In re Sovereign Hotel Limited (Insolvency Cause E002 of 2022)
[2023] KEHC 21269 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEHC 21269 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

INSOLVENCY CAUSE E002 OF 2022

MS SHARIFF, J

MAY 29, 2023

BETWEEN

SOVEREIGN HOTEL LIMITED ..... PETITIONER

AND

NATIONAL BANK OF KENYA LIMITED ..... 1ST RESPONDENT

KOLLURI VENKATA SUBBARAYA KAMSASTRY ..... 2ND RESPONDENT

RULING

Introduction

1. In its Notice of Motion dated and filed on 28th November 2022, the Petitioner herein sought orders that pending the hearing and determination of this Petition, a temporary conservatory order do issue restraining the Respondents from administering or purporting to administer and/or interfering with its business affairs.

2. James McTough, the Petitioner's Director, swore an Affidavit on 28th November 2022 in support of the said application.

3. The Petitioner pointed out that on 27th August 2015, the 1st Respondent extended banking facilities amounting to USD 5,846,000 and Kshs 10,000,000/= towards Mortgage and overdraft renewal respectively. It averred that it was a term of the facilities that it had to liquidate the same together with interest in one hundred and eighty (180) instalments of USD 59,249.31 commencing at the end of the month of the draw down.

4. It confirmed that it executed a floating debenture with the 1st Respondent with respect to its immovable assets but that it was never availed a copy despite requesting for the same.

5. It stated that as at 8th November 2022, it had effected repayments amounting to USD 2,043,841.97 leaving a principal balance of USD 3,802,158.00. It asserted that the said figures over and above the

outstanding principal amount, constituted bank interest on the facility, statutory charges, penalty arrears and legal fees.

6. It explained that the delay in settling the entire debt within the agreed timelines was as a result of developing circumstances that were beyond its control led by the Covid-19 pandemic that ravaged its business as the hotel remained closed during the government imposed routine curfews over the period and as a result, its business became low as expected and just like many businesses, it started to struggle with repayments of the loan facilities.

7. It pointed out that it held several meetings with the 1st Respondent to restructure the loan during which time it made efforts to continue submitting periodic payments to the 1st Respondent to reduce the loan amount. It stated that on 26th September 2022, the 1st Respondent proposed a settlement figure with timelines and it responded to the offer with a counter proposal on 8th November 2022.

8. It was its case that the 1st Respondent revoked its acceptance of various proposals towards the liquidation of its respective credit facilities and/or otherwise refused to formally communicate its acceptance of certain mutually agreed proposals despite having undertaken to do so as a result of which it had been greatly prejudiced.

9. It averred that on the evening of 25th November 2022, the 1st Respondent invaded its premises in the company of armed guards and took control of the management which it handed over to the 2nd Respondent. It was emphatic that the same was in disregard to the mandatory provisions that were set out under Sections 536-639 of the *Insolvency Act* No 18 of 2015 as read with *Insolvency Regulations, 2016*.

10. It denied ever having been served with any statutory notices specified under the aforesaid Sections of the *Insolvency Act* and stated that the 1st Respondent did not file any notice in the High Court as was statutorily required. It was therefore its contention that the 1st Respondent's action was premature as its statutory power to appoint an administrator had not arisen.

11. It added that the appointment of the 2nd Respondent as its Administrator was not in compliance with the mandatory requirements provided for under Regulation 102 of the Insolvency Regulations. It averred that save for a WhatsApp message, the 2nd Respondent had not served it with a notice of his appointment.

12. It asserted that the 2nd Respondent was appointed to achieve ulterior motives contrary to the intention of the law governing administration and that to buttress the mischief, the 2nd Respondent had also taken management of its Director's house, the deponent herein, and replaced his security guard with another. It stated that the house which was situated on Land Parcel Kisumu Municipality Block 11/219 was not part of the securities listed in the Debenture.

13. It further averred that its business was now faced with wastage and unless the court intervened to restrain the Respondents from proceeding with the illegal action, there was a likelihood that its employees, service providers, the entire VIP guests who patronised its high end hotel business would be prejudiced as it risked the danger of collapsing at the expense of the Respondents' illegal and malicious actions.

