



Karithi & 5 others v Africa Merchant Assurance Company Limited (Insolvency Cause E004 of 2020) [2021] KEHC 100 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)

Neutral citation: [2021] KEHC 100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E004 OF 2020
MW MUIGAI, J
SEPTEMBER 16, 2021**

BETWEEN

**ELIZABETH WAWIRA KARITHI 1ST PETITIONER
ANISIA MUTHONI NJERU 2ND PETITIONER
FAITH MUTHONI MWENDIA 3RD PETITIONER
SILAS MURIOKI KINOTI 4TH PETITIONER
ABEL MWANI 5TH PETITIONER
JOHN MWANGI 6TH PETITIONER**

AND

AFRICA MERCHANT ASSURANCE COMPANY LIMITED APPLICANT

RULING

NOTICE OF MOTION

- 1 The Applicant filed a Notice of Motion Application dated 22nd November 2020 for orders that; -
 - a. The Court stays the liquidation order made against the Company/Applicant on **18th November 2020** and any consequential proceedings relating thereto.
 - b. The Court to review and set aside the liquidation order made against the Company/Applicant on **18th November 2020** and any consequential proceedings relating thereto.



c. The Court grant the Company/Applicant leave to file its answer and/or Defense to the Petition within such period as the court shall deem fit.

2. Which Application was supported by the sworn Affidavit of **Bemih Kanyonge** dated **22nd November 2020** on the grounds that; -

1. On 18th November 2020, the Court granted liquidation order against the Company/Applicant which order was issued ex parte on account of non-attendance by counsel.
2. The Company/Applicant has as a result been prejudiced, embarrassed and affected in its operations and unless the orders sought herein are granted, will be formally taken over by the official receiver by the 26th November 2020 pursuant to Section 432(1) as read with 431(3) of the [Insolvency Act](#).
3. The Company is desirous of defending the Petition and has a strong Defense to the Petition with reasonable chance of success as summarized hereunder; -
 - a. The Petition is fatally defective for non-joinder of the Commissioner of Insurance as required under Section 121 of the [Insurance Act](#).
 - b. For purposes of Section 424(1)(e) of the [Insolvency Act](#), the allegation that the Company is unable to pay the Petitioners' alleged debt of Kshs.10, 235, 552.17 fails the statutory provision under Section 121 as read with Section 41 of the [Insurance Act](#).
 - c. Under Section 432(3) of the [Insolvency Act](#), a liquidation order once made ought to be executed in favor of all creditors of the Company in order of priority. All proceedings relating to the Petition prior to and before making of a liquidation order ought therefore to be served on all creditors. The Petition is fatally defective for non-compliance with this requirement.
4. It is in the interest of justice for the Court to accord all parties an unconditional chance to ventilate their respective positions. There is a draft defense that discloses a reasonable defense.
5. On the day the liquidation order was made against the company, Counsel had logged on to the Microsoft Teams link for the court but due to technical difficulties dropped off from the platform only to log back on after the liquidation order had been made in his absence.
6. Counsel regrets the inadvertent mistake that resulted in the making of the Liquidation Order and prays that the same ought not to be visited on the Company/Applicant.



7. The Company/Applicant has made significant efforts to pay part of the debt and this is not disputed and has to date paid over Kshs.4, 300, 000 to the Petitioners through their Advocates on record.
8. It is fair and just that the liquidation order be set aside and the Company granted an opportunity to defend the same.

REPLYING AFFIDAVIT

3 The Petitioner/Respondents opposed the Application vide the sworn Affidavit of Morris Karigi dated 1st December 2020 and deposed as follows; -

