



Seyani Brothers & Company Kenya Ltd & 4 others v Green Square Ltd (Civil Suit 253 of 2017) [2023] KEHC 24296 (KLR) (Commercial and Tax) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 253 OF 2017
A MABEYA, J
OCTOBER 27, 2023**

BETWEEN

**SEYANI BROTHERS & COMPANY KENYA LTD 1ST PLAINTIFF
NORKUN INTAKES LTD 2ND PLAINTIFF
TEAM 2 ARCHITECTS 3RD PLAINTIFF
HAROLD R FENWICK & ASSOCIATES 4TH PLAINTIFF
ENGPLAN CONSULTING ENGINEERING LTD 5TH PLAINTIFF**

AND

GREEN SQUARE LTD DEFENDANT

RULING

1. For determination is the 1st plaintiff's application dated 6/3/2023. The plaintiff did not indicate which provisions of the law that it was filed under.
2. The 1st plaintiff prayed for an order to direct Mr.Patrick Ngeny and Ms.Elizabeth Ngeny to attend Court on an appointed day to be examined as to the affairs and assets of the defendant and an order to have them present to the Court the following documents of the defendant: -
 - i) Annual audited reports for the years between 2017 to 2021.
 - ii) Annual returns filed for the years 2017 to 2021.
 - iii) Assets inventory for the years 2017 to 2021.
 - iv) Statements of account for the period between 2017 to 2021.



3. In default of compliance with the aforementioned orders, the 1st plaintiff prayed for an order to have Mr. Patrick Ngeny and Ms.Elizabeth Ngeny be personally held liable to satisfy the decretal sum and costs.
4. The application was supported by the affidavit sworn by Hirji Khimji Seyani on the grounds that the decretal sums and costs in this suit, which was awarded to the 1st plaintiff, remain unsettled. That the defendant company was placed under liquidation and its directors have refused to furnish the Official Receiver with its statement of affairs.
5. That the only asset of the defendant known by the 1st plaintiff is Land Reference Number 631/1033 which is charged to KCB Bank (K) Limited and hence the plaintiff cannot lay claim to it unless the chargee's obligations are settled.
6. The 1st plaintiff contended that it has reason to believe that the defendant's directors have deliberately run down the affairs of the defendant in order to defeat the creditors' claims including that of the 1st plaintiff. That it was therefore in the interests of justice that the defendant's directors be examined on oath to ascertain the statement of affairs of the defendant so that the Court can make further orders as regards the satisfaction of the decretal sum and costs.
7. In opposition, the defendant filed grounds of opposition dated 16/4/2023 and a replying affidavit sworn on 20/4/2023 by Christopher Kiprono Ng'eno, one of its directors.
8. In the grounds of opposition, the defendant contended that the application before the Court was res judicata as the Court pronounced itself on how it ought to be moved going forward; that by bringing into this suit issues that have been dealt with in Milimani HCCOMMIP NO. E040 of 2021, confirmed that the application was actuated by malice and bad faith.
9. The defendant further contended that the 1st plaintiff had hatched a convoluted scheme in order to bring confusion in both Courts to mislead the Court into giving orders that are not supported by any law.
10. In the replying affidavit, it was averred that vide a ruling delivered on 3/3/2023, the Court struck out a Notice to Show Cause (NTSC) dated 22/11/2021 and that the current application was similar to the NTSC dated 22/11/2021.
11. The application was canvassed by way of written submissions which I have considered.
12. The defendant was placed under liquidation vide an order dated 27/8/2021 in HCCOMMIP/ E040/2021 and the Official Receiver was appointed as the interim liquidator of the company. The liquidation order was made due to the fact that the defendant company was unable to satisfy a decree issued against it in favour of the plaintiff in this suit.
13. In the application before me, the plaintiff seeks orders to compel the company's directors to appear in Court to be examined as to the affairs of the company and to produce various company documents. Failing, they be held liable to personally satisfy the decretal sum and costs.
14. Vide a ruling dated 3/3/2023, the Court aptly stated that section 432(2) of the *Insolvency Act* provides that once a liquidation order is made, legal proceedings can only be brought against the company with the approval of the Court. Further, that such an approval can only be sought before the Insolvency Court.
15. The prayers in the application before me constitute recovery proceedings against the company. The application is therefore a non-starter as the plaintiff did not seek leave from the Insolvency Court. The



plaintiff lacks locus standi to move this Court with this application. Matters regarding the company ought to be directed to the Official Receiver as the liquidator on issues regarding the company.

16. In the premises, the application dated 6/3/2023 is frivolous and is hereby struck out with costs to the defendant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

