling is the claimants' application dated February 8, 2020 and the respondent's preliminary objection dated January 27, 2022.
2. By their application, the claimants seek leave to amend their memorandum of claim to enjoin National Cement Company (NCC) limited as 2<sup>nd</sup> respondent in this case.
3. The application is supported by an affidavit sworn by the claimants' counsel, Namada Simoni and is based on the following grounds:
  - a. Investigations have revealed that NCC limited has now acquired Athi River mining cement company limited, having purchased the said Athi River mining cement company limited and absorbed it under the Simba cement brand;
  - b. Further investigations have revealed that the said NCC limited has assumed all assets and businesses of Athi River mining cement company limited after paying an agreed consideration to Price Waterhouse Coopers in settlement of administration expenses;
  - c. At the accrual of the cause of action herein and during the drafting of the pleadings for this suit, the respondent existed and operated as Athi River mining cement company limited;
  - d. The amendment sought hereby shall enable the court to determine the real question in dispute between the parties and award damages fairly and accordingly;
  - e. It is in the interest of justice that the prayers sought herein are granted.
4. In his affidavit in support of the application, the claimants' counsel, Namada Simon depones that investigations had revealed that NCC limited has purchased Athi River mining company limited from the official receiver, Price Waterhouse Coopers.



5. In reaction to the claimants' application, the respondent filed a notice of preliminary objection dated January 27, 2022 stating:
  - a. That the claimants' application dated February 8, 2020 is in violation of section 560 of the *Insolvency Act*, 2015 which provides that while a company is under administration, a moratorium is placed over all legal proceedings against the company and if a party wishes to institute or continue with legal proceedings against such company, they must obtain the consent of the administrator or leave of the court;
  - b. That the respondent was placed under administration with effect from August 17, 2018, which administration is confirmed by the claimants in their application;
  - c. That the claimants have neither sought nor subsequently obtained the consent of the administrator or leave of the requisite court to continue with the proceedings herein and thus this court lacks the jurisdiction to proceed with this matter;
  - d. That the application dated February 8, 2020 is therefore misconceived, incompetent, defective, an abuse of the court process and should thus be struck out.
6. In their grounds of opposition to the preliminary objection, the claimants state that:
  - a. The preliminary objection lacks merit and is founded on wrong principles and presumptions;
  - b. The issues raised in the objection, with regard to there being a moratorium against the respondent and in opposition to the claimants' application to enjoin a new employer, is a factual issue and not a point of law;
  - c. The objection is misguided as it seeks to bar the claimants from pursuing their remedies against the new employer on the ground that the previous employer is under administration;
  - d. The grounds raised in the objection are substantive issues emerging which need to be determined at the hearing of the substantive suit;
  - e. The objection does not meet the threshold for preliminary objections as set out in the case of *Mukisa Biscuit v West End Distributors Limited* [1969] EA 696;
  - f. The preliminary objection as filed and the prayers sought thereof are unmeritorious and ought to be dismissed with costs to the claimants.
7. The parties urged their respective positions by way of written submissions. In their submissions dated June 7, 2022, the claimants state that the respondent's preliminary objection is ill conceived as it does not raise a pure point of law.
8. The claimants further question whether the respondent is still under administration, having sold its business to NCC limited. In this regard, the claimants pursue the argument that their application seeks to enjoin the new business owner, who should take over the liabilities of the respondent, including the claimants' claim.
9. In its submissions dated July 27, 2022, the respondent takes issue with the claimants' submission to the effect that the respondent is no longer under administration. The respondent states that this allegation is unsupported and further submits that an issue cannot be raised by way of submissions.
10. The respondent contends that by operation of law, section 560 of the *Insolvency Act* placed a moratorium on all legal proceedings against it, barring *inter alia*; the continuance of any court



proceedings, including the present proceedings and the subject application, without the requisite sanction of the court or the consent of the administrator.

11. Section 560 of the *Insolvency Act* states as follows:

560. Moratorium on other legal process while administration order has effect

1. 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 company's property only with the consent of the administrator or with approval of the court.

12. The claimants concede that the respondent was placed under administration effective August 17, 2018. They however seem to suggest that the administration may have been lifted, a suggestion that is not supported by any evidence.

13. Both parties rely on the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696 where the Court of Appeal defined a preliminary objection in the following terms:

“...a preliminary objection consists of a 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 to 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.”

14. By its objection, the respondent challenges the jurisdiction of this court to continue with the present proceedings in light of the fact that the respondent is under administration. The law is clear that legal proceedings can only be mounted or continued against a company under administration either with the consent of the administrator or leave of the court handling the insolvency proceedings.

15. No such consent or leave has been demonstrated and this court therefore lacks jurisdiction to proceed with the claimants' application. The said application is consequently struck out with costs in the cause.

16. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF OCTOBER 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Omamo h/b for Mr. Namada for the Claimants

Miss Mwaniki h/b for Mr. Kimathi for the Respondent

