



**Bag & Envelope Converters Limited (Under Receivership) &  
another v Virdee & another (Commercial Case E110 of 2022)  
[2025] KEHC 3157 (KLR) (Commercial and Tax) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3157 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E110 OF 2022  
MN MWANGI, J  
FEBRUARY 28, 2025**

**BETWEEN**

**BAG & ENVELOPE CONVERTERS LIMITED (UNDER  
RECEIVERSHIP) ..... 1<sup>ST</sup> PLAINTIFF**

**PRINT POINT LIMITED (UNDER RECEIVERSHIP) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JAGJIT SINGH VIRDEE ..... 1<sup>ST</sup> DEFENDANT**

**ISAAC MIANO NGETHE T/A PRINCIPAL AUCTIONEERS .. 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs vide a plaint dated 1<sup>st</sup> April 2022 instituted this suit against the defendants seeking judgment against them as hereunder -
  - i. A permanent injunction directing the defendants, their respective agents, servants, directors, employees, or otherwise howsoever, from offering for sale, advertising for sale, selling, disposing of, alienating, transferring and/or in any way interfering and/or dealing in any manner with the subject properties set out in the proclamation of attachment/repossession/distrain of moveable property dated 15<sup>th</sup> March 2022 and the notification for sale dated 30<sup>th</sup> March 2022 or on any other date or any further distress proceedings;
  - ii. A permanent mandatory injunction directing the defendants, their respective agents, servants, directors, employees, or otherwise howsoever, to return and or surrender unconditionally, the 2<sup>nd</sup> plaintiff's property proclaimed and or seized vide the proclamation dated 15<sup>th</sup> March 2022



and the notification of sale dated 30<sup>th</sup> March 2022 and through any other form or date or process;

- iii. A declaration that the purported distress for rent, seizure and attempted and intended sale by public action and the entire proceedings therein undertaken by the defendants are illegal, unlawful, irregular, null and void;
  - iv. A declaration that the proclamation of the subject properties and seizure thereof dated 15<sup>th</sup> and 30<sup>th</sup> March 2022 are illegal, unlawful and null and void ab initio and contravenes the provisions of the Moveable Property Security Rights Act and the [Companies Act](#) and all other provisions of the law; and
  - v. Any other or further relief that this Honourable court may be pleased to so grant.
2. In the plaint, the plaintiffs averred that they secured various loan facilities from Prime Bank Limited totaling Kshs.149,300,000/=. Additionally, the 2<sup>nd</sup> plaintiff, a sister company of the 1<sup>st</sup> plaintiff, also secured loans from the said Bank. The plaintiffs averred that these loans were secured by debentures over their properties and assets registered in favour of the Bank, which remain under the legal ownership of Prime Bank Limited until full repayment of the loans. They contended that the 2<sup>nd</sup> defendant proclaimed and seized assets belonging to the 2<sup>nd</sup> plaintiff on the premise of levying distress for rent arrears of Kshs.35,632,808.01, owed to the 1<sup>st</sup> defendant by the 1<sup>st</sup> plaintiff.
  3. The plaintiffs contended that these actions were unlawful since the seized assets were already pledged to Prime Bank Limited as security for outstanding debts totaling over Kshs.285,000,000/= as at 28<sup>th</sup> February 2022, which amount continued to accrue interest until payment in full. The plaintiffs stated that the appointment of Mr. PVR Rao as Manager and Receiver in July and August 2020 was undertaken well before the demands and distress was levied by the defendants hence the Receiver's claims rank above the defendants' claims in any event.
  4. In opposition to the plaintiffs' suit, the defendants filed a defence and counterclaim dated 20<sup>th</sup> September 2022. In their defence, the defendants denied all the averments in the plaintiffs' plaint. They averred that the 2<sup>nd</sup> plaintiff had entered into a six-year lease from 1<sup>st</sup> November 2016 over two go-down facilities erected on all that parcel of land known as L.R. No. 204/4134, with an understanding that both plaintiffs would occupy the said premises. They contended that the plaintiffs had defaulted on rent payments since November 2014, and that the 1<sup>st</sup> defendant as the lessor of the said property, lawfully appointed the 2<sup>nd</sup> defendant to levy distress for unpaid rent. The defendants confirmed being aware of the Receiver's appointment, but contended that after unsuccessful demands for rent payment, they proceeded with distress for rent. The defendants averred that the plaintiffs' claims are now irrelevant as the subject assets had been sold.
  5. In their counterclaim, the defendants reiterated that the 1<sup>st</sup> defendant is the lessor of all that parcel of land known as L.R. No. 204/4134, Changamwe Road, on which is erected two go-down facilities. They averred that the 2<sup>nd</sup> plaintiff entered into a Lease Agreement on 1<sup>st</sup> November 2016 over the said property, for a monthly rent of Kshs.369,000/= with a 10% increase every two years. They claimed that it was understood that both plaintiffs would occupy the premises, as they had previously done under a lease offer dated 1<sup>st</sup> September 2010. They asserted that the plaintiffs defaulted on rent payments since November 2014, accumulating arrears of Kshs.37,162,639.00 as at July 2022, but despite demands and notices to sue, the plaintiffs had failed to settle the outstanding rent.
  6. The defendants prayer is for the plaintiffs' suit to be dismissed with costs, and for judgment be entered against the plaintiffs in favour of the defendants for –