14. It was emphatic that there was no need for the administration as it had demonstrated to the 1st Respondent its ability to repay its debts. It pointed out that it was willing to give an undertaking as to damages and was willing to abide by the conditions that the court would impose on it to issue the reliefs sought.

15. In opposition to the present application, the 1st Respondent's Recoveries Manager, Paul Chelang'a, swore a Replying Affidavit 9th December 2022 on behalf of the 1st Respondent herein. The same was filed on 13th December 2022.

16. The 1st Respondent averred that the Petitioner failed to disclose important facts to the court and/or to produce various vital and material documents which included the first Letter of Offer dated 22nd November 2013, Debenture issued on 10th February 2014 and several demands it issued it and its directors but had instead annexed correspondence that was exchanged during negotiations and marked "without prejudice".

17. It was its contention that without the material non-disclosure and the misleading information that the Petitioner provided, this court would not have granted any ex parte conservatory order on 30th November 2022.

18. It averred that it extended credit facilities to the Petitioner at the Petitioner's instance and that the Petitioner executed the Letter of Offer dated 22nd November 2013 and a Debenture dated 10th February 2014 to secure the total principal sum of USD 5,661,000 and Kshs 10,000,000.

19. It further stated that Clause 18 of the said Debenture dated 10th February 2014 provided that it could appoint a Receiver of all or part of the charged assets at any time after the sums secured by the Debenture became payable either as a result of lawful demand that it made or under the provisions of Clause 15(events of default) or if requested by the Petitioner.

20. It asserted that in 2015, the Petitioner applied for additional facilities, being mortgage of USD 5,846,000 and an overdraft renewal in the sum of Kshs 10,000,000/= which application it accepted through the Letter of Offer dated 27th August 2015 and the facilities were advanced to the Petitioner. It added that the Petitioner subsequently applied for a restructuring and refinance of the credit facilities in 2018 and it agreed to provide the facility by Letter of Offer dated 19th June 2018 which comprised of a restructure of the outstanding mortgage previously advanced to it, the new mortgage sum of USD 7, 407, 983 and a new overdraft facility in the sum of Kshs 20,000,000.

21. It was categorical that the Petitioner defaulted in repaying the credit facilities and it issued it and its directors, various notices. It asserted that the said default was not caused by the Covid- 19 pandemic as it predated the said period as was evidenced by the Account Statement covering the period between November 2018 and December 2019.

22. It pointed out that despite the Petitioner and its directors not complying with its various demands for repayment, it did not immediately exercise any of its remedies but that it continued to engage the Petitioner on a without prejudice basis to attempt to settle the matter amicably but that when it became clear that the Petitioner was not serious about settling the debt, its advocates issued the demand notice dated 23rd August 2022 wherein it set out the various notices that were previously issued to the Petitioner and its directors, the outstanding debt as at 15th August 2022 which was USD 9,996,660.94 and pointed out that it was entitled to pursue various remedies under the law and the various securities provided to it including appointing a Receiver pursuant to the powers conferred to it by law and in particular pursuant to Clause 18 of the said Debenture dated 10th February 2014 if the outstanding debt or any portion thereof remained unpaid fourteen (14) days from the date of service of the said notice.

23. It further stated that the Petitioner then engaged it on a without prejudice discussions to settle the dispute but the attempts were unsuccessful as it did not make any acceptable settlement proposal and took too long to respond to its counter-proposal as a result of which it appointed the 2nd Respondent

as the Petitioner's Receiver and Manager which it communicated to the Petitioner vide its letter dated 25th November 2022.

24. It pointed out that the Petitioner's allegation that it failed to supply it with a copy of the said Debenture dated 10th February 2014 was an afterthought as the Petitioner executed the Debenture and was aware of its contents and that it never requested for a copy of the same.

25. It was emphatic that Section 690 of the *Insolvency Act* was clear that the new insolvency regime had expressly preserved the right to appoint an Administrative Receiver (who included receivers and managers) for holders of floating charges which were created before the *Insolvency Act* came into force as the Legislature recognised that holders of those floating charges would have accrued certain rights and it would therefore be prejudicial, unfair and unjust to strip them away. It was therefore its case that the application herein did not meet the test for the grant of a conservatory order.