- a. The Application is misconceived, unmerited, bad in law and purely meant to delay the Petitioners' enjoyment of the fruits of the liquidation order.
- b. The Applicant was duly aware of the matter coming up for highlighting of submissions on 18th November 2020 and failure to respond to the Petition was deliberate since the Applicant was duly served with the Petition on 2nd March 2020.
- c. The Applicant has on three occasions, 9/3/2020, 16/9/2020 and 21/10/2020 sought leave to put in their responses which leave was duly granted.
- d. The Petitioners should not suffer the Applicant's Advocate's alleged mistake as no party should have undue advantage over another.
- e. The Applicant failed to honor its obligation to pay the full decretal sums and had on numerous occasions issued cheques to the Petitioners that it knew would be dishonored due to insufficient funds.
- f. In response to paragraph 14, the Applicant has not provided any tangible evidence that it has indeed paid the amounts as alleged of Kshs.4, 300, 000. The Applicant only made the payment of Kshs.1, 500, 000 on 23rd November 2020 five days after the liquidation order had been made in an effort to mislead the Court.
- g. The Applicant has not demonstrated good faith in this matter and is therefore undeserving of the Court's indulgence. In addition, the Applicant has not demonstrated that it stands to suffer should the liquidation proceed.
- h. The Petitioners will continue to suffer prejudice if the liquidation order is set aside thus the Application should be dismissed since sufficient cause has not been demonstrated and the reply to the Petition consists of mere denials and does not have any triable issues.

NOTICE OF MOTION



4 The Petitioners filed a Notice of Motion Application dated 17th December 2020 for orders that; -

1. The Court sets aside its orders granted on 25th November 2020 ex debito justitiae and consequently the Application dated 22nd November 2020 by the Respondent be struck out in limine.
2. Which Application was supported by the sworn Affidavit of Morris Karigi dated 17th December 2020 on the grounds that; -
 - a. The Respondent obtained orders against the Petitioners on 25th November 2020 staying liquidation orders issued by the Court through material non-disclosure.
 - b. The matter was slated for mention for directions on 9th December 2020 and 16th December 2020 but the file went missing and the Respondent did not appear in court or trace the file.
 - c. Consequently, the Respondents Application is riddled with falsehoods, material non-disclosure and deceit and is an attempt to mislead the Court into granting the reliefs sought.
 - d. The Respondent lied to the court that it had paid Kshs.4, 300, 000 and as per the Respondent's documents a total sum of Kshs.2, 456, 335 was paid however there was no payment made in the month of May.
 - e. Unless the orders granted ex parte on 25th November 2020 are set aside, the Petitioners will suffer substantial loss.
 - f. The court to strike out the Application dated 22nd November 2020 since sufficient cause was not demonstrated on why there should be a stay of liquidation.

GROUND OF OPPOSITION

5 The Company/Respondent opposed the Application vide the Grounds of Opposition dated 22nd February 2021 on the grounds that; -

1. The Application is argumentative and otherwise an abuse of the court process.
2. The issues raised in the Application can be efficiently and effectively subsumed in response to the pending Application dated 24th November 2020.
3. The allegations raised in the Supporting Affidavit are res sub judice and the subject of a defamation suit in CMCC 75 of 2020 Morris Mugendi Karigi T/a Mugendi Karigi & Co. vs AMACO –between the Advocate for the Petitioners



and the Respondent herein. A fact not disclosed by the Applicant. Impleading the same is an abuse of the court process.

4. The Respondent reiterates the contents of the Application dated 24th November 2020 and shall at the hearing put the Applicant to strict proof.
5. The Respondent prays that the Application dated 17th December 2020 be dismissed with costs.

APPLICANT/COMPANY'S SUBMISSIONS

- 6 The Applicant submitted that the jurisdiction and the power of the court in considering an application of this nature is discretionary and ought to be judiciously exercised in order to meet the ends of justice. In the case of *Trust Bank Limited versus Amalo Company Limited [2002] eKLR* the Court of Appeal asserted this principle as follows; -

The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Georges, C.J. (Tanzania) in the case of Essanji and Another Vs. Solanki [1968] EA at page 224.

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right."

- 7 Further, the Applicant submitted that the Advocate deposed on oath that the mistake leading up to the liquidation order was inadvertent and regrettable. It is settled that the Court should strive to ensure that a party should not suffer injustice as a result of the Advocate's mistake.
- 8 It was the Applicant's submission that the draft answer petition discloses triable issues of law and fact that can only be justly and definitively determined at a hearing. Disallowing the Application will unduly prejudice the Company/Applicant and the serious collateral consequences a liquidation order portends to various stakeholders including the insured public, employees, shareholders and creditors in whose interest the company ought to be sustained as a going concern.
- 9 Regarding the Petitioners' Application dated 17th December 2020, the Applicant submitted that the same is unmerited and ought to be dismissed. The failure to file the answer to the Petition within the prescribed time was of the Applicant's honest belief and understanding that parties were willing to amicably resolve the dispute.