- i. Kshs.37,162,639.00;
  - ii. Interest from the date of filing suit; and
  - iii. Costs of the suit.
7. The plaintiffs filed a reply to the defence and a defence to the counterclaim dated 27<sup>th</sup> February 2023. In their reply, they averred that since the said rent arrears existed since 2014, the 1<sup>st</sup> defendant acted inconsistently by entering into a new lease in 2016. They asserted that no business operations were conducted in the premises after the Receiver Manager took over in August 2020. Further, that the Receiver Manager was unaware of any Lease Agreement or rent obligations. The plaintiffs averred that Prime Bank's rights as a secured creditor supersede the 1<sup>st</sup> defendant's claims, rendering the distress for rent unlawful. Additionally, they contended that any rent claims should be directed at the plaintiffs' Directors, and not the Receiver Manager, who had no legal obligation to settle them.
8. In their defence to the defendants' counterclaim, the plaintiffs denied all the averments contained therein and averred that the defendants' counterclaim is defective as it was filed after the plaintiffs were placed under receivership, thus the defendants ought to have first sought leave of the Court before filing it. The above notwithstanding, the plaintiffs contended that the Lease Agreement in question was unregistered, making the 1<sup>st</sup> plaintiff an unsecured creditor with no legal right to claim rent. They maintained that the Receiver Manager was not liable for rent arrears, as his duty was solely to protect Prime Bank Limited's interests by selling assets to reduce outstanding loans. The plaintiffs asserted that the defendants' counterclaim was legally untenable due to inter alia, misjoinder of parties and lack of privity of contract. In addition, they claimed that rent-related disputes ought to be handled by the Environment and Land Court, and not the High Court of Kenya.
9. This matter proceeded to hearing with the plaintiffs calling one witness in support of their case. The defendants called two witnesses to support their case.

#### **Plaintiffs' Case.**

10. Mr. Ponangipalli Venkata Ramana Rao testified as PW1. He adopted his witness statement dated 1<sup>st</sup> April 2022 and his supplementary witness statement dated 9<sup>th</sup> August 2023 as his evidence-in-chief. He produced the documents in the plaintiffs' list and bundle of documents dated 1<sup>st</sup> April 2022 as plaintiffs' exhibit Nos. 1 to 22.
11. He testified that he was appointed by Prime Bank Limited, a secured creditor, vide Deeds of Appointment dated 3<sup>rd</sup> July 2020 and 17<sup>th</sup> August 2020, to be the Receiver and Manager of the plaintiffs' properties charged in favour of the Bank under the Bank's debentures. He explained that was in view of the fact that the plaintiffs were indebted to the Bank to the tune of Kshs.284,000,000/= . He testified that the defendants attempted to levy distress for rent arrears amounting to Kshs.35,600,000/= by proclaiming the plaintiffs' assets, but by that time, he was not aware of any Lease Agreement between the plaintiffs and the 1<sup>st</sup> defendant, or of the existence of any invoices for rent, or demands for any outstanding rent. He stated that the proclaimed assets belong to the 2<sup>nd</sup> plaintiff and are not available for proclamation and attachment as they had already been pledged as security under debentures registered in favour of Prime Bank Limited.
12. Mr. Rao asserted that the distress for rent having been initiated after the plaintiffs were placed under receivership was unlawful, since Prime Bank Limited, as a secured creditor had first priority over the assets. He denied liability for rent arrears as claimed by the 1<sup>st</sup> defendant, asserting inter alia, that the claim is questionable, as the defendants allege rent default since 2014 but still entered into a lease with



the plaintiffs in 2016, no business operations occurred at the premises after he took over in August 2020 and if a lease existed, it was unregistered, making the 1<sup>st</sup> defendant an unsecured creditor. Mr. Rao testified that the defendants' counterclaim is defective, as it was filed without leave of the Court, after the plaintiffs were placed under receivership.

