



REPUBLIC OF KENYA



**In re Cytonn High Yields Solutions (In Liquidation) (Insolvency Petition E063 of 2021)
[2024] KEHC 9136 (KLR) (Commercial and Tax) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E063 OF 2021
FG MUGAMBI, J
JULY 26, 2024
IN THE MATTER OF THE INSOLVENCY ACT NO. 18 2015
IN THE MATTER OF THE LIMITED LIABILITY PARTNERSHIP ACT CAP 30A OF 2012
IN THE MATTER OF COMPANIES ACT NO. 17 2015
IN THE MATTER OF CYTONN INVESTMENT PARTNER SIXTEEN (CIP 16)
IN THE MATTER OF CYTONN HIGH YIELDS SOLUTIONS (IN LIQUIDATION)**

RULING

Background

1. This ruling determines two applications filed by the Official Receiver. The first application is the one dated 19/6/2024 which seeks to have Cytonn Investment Management PLC evicted from the properties known as LR Number 2/85 (Originally 2/44/2), LR Number 2/86 (Originally 2/44/3) and LR Number 2/87 (Originally 2/44/4), (altogether the Kilimani properties). The Official Receiver also prays to repossess these properties with the assistance of the OCS Kilimani Police Station and the Commandant, Security of Government Buildings, pending the hearing and determination of this matter.
2. The application further seeks an order for the OCS Kilimani Police Station to appear before the court to report on the progress of repossession. Finally, that officers be appointed by the court to safeguard the property until such a time as execution shall be undertaken.
3. The application is supported by the affidavit and further affidavit of Diana Mumo sworn on 19/6/2024 and 20/6/2024 respectively. She confirms that a liquidation order was issued by this court (Mabeya, J) on 6/1/2023 against Cytonn High Yields Solutions (CHYS).



4. Subsequently, this court issued vesting orders on 30/11/2023 and authorized the Official Receiver to value the Kilimani property with a view to selling the same to recoup the creditors' investments. The Official Receiver then took over and secured the property on 22/12/2023. That Cytonn Investment Partners Sixteen LLP filed an appeal against the vesting orders issued by this court and the matter came before the Court of Appeal on 27/12/2023.
5. The matter was not heard on that day but the Court issued directions that the status quo be maintained pending the proper constitution of the bench and the determination of the matter. It is further averred that as at the time of the issuance of the directions by the Court of Appeal, the Official Receiver was in possession of the Kilimani property.
6. The Official Receiver contends that on 18/6/2024 unknown persons claiming to be from Cytonn, assaulted and forcibly detained and thereafter removed the security guards that had been hired by the Official Receiver from the premises, took over the property and locked them out. Further, that the representatives of the Official Receiver were denied access to the property and have since been unable to repossess the property. It has recently come to the attention of the Official Receiver that the Directors of Cytonn Management PLC have since put up signage intending to lease the Kilimani property.
7. In response to the application, Cytonn Investment Partner Sixteen LLP (CIP 16 LLP) raised a preliminary objection challenging the jurisdiction of this court. Vide the said Notice of Preliminary Objection dated 19/6/2024 they argue that the court with jurisdiction to hear and determine an application for eviction as sought by the Official Receiver is the Environment and Land Court [the ELC]. Further, that before eviction, a 3 month eviction notice must be issued to the occupiers of private land.
8. In response to the application CHYS filed its response to the application denying the issuance of any status quo orders by the Court of Appeal. They however urged that this court should hold its horses and allow the Court of Appeal to make its determination. They argue that in any case, with the preservation orders in place, the Kilimani property cannot be sold or transferred.
9. Also opposing the Official Receiver's application dated 19/6/2024, the firm of Ken Daniel & Henry On behalf of Valerina Jiwa and 289 other creditors filed Grounds of Opposition dated 9/7/2024. They urge the court to dismiss the application which they have termed as a delay tactic. It is also their case that this court lacks jurisdiction to entertain the dispute before it and that in any case, the application has been rendered moot by the preservation orders already in place.

Application dated 26/6/2024:

10. The second application is dated 26/6/2024 seeking to have the application of 19/6/2024 placed before a Judge for directions. The same is opposed by a replying affidavit sworn by Edwin H. Dande on 5/7/2024. He confirms that the Notice of motion application dated the 26th June 2024 raises the same issues raised in the application dated the 19th June 2024 to which Cytonn Investment Partners Sixteen LLP responded through a replying affidavit sworn by myself on the 19th June 2024 and the Preliminary Objection dated the 19th June 2024.
11. I agree with this averment and in the interest of expeditious resolution of the matters at hand I find that the application of 26/6/2024 has been overtaken by events, and is moot, as this court is now seized of the application dated 19/6/2024 which I now proceed to determine.