26. On 16th December 2022, James McTough swore a Supplementary Affidavit on behalf of the Petitioner herein. The same was filed on even date. It was the Petitioner's contention that the suit herein was not only based on non- compliance by the Respondents on the mandatory provisions of the *Insolvency Act* but also on the ground that the 1st Respondent's move to place it on receivership was premature in light of the ongoing negotiations towards settlement of the dispute. It added that the Debenture attached to the 1st Respondent's Replying Affidavit was never availed to it despite requesting for the same.

27. It asserted that ten (10) days after placing it on receivership, the 1st Respondent commenced its statutory power of sale by issuing it with a forty five (45) days' Redemption Notice to sell the suit property upon which its hotel operated which was evidence of ill intentions. It added that in the 2nd Respondent terminated the services of its staff, cancelled the suppliers' contracts and stopped payments to other creditors.

28. It added that in the short time that the 2nd Respondent was in its business premises, he had subjected it to a loss by converting its hotel as his abode, inviting his friends and cronies to spend at the hotel without paying for accommodation, food and other services and that by the time he left the premises on 1st December 2022, the bills he left behind inclusive of the losses occasioned ran into millions of Kenya shillings. It was emphatic that the Respondents' actions were not to bring it back to profitability but rather, it was to deal it a death blow.

29. On 20th December 2022, Paul Chelang'a swore a Further Affidavit in response to the Petitioner's Supplementary Affidavit. The same was filed on 21st December 2022.

30. The 1st Respondent further averred that the Petitioner's complaint regarding the Redemption Notice was misleading and ought to be disregarded for the reason that the notice was addressed to Patricia Ann McTough and James Michael McTough who were the chargors and not parties to these proceedings. It added that the property to be sold in exercise of its power of sale did not belong to the Petitioner herein and that the process therefore did not directly concern it except that the money recovered through the process would satisfy the whole or a portion of the debt it owed it.

31. It further asserted that the allegation that the appointment of the Receiver Manager was premature was not true as the Petitioner had defaulted on the credit facilities advanced to it for a number of years and never provided any acceptable payment plan during that period. It was emphatic that the negotiations did not in any way prejudice its rights and powers under the law and the Debenture dated 10th February 2014 to pursue the remedies available to it for recovery.

32. On his part, 20th December 2022, the 2nd Respondent swore a Further Affidavit in response to the Petitioner's Petition herein and its application. The same was filed on 21st December 2022.

33. He asserted that he was appointed under Clause 18 of the Debenture dated 10th February 2014 and not under the *Insolvency Act* as the Petitioner had contended. He also adopted all the averments that were made by Paul Chelang'a in his Replying and Further Affidavits in respect to his appointment as the Receiver and Manager to the Petitioner's property and assets that were charged to the 1st Respondent under the aforesaid Debenture dated 10th February 2014.

34. He explained that upon his appointment as Receiver and Manager, all the employment contracts were discharged by operation of the law which he communicated to the staff as a routine measure whereafter he could consider their re-employment.

35. He added that he was accompanied by security guards and the 1st Respondent's agents due to the hostile nature of takeovers by Receivers and Managers and that he scaled down the number of the security guards which he changed as a routine measure and due to the fact that there had been tension between the previous guards and the Petitioner for non-payment of their services for five (5) months.

36. He said that he observed there had been mismanagement deficiencies and failure to comply with the law and that the said James McTough withdrew between Kshs 700,000/= and Kshs 800,000/= despite his salary being Kshs 50,000/=.

37. He was emphatic that he was at the premises as a Receiver and Manager and not as a guest and that during the short period he was there between 25th November 2022 and 1st December 2022, he organised a training session and banquet which generated sufficient revenue for the business. He thus urged this court to dismiss the said application.