13. During cross-examination, PW1 confirmed his appointment as the Receiver Manager of the plaintiffs in July and August 2022. He stated that they took over two godowns along Changamwe Road in Industrial area, where the 2<sup>nd</sup> plaintiff was a tenant, but he did not receive a list of creditors from the plaintiffs' Directors. He stated that he later learnt that the defendants were creditors. He acknowledged receiving rent demands from Nemchand Anand & Company for the premises occupied by the 2<sup>nd</sup> plaintiff and confirmed making rent payments, but denied knowledge of any premises owned by the 1<sup>st</sup> defendant. He further stated that they sold the machinery in the premises and handed the premises over to Nemchand Anand & Company on 26<sup>th</sup> May 2023.
14. In re-examination, PW1 clarified that the machinery sold was covered under the debenture and was sold to recover the amount owed to Prime Bank Limited by the plaintiffs.

### **Defendants' Case.**

15. Ranjit Singh Matharu testified as DW1. He stated that the 1<sup>st</sup> defendant is his brother-in-law. He produced a Power of Attorney dated 21<sup>st</sup> February 2022 as defendants' exhibit Nos. 1 & 2. He stated that it was issued to him by the 1<sup>st</sup> defendant for him to manage his properties since the 1<sup>st</sup> defendant is based in the United Kingdom. He adopted his witness statement dated 14<sup>th</sup> March 2024 as his evidence-in-chief. He produced the documents in the defendants' list and bundle of documents dated 20<sup>th</sup> September 2022 as defendants' exhibit Nos. 3 to 13.
16. Mr. Matharu denied knowledge of Nemchand Anand & Company and receipt of any rent payments from the Administrator. He testified that the plaintiffs had not paid rent for the 1<sup>st</sup> defendant's property from November 2014 to July 2022, at which point the rent arrears stood at Kshs.37,162,639.00. He stated that despite multiple demands between 2018 & 2021, the plaintiffs failed to pay. It was his evidence that in October 2021, the 1<sup>st</sup> defendant learned that the plaintiffs were under receivership, thus he wrote to Prime Bank Limited on 27<sup>th</sup> January 2022, informing it that he had requested the plaintiffs to vacate the premises due to unpaid rent and the Bank forwarded the matter to the Receiver. He asserted that a formal demand for rent and vacant possession of the premises was sent on 10<sup>th</sup> March 2022 to the plaintiffs, but no response was received.
17. He stated that on 15<sup>th</sup> March 2022, Auctioneers proclaimed the plaintiffs' movable assets for distress for rent. Mr. Matharu testified that the Receiver advertised and sold the assets, undermining the distress process. He confirmed that one godown was handed over to him in September 2022 and the other one in May 2023 but the unpaid rent still remains due and owing. DW1 asserted that the Receiver has sufficient funds and should be ordered to settle the said arrears, as blocking the distress process was unjust.
18. During cross-examination, DW1 admitted that he had no proof that his Power of Attorney was registered under Kenyan law. He stated that they learned of the plaintiffs' receivership in September 2022 and could not confirm whether the defendants sought Court approval before filing their counterclaim. He mentioned about discussions with Mr. Satish, who was leasing the 1<sup>st</sup> defendant's premises and stated that he had agreed to pay rent, but he was given more time to do so due to the COVID-19 Pandemic. DW1 denied knowledge that the assets in question were charged but acknowledged that a Bank's rights would take precedence over the 1<sup>st</sup> defendant's. He also admitted