Analysis and determination

12. I have carefully considered the pleadings, evidence authorities cited and submissions made by the parties. In my view, there are 2 issues that lend themselves for determination:

- i. Whether this court has jurisdiction to hear and determine the application before the court; and
- ii. Whether the Official Receiver is deserving of the orders sought.

Whether this court has jurisdiction to hear and determine the application before the court:

13. The Supreme Court in *Samuel Kamau Macharia v KCB & 2 Others*, Civil Application No. 2 of 2011 expressed itself on the importance of jurisdiction when it stated thus;

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with the counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

14. The critical need for the court to ensure that it is clothed with jurisdiction before entertaining a matter was also well set out in the celebrated case of *Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd*, [1989] KLR 1.

15. The nature of the proceedings before this court is one of those that are often referred to as “mixed grill” cases. These cases involve a variety of jurisdictional issues that typically span across multiple courts.

16. The jurisprudence is well established that the court with jurisdiction over the pre-dominant issue also has the authority to decide other related matters that arise during the proceedings. This principle is supported by decisions of this court including *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another*, [2016] eKLR and *Peter Mutisya Musembi & Another v National Bank of Kenya Limited*, [2015] eKLR which referred to *Dean Patty v Commonwealth Bank of Australia*, (2000) FCA 1072.

17. That said, the jurisdiction of the ELC is set out in section 13 of the *ELC Act*. For the avoidance of doubt, it provides as follows:

“In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes:

- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. relating to compulsory acquisition of land;
- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. any other dispute relating to environment and land.”



18. It is undisputed that under section 13 (2) of the ELC Act, the ELC has jurisdiction to issue eviction orders. It is equally undisputed that the impugned vesting order arose from a liquidation order earlier issued by this court. This fact is acknowledged by all the parties in their respective pleadings.
19. Corporate insolvency processes are regulated by the Insolvency Act. Section 2 of the Insolvency Act defines court as:

“The High Court, and if there is an insolvency division of that Court, means that division; and “relevant court”, in relation to a matter other than one that is specifically entrusted to the High Court by a provision of this Act, means the court exercising or having responsibility for exercising jurisdiction in respect of that matter.”
20. Further, section 423(1) of the Insolvency Act vests the High Court with the jurisdiction to supervise the liquidation process of companies registered in Kenya. It is quite instructive that: Only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya.
21. The ordinary course of a liquidation process mandates a liquidator to preserve, realize, manage and dispose of the assets of a company in liquidation. This may include attaching and seizing land belonging to a company, as part of the assets of the liquidated company, in a case such as the present one. In fact, the Insolvency Act comprehensively addresses the process of administration of estates within the confines of liquidation, notwithstanding that part of such assets are immovable [land].
22. I am equally satisfied that it is the Insolvency Court that is vested with jurisdiction to supervise the Official Receiver in his duties under the Insolvency Act. The fact that this application involves a land matter incidental to the liquidation process does not divest this court of jurisdiction. As such, the Notice of Preliminary Objection dated 19/6/2024 fails and it is dismissed on that account.

Whether the Official Receiver is deserving of the orders sought:

23. The chronology of events as described by the parties and from the evidence on record shows that the liquidation order against CHYS was made on 6/1/2023 and the Official Receiver was appointed as liquidator. The vesting orders were issued vide a ruling dated 30/11/2023. I do not see any contention on the submission that the Official Receiver took over the Kilimani property following the vesting orders on 22/12/2023.
24. Subsequently, an appeal was filed at the Court of Appeal being E615/2023. There appears to have been only one [1] court appearance before the Court of Appeal, on 27/12/2023. There is a serious bone of contention amongst the parties on the Orders and Directions that were issued by the Court of Appeal. The transcript from the Court (Tuiyott, Nyamweya and Mativo, JJ,A) gives a reflection of what transpired in Court on that day. I have carefully read the transcript.
25. It is apt to produce here a verbatim illustration of the court proceedings for purposes of clarity on what the position was as at the said date of 27/12/2023. This is at page 6 of the transcript:

“Ms Mugo Advocate:

My lord, we extracted orders on 21st and the Kilimani Property was vested with the official receiver. We did a letter to the Registrar of Lands to register the vesting orders and title documents and then we went ahead and took possession of the 4 acres of land which is situated at Kilimani... (interrupted by the Presiding judge)

Tuiyott, JA:



Just one minute, has the vesting order been registered?

Ms Mugo Advocate:

Yes.

Tuiyott, JA:

When was it registered?

Ms Mugo Advocate:

On 21st of December.