PETITIONERS' SUBMISSIONS

- 10 The Petitioners submitted that the orders therein were granted through material non-disclosure of facts by the Respondent in misleading the Court with regard to payments of the amounts due and owing to the Petitioners. The Respondent alleged to have paid the Petitioner's Advocate a record of **Kshs.4, 300, 000** while a total of **Kshs.2, 456, 335** is what is evidenced to have been paid.

The court enunciated the issue of material non-disclosure in the case of *Edward Karanja Ragui v Barclays Bank of Kenya Ltd [2002] eKLR* as follows; -

It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged."



- 11 Further, the Petitioners submitted that the Respondent has not demonstrated that it will suffer any substantial loss if liquidation of the company proceeds. The fact that it will be required to pay amounts due and owing to the Petitioners does not in itself give rise to substantial loss.
- 12 It was the Petitioners' submission that the Respondent did not disclose material facts to be granted the *ex parte* orders which in essence would have been final orders if the Petitioners never moved the court and the said orders should be vacated for non-disclosure.
- 13 In the case of *Esther Muthoni Passaris versus Charles Kanyuga & 2 others [2015] eKLR* the court stated;

There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders ex parte (without notice) then that party is obligated to disclose all facts which the court thinks are most material to enable the court to fairly form its judgment. Where a party does not observe this rule, he disentitles himself from the relief which he asks the court to grant and such relief will not even be visited by the court at the inter partes stage."

- 14 On the issue of whether the Application dated **22nd November 2020** should be dismissed with costs, the Petitioners submitted that the Application should be struck out as it has failed to meet the set criteria for setting aside the liquidation order being sought. In addition, the failure by the Respondent to file any response to the Petition was deliberate as it was granted sufficient time from **2nd March 2020** to put in their response.

DETERMINATION

- 15 The Court carefully considered the Applications by the parties and the responses therein. There are two Applications for determination Notice of Motion Application dated **22nd November 2020** and the Notice of Motion dated **17th December 2020** the issue for determination is whether the debtor has made out a case for stay, review and/or setting aside of the liquidation order of **18th November 2020**.
- 16 The Applicant sought stay of the liquidation order on **18th November 2020** as well as a review and setting aside of the said order. The Applicant's main ground for the Application was that the said order was issued *ex parte* on account of non-attendance of the hearing by Counsel on the material day and asked that the Advocate's mistake for missing court should not be visited upon the client.
- 17 **Section 428 of the *Insolvency Act*** – provides for power to stay or restrain proceedings against company when the liquidation application has been made
- (1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may —
 - (a) if legal proceedings against the company are pending in the Court— apply to the Court for the proceedings to be stayed; and
 - (b) if proceedings relating to a matter are pending against the company in another court—apply to the Court to restrain further proceedings in respect of that matter in the other court.
 - (2) On the hearing of an application under subsection (1)(a) or (b), the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.



- (3) If, in relation to a company registered (but not formed) under the Companies Act, 2015, the application is made by a creditor, this section extends to any contributory of the company.
- 18 The above provision requires that stay maybe granted after the liquidation application is made and before a liquidation order was made. The order made on **18th November 2020** was made *ex parte* and **Order 51 Rule 15 of CPR** provides;
- 19 The court may set aside an order made *ex parte*.
- Essentially, setting aside an *ex parte* order is a matter of the discretion of the court. The Applicant is however required to satisfy to the court that it had a good and sufficient cause.
- 20 In the case of Stephen Ndichu versus Monty's Wines And Spirits Ltd [2006] eKLR the Court opines as follows; -

The principles governing the exercise of judicial discretion to set aside ex-parte judgements are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel –vs-E. A. Cargo Handling Services Ltd (1974) E. A. 75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah –vs- Mbogo (1969) E. A. 116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration –vs- Gasyali (1968) E. Way. 300). It also goes without saying that the reason for failure to attend should be considered.”