- that no rent invoices had been issued since 2014, explaining that they were unable to access the 1<sup>st</sup> defendant's premises to do so.
19. In re-examination DW1 testified that on 27<sup>th</sup> January 2022, the 1<sup>st</sup> defendant informed Prime Bank Limited via email that the premises had been leased out but there were outstanding rent arrears. That the Bank responded that the information had been forwarded to the Receiver, who was expected to follow up. DW1 further stated that their Advocates wrote to the 1<sup>st</sup> plaintiff demanding rent arrears of Kshs.34,815,303 from November 2014 to March 2022.
  20. In the counterclaim, the plaintiff's (now defendants) called Mr. Ponangipalli Venkata Ramana Rao who testified as DW1 in the defence to the counterclaim. He stated that a notification for receivership of the 2<sup>nd</sup> plaintiff was published in the Daily Nation on 25<sup>th</sup> August 2020, and creditors were invited to submit their claims via a publication on 8<sup>th</sup> August 2020, but no claim was received from the 1<sup>st</sup> defendant. He further stated that as the Receiver Manager, he took control of the company's assets and operations, confirming that the plaintiff companies were closed in April 2020. He denied having received any rent invoices from the 1<sup>st</sup> defendant and stated that the 1<sup>st</sup> defendant was required to revalidate its Lease Agreement with the 2<sup>nd</sup> plaintiff during the receivership and submit invoices with VAT, which was not done. He also noted difficulties in identifying the rightful owner of the invoices and confirmed that the receivership was still ongoing at the time he testified in Court.
  21. In cross-examination, DW1 testified that the address on page 18 of the defendants' bundle of documents remained under the control of the plaintiffs' Directors. He stated that although the letter was copied to the Receiver Manager, they never received it, and even if they had, it would constitute a claim that would rank second to secured creditors' claims. He confirmed that during receivership, rent is payable by the Receiver upon receipt of a valid Lease Agreement. While he could not verify whether the suit property belonged to the 1<sup>st</sup> defendant, he confirmed that rent invoices were received from Nemchand Anand & Company and duly paid. He maintained that the letter on page 17 of the defendants' documents was received by the Bank and emphasized that any correspondence concerning a company in receivership should be addressed to the Receiver.
  22. In re-examination, Mr. Rao maintained that they have never received any invoices from the 1<sup>st</sup> defendant.
  23. At the close of the defendants' case, the Court directed parties to file written submissions. The plaintiffs' submissions were filed on 27<sup>th</sup> November 2024 by the law firm of Macharia-Mwangi & Njeru Advocates, and the defendants' submissions were filed by the law firm of Hamilton Harrison & Mathews Advocates on 10<sup>th</sup> December 2024.
  24. Ms Akong'a, learned Counsel for the plaintiffs relied on the case of Teenwise Media Ltd. v Kenatco Taxis Ltd. & another [2016] eKLR, and submitted that the plaintiffs were placed under receivership by Prime Bank Limited, which appointed a Receiver Manager over the plaintiffs' charged assets, but despite the foregoing, the defendants did not obtain Court approval before filing the counterclaim against the plaintiffs in receivership, rendering the suit and all related proceedings null and void ab initio. Counsel referred to the case of Dennis Nyaundu v Francis Aburi Oyaro [2021] eKLR, and Section 4(1) of the *Limitation of Actions Act* and contended that in any event, the defendants' counterclaim is statute barred since the cause of action arose in November 2014, but the counterclaim was filed on 21<sup>st</sup> September 2022.
  25. Ms Akong'a stated that on perusal of DW1's Power of Attorney dated 19<sup>th</sup> February 2022, it is evident that it was prepared in London. She however cited the case of JPO v WOO [2021] eKLR and submitted that the said Power of Attorney is not valid having not been registered as provided for under Section