Tuiyott, JA:

When do you say you took possession?

Ms Mugo Advocate:

Yes my lord...?

Tuiyott, JA:

What does possession mean and when did you take possession and what does that possession entail?

Ms Mugo Advocate:

What that basically means is that, we went to the Kilimani Property on Friday that is on 22nd and we have some police officers that are guarding the premises, because basically it means the premises are now under the curfew of the Official Receiver because the next cause of action we intend to do is to dispose of that parcel of land for the benefit of the creditors who are members of the public. Who are over 3,000. Who had invested in CIF 16.

Tuiyott, JA:

I understand you Ms Mugo to be conceding that at least for now as we give you a date that there should not be further execution other than what has happened?

Ms Mugo Advocate:

My lord, I would like status quo to be maintained.

Tuiyott, JA:

which means you proceed with the application that has already commenced.

Ms Mugo Advocate:

Yes, I want to proceed.”

26. It is clear that at the point of filing the appeal in HCCA E615 of 2023, the Official Receiver was already in possession of the Kilimani property. This is confirmed by the submissions made before the Court of Appeal by Ms. Mugo appearing for the Official Receiver. Pages 4 and 5 of the transcript reads as follows:

“Nonetheless, I would also want to bring it to the attention of this Court that we took over the Kilimani Property that is CIT 16, the official receiver is actually in possession of the property. We are occupying that property as we speak. We have our police officers that are guarding that property. So, in relation to that, execution has actually commenced, so in



regard to having a stay of execution on CIT 16, the issuance of a stay of execution will have far reaching interference with the present ongoing execution.”

27. It is clear that parties made extensive submissions on the question of stay of execution of the vesting orders of 30/11/2023 as well as prayers for status quo. In the end, the Court of Appeal did not grant either of the prayers but instead directed as follows as evidenced at page 24 of the transcript:

“In respect to the request for stay of execution, we shall be crafting an order in respect to that request one way or the other. However, there shall be no further execution of that the High Court Order, as of the time that I am making this order which is 11: 33a.m and later today or at least by tomorrow we shall give you a final order. We are very concerned that things may move very quickly, so we holding further execution so that, there is no execution between now and the time we communicate the order that shall be then passed over to you either by the end of the day or by tomorrow morning latest 10 o'clock.”

28. My interpretation of the Court of Appeal’s directions upon hearing the parties was that everything that had transpired as at 11:33am on 27/12/2023 ought to have been left as was and no further action was to be taken thereafter, in terms of executing the vesting orders. I have not been shown any further Orders issued by the Court of Appeal and my assumption is that there is still none as at the time that parties were heard on this application.

29. In my understanding the Court of Appeal did not reverse the actions already taken regarding the Kilimani properties; it only halted any future actions. This means that the status of the properties as it was at the time the Court of Appeal issued its directions should be restored. Specifically, possession of the properties should revert to its prior state, pending any further directions by the Court of Appeal.

30. The issue of lack of valid notices before the takeover by the Official Receiver in my view is a matter to be canvassed substantively in the proceedings challenging the vesting orders. The legality of the actions by the Official Receiver as well as allegations of vandalism and destruction are all contested and can only be determined upon presentation of proper evidence. None of these allegations warrants the disobedience of the orders issued on 27/12/2023.

Disposition:

31. Accordingly, the application dated 19/6/2024 is merited and is allowed in the following terms:

- i. Pending the hearing and determination of the matter, the Directors of Cytonn Investment Management PLC, their CEO, Edwin Dande and their agents, employees, servants and assignees herein be and are hereby ordered to immediately evacuate and/or be evicted from the parcels of land known as LR Number 2/85 (Originally 2/44/2), LR Number 2/86 (Originally 2/44/3) and LR Number 2/87 (Originally 2/44/4).
- ii. Pending the hearing and determination of the matter, it is hereby ordered that LR Number 2/85 (Originally 2/44/2), LR Number 2/86 (Originally 2/44/3) and LR Number 2/87 (Originally 2/44/4) shall be guarded by officers appointed by the Official Receiver to safeguard the property until such a time as further execution can be undertaken or pending further directions.
- iii. The OCS Kilimani Police Station is hereby ordered to provide police escort to the Official Receiver for the purpose of peace and order during the process of repossession of LR Number 2/85 (Originally 2/44/2), LR Number 2/86 (Originally 2/44/3) and LR Number 2/87 (Originally 2/44/4)



- iv. The OCS Kilimani Police station shall appear before the court on 31st July 2024, to state the progress of the repossession.
- v. The costs of this Application be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY 2024.

F. MUGAMBI

JUDGE