- 21 The liquidation petition was filed in court on **25th February 2020** and the same was served upon the company on **2nd March 2020** and received by the Legal Claims Manager of the company as evidenced by Affidavit of Service dated **6th March 2020**. The matter came up for hearing on **18th November 2020** and the Applicant/company was absent following which the liquidation order was made by this Court.
- 22 In considering whether the applicant has demonstrated a sufficient cause warranting setting aside of the *ex parte* decision or proceedings the court in the case of Wachira Karani versus Bildad Wachira [2016] eKLR held that:

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

- 23 The Applicant/Company based their absence from the hearing on **18th November 2020** on the technical difficulties in getting online of the Court’s Microsoft Teams Link that interfered with the Counsel’s connection to court proceedings on the material day.
- 24 However, the Applicant has not provided any reason as to why it did not file any response to the said Petition or any Application in response thereto.



25 From the foregoing, it cannot be said that the Applicant/Company is desirous of defending the Petition. The Applicant waited until the Liquidation Order was granted in order to file an Application in opposition to the Petition. This is clearly an afterthought given that the Petition was filed in February and the matter came up for hearing in November, the Applicant had more than enough time to put in a response. Applicant's non-compliance with respect to filing its response does not constitute an excusable mistake.

26 In determining this application I consider the case of *Shah v. Mbogo & Another* (1967) EA 470 where the Court of Appeal for Eastern Africa held as follows:-

IV. Applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."

27 The Petitioners filed a Notice of Motion Application dated **17th December 2020** seeking to set aside *ex parte* orders granted on **25th November 2020** staying liquidation orders issued by this Court through material non-disclosure and deceit.

28 The Company/Respondent informed the court that it had paid Kshs.4, 300, 000 and as per the Respondent's documents (**marked BK1A-E**) a total sum of **Kshs.2, 456, 335** was paid. The Company/Respondent has not controverted this.

29 The Petitioners' argument is that the Company obtained the order on non-disclosure of a material fact. Non-disclosure of facts was discussed in *Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others* Civil Appeal No. 210 of 1997 where the Court of Appeal stated as follows: -

It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law."

30 The actual amount paid by the Company/Respondent is half of what it misrepresented to have paid to the Petitioners as used it as a basis to obtain the orders. This is tantamount to peddling falsehoods while under oath. This is to be discouraged and avoided by all means possible.

31 The Court considered the mandatory provisions of **Section 121 of Insurance Act** that provides;

- (1) If an application for the liquidation of an insurer is presented by a person other than the Commissioner, the applicant shall serve a copy of the application on the Commissioner.



(2) On being served with a copy such an application, the Commissioner becomes a party to the proceedings and is entitled to be heard at the hearing of the application.

32 The *ex parte* Court Order of 18th November 2020 granted liquidation of the Defendant Company. However, compliance of **Sections 424 (1) (c) of Insolvency Act and Sections 41& 42 of Insurance Act** on determination of the Company's capital adequacy and assets ought to be considered before liquidation order is granted. These provisions challenge the process of liquidation of a Company/ Insurer.

33 Although, the Applicant/Company sought to set aside the orders of 18th November 2020 failed to respond to the Petition and/or fully disclose the monies paid to Petitioner and ought not have orders set aside.

34 However, liquidation of a Company/Insurer requires mandatory compliance of **Section 121 of Insurance Act**. Since, **Section 428 of the Insolvency Act Order 51 Rule 15 of CPR** allows for setting aside of orders.

DISPOSITION

The Court grants setting aside of *ex parte* orders of 18th November 2020 but on the following conditions;

- a. The Applicant/Respondent pays into a joint interest earning Account of Ksh 1,000,000/- within 60 days held by parties' advocates on record.**
- b. The Applicant/Respondent thereafter, files and serves the Response to the Petition to the Respondent/Applicants/Petitioners.**
- c. The matter shall be mentioned for directions before Incoming Judge or Any Court within the Division as this Court is proceeding on transfer.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

MUGENDI KARIGI ADV. FOR THE PETITIONERS

MBURUGU & KANYONGE ADV. FOR THE RESPONDENT

COURT ASSISTANT- TUPET