- 9 of the *Registration of Documents Act*. Counsel relied on the case of *I & M Bank Ltd. v ABC Bank Ltd. & another* [2021] eKLR and contended that the debentures in favour of Prime Bank Limited are registered under the Movable Property Security Act, whereas the Lease Agreement between the plaintiffs and the 1<sup>st</sup> defendant was unregistered, making the 1<sup>st</sup> defendant an unsecured creditor. She relied on the Court of Appeal case of *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another* [2014] eKLR, and asserted that Prime Bank Limited being a secured creditor had superior rights over the plaintiffs' assets as against the 1<sup>st</sup> defendant, an unsecured creditor.
26. She referred to the case of *Surya Holdings Limited & others v CFC Stanbic Bank Limited* [2015] eKLR, and submitted that the Receiver Manager appointed by Prime Bank Limited, was tasked with overseeing assets under the debentures and maximizing the secured creditor's interests by selling movable assets, which has since been done. She asserted that the plaintiffs were placed under receivership as publicly announced in the Daily Nation, which announcement specified that transactions within the plaintiff companies required the Receiver's consent and that all creditor claims should be directed to the Receiver.
27. Ms. Akong'a argued that the Receiver Manager never received invoices or rent arrears demands from the 1<sup>st</sup> defendant and maintained that any such claims should be directed to the plaintiffs' Directors, and not the Receiver Manager. Counsel urged this Court to allow withdrawal of the plaintiffs' suit with no order as to costs, since the reliefs sought in the plaint are spent. She also prayed for the defendants' counterclaim to be dismissed with costs to the plaintiffs.
28. Mr Makori, learned Counsel for the defendants relied on the case of *Ocean Engineering Works Ltd & another v SBM Bank of Kenya Ltd* [2024] KEELC 4724 (KLR) and submitted that a counterclaim does not require prior leave of the Court, as Order 7 Rule 3 of the Civil Procedure Rules, 2010 grants defendants the inherent right to assert claims within the same proceedings. He cited the case of *Thomas and Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chasebank Kenya Limited (In Receivership) and another (Interested parties)* cited by the Court in *Coast Hauliers Limited v Imperial Bank Limited (In Receivership)* [2021] eKLR, to support the assertion that the plaintiffs' reliance on Section 56(2) of the *Kenya Deposit Insurance Act* is misplaced, as the said provisions only restrict the initiation of claims or proceedings against an institution under receivership, and not the filing of a defence or counterclaim.
29. Counsel submitted that Section 56(2) of the *Kenya Deposit Insurance Act* applies only to companies under liquidation, while receivership is governed separately under Sections 43 to 53 of the Act. Citing the case of *Langley Construction Limited v Sells* [1969] EA, Mr. Makori argued that a counterclaim against a company in liquidation does not require prior leave of the Court. He stated that the 1<sup>st</sup> defendant and the 2<sup>nd</sup> plaintiff entered into a six-year lease on 13<sup>th</sup> November 2016, and the plaintiffs owed rent even before receivership, making the claim legally enforceable. He emphasized that the Receiver Manager had a duty to review and either repudiate or honour the plaintiffs existing contracts, including the lease. Relying on *Powdrill v Watson* [1995] A.C 394, Counsel argued that the failure to repudiate the lease implied an obligation to fulfill the lease terms, especially since the plaintiffs occupied the premises without paying rent.
30. Mr. Makori cited the superior Court of Ontario case of *Spina v Shoppers Drug Mart Inc.* 2023 ONSC 1086 and argued that the counterclaim in this case is not time-barred, as the plaintiffs continuously occupied the property from 2014 to 2022 and 2023 without paying rent, constituting an ongoing breach of contract. He asserted that each successive breach reset the limitation period. Relying on the case of *Mistry Valji Naran Mulji v Janendra Raichand & 2 others* [2018] eKLR, Counsel maintained that even if the claim was time-barred, the defendants could still recover unpaid rent for the period



not affected by the statute of limitations. He further cited the case of *Ndishu & another v Muriungi* [2022] (Civil Appeal 3 of 2020) [2022] KEHC 2 (KLR) and submitted that the defendants' witness Power of Attorney is valid, and since the plaintiffs did not raise a Preliminary Objection or amend their pleadings to contest it, they cannot do so at this stage.

### **Analysis And Determination.**

31. I have considered and analyzed the evidence adduced in line with the pleadings filed, as well as the written submissions filed by Counsel for the parties. The issues that arise for determination are -
- i. Whether the defendants' counterclaim is fatally defective for want of leave of the Court;
  - ii. Whether the defendants' counterclaim is time barred;
  - iii. Whether the defendants' witness Power of Attorney is valid;
  - iv. Whether the plaintiffs are indebted to the 1<sup>st</sup> defendant in the counterclaim; and
  - v. Whether the defendants are entitled to the reliefs sought in their counterclaim.

### **Whether the defendants' counterclaim is fatally defective for want of leave of the Court.**

32. The defendants' case is that the 1<sup>st</sup> defendant is the lessor of L.R. No. 204/4134, Changamwe Road, where two go-down facilities were leased to the 2<sup>nd</sup> plaintiff at an agreed monthly rent of Kshs.369,000/=, with a 10% increase every two years, under a six-year Lease Agreement dated 1<sup>st</sup> November 2016. The defendants contended that both plaintiffs occupied the premises but defaulted on rent payments since November 2014, leading to accumulated rent arrears of Kshs.37,162,639.00 as at July 2022. That as a result, the 1<sup>st</sup> defendant appointed the 2<sup>nd</sup> defendant to levy distress for the unpaid rent.
33. The plaintiffs on the other hand argue that the Receiver Manager was appointed by Prime Bank Limited, a secured creditor, through Deeds of Appointment dated 3<sup>rd</sup> July 2020 and 17<sup>th</sup> August 2020, to oversee the plaintiffs' properties charged under the Bank's debentures. The plaintiffs contend that the said appointment occurred before the 2<sup>nd</sup> defendant levied distress on the 2<sup>nd</sup> plaintiff's assets and before the defendants filed their counterclaim. The plaintiffs assert that the defendants should have sought leave of the Court before filing the counterclaim.
34. In rebuttal of the plaintiffs' claims, the defendants submitted that pursuant to the provisions of Order 7 Rule 3 of the Civil Procedure Rules, 2010, they are within their rights to file a counterclaim against the plaintiffs' suit.
35. The *Insolvency Act* under Section 432(2) states that –
- 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.
36. The defendants in asserting their right to file a counterclaim against the plaintiffs' suit without leave of the Court relied on the provisions of Order 7 Rule 3 of the Civil Procedure Rules, 2010 which provides that –
- A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the court to pronounce a final



judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.

37. From the above provisions, it is evident that a counterclaim has the same effect as a cross-suit, which means that it can survive on its own, even after the plaintiffs' suit is withdrawn and/or dismissed. As such, the defendants' assertions that they had every right to file a counterclaim against the plaintiffs suit without leave of the Court pursuant to the provisions of Order 7 Rule 3 of the Civil Procedure Rules, 2010 based on the argument that the plaintiffs had already instituted the suit, holds no water.

38. The Court of Appeal in *Joseph Kaara Mwethaga v Thabiti Finance Company Limited & others* Civil Application No. Nai. 120 of 1998 cited by the Court in *Ruth Wanjiku Kagiri v Reliance Bank Limited (In Liquidation) & 2 others* [2012] KEHC 2811 (KLR) held that -

...a suit filed against a Company registered under the *Companies Act* undergoing an involuntary liquidation without leave being obtained in breach of the Mandatory provisions of sections 228 and/or 241 of the *Companies Act* (Cap 486) and/or section 35 of the *Banking Act* (Cap 488) renders the suit incurably defective and incompetent in law and it follows that an application for an injunction made in such a suit must also fail...

39. Similarly in *David Gilbert Hastie & another v Trust Bank Ltd. (In Liquidation)* [2009] KEHC 1409 (KLR) the Court held that -

Upon reading the provisions of the *Companies Act* and authorities relied upon and upon hearing submissions regarding the issue, it is clear that the proceedings by or against a company in liquidation must be controlled by court to avoid the disposing of the companies assets for the benefit of only some of the creditors. It is therefore mandatory that before commencing suit, leave must be obtained from the court. Failure to do so renders the suit a nullity.

40. Although in the above two cases the applicable provisions were derived from the *Companies Act*, Cap 486 Laws of Kenya, the applicable provisions are now drawn from Section 432(2) of the *Insolvency Act*. In the circumstances, it is my finding that the defendants herein ought to have first sought leave of the Court to file a counterclaim against the plaintiffs in compliance with the provisions of Section 432(2) of the *Insolvency Act*, which are couched in mandatory terms.

41. In the end, I find that the defendants' counterclaim is fatally defective for want of leave of the Court in the filing of the same. It is hereby struck out.

42. Section 27 of the *Civil Procedure Act* provides that costs follow the event. Noting that the plaintiffs urged this Court to allow them to withdraw their suit with no order as to costs as the reliefs sought in the plaint are spent, I am persuaded that the plaintiffs are entitled to costs of the counterclaim.

43. The final orders are that -

- i. The plaintiffs' suit is hereby marked as withdrawn with no orders as to costs;
- ii. The defendant's counterclaim is hereby struck out; and
- iii. Costs of the counterclaim are hereby awarded to the plaintiffs.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Akong'a for the plaintiffs

Mr. Oyaro h/b for Mr. Makori for the defendants

Ms Lucy Njeru - Court assistant.