38. The Petitioner's Written Submissions were dated 13th January 2023 and filed on 16th January 2023 while those of the Respondents were dated and filed on 20th January 2023. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

39. The Petitioner submitted that it was trite law that a litigant who was seeking an interim grant of an injunction had to demonstrate the three (3) limbs that were set out in the case of *Giella v Cassman Brown* (1973) EA 358 which were, a *prima facie* case, irreparable harm and balance of convenience. It was its case that it had demonstrated all the three (3) limbs and was hence entitled to the orders it had sought.

40. It pointed out that it had shown that it had a *prima facie* case and in this regard, relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR where it was held that a *prima facie* case was a case in which on the material presented to the court a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party as to call an explanation or rebuttal from the latter.

41. It further submitted that the bone of contention in this suit was basically with respect to two (2) issues, the first being whether the Respondents' action to place it on receivership was premature and the second being, whether the *Insolvency Act* was applicable and was complied with by the Respondents during the process of placing it on receivership. It argued that the 1st Respondent jumped the gun on both issues and breached the mandatory provisions of the *Insolvency Act* which were applicable to the Debenture in issue.

42. It reiterated its averments in its Supporting Affidavit and contended that having accepted the 1st Respondent's offer to repay the facility by way of monthly instalments of USD 20,000 as well as its Recoveries Manager's conduct in following up on the said monthly instalments, the 1st Respondent

was estopped from relying on the contention that it was obliged to pay enhanced monthly instalments of USD 115,000.

43. It asserted that the 1st Respondent failed to comply with Sections 536, 537, 538 and 539 of the *Insolvency Act* before placing it on receivership and that the 1st Respondent did not deny that fact but claimed that the aforesaid Act did not apply as the Debenture upon which it relied on in placing it on receivership was made before the *Insolvency Act* came into force. It contended that the issue remained a bone of contention that should be heard and determined in the main Petition but that for purposes of demonstrating a *prima facie* case, it argued that the said Act was currently the law in force and applied to both parties and the Respondents could not run away from it.

44. In that respect, it placed reliance on the case of *Thika Nursing Homes Limited v Rao & 2 others* [2021] KEHC 417 (KLR) where it was held that the *Insolvency Act* applied to debentures that were created before it came into force.

45. It further asserted that it was bound to suffer irreparable harm in the event the application was not granted as the 1st Respondent had placed it on receivership and also went ahead to exercise its statutory power of sale by advertising it for public auction. It added that the objects set out on Section 522 of the *Insolvency Act* were meant to maintain a company in distress as a going concern, achieve a better outcome for the whole body of creditors and to realise the property of the company in order to make a distribution to one or more secured creditors and that as the 1st Respondent moved to take control of it, it would suffer irreparable harm as there would be no company to salvage in the event the Petition herein was found in its favour.

46. It contended that the balance of convenience tilted in its favour because it was still in control and operation and was remitting a monthly pay of USD 20,000 to the 1st Respondent and hence, the 1st Respondent was not suffering any prejudice as it continued to receive its monthly pay as usual before it placed it on receivership.

47. It submitted that it had demonstrated in its affidavit evidence that the 2nd Respondent could not be trusted with the management of its operations as during the short one (1) week he was at its premises, he caused chaos and was out to kill its operations. It added that if the 2nd Respondent was allowed to return back before the main Petition was heard and determined, the court would have no application to talk of at the conclusion of the Petition.

48. On their part, the Respondents submitted that a party seeking a conservatory order had to demonstrate that it had a *prima facie* case with a likelihood of success and that unless the court granted the said order, there was real danger that it would suffer prejudice. In that regard, they placed reliance on the cases of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR and *Muslims for Human Rights (MUHURI) & 4 others v Inspector General of Police & 2 others* [2014] eKLR. They did not, however, specifically set out the holding that they relied upon.

49. They also relied on the case of *Giella v Cassman Brown & Company* (*supra*) and pointed out that as the order sought by the Petitioner was in the nature of an injunction, the two (2) related tests (sic) were relevant and ought to be applied together.

50. It was their case that the Petitioner did not have a *prima facie* case with a probability of success. In this respect, they also relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (*supra*) and contended that the entire Petition on which the instant application was anchored was based on allegations that were not supported by the material that was placed before the court, including material furnished by the Petitioner.

51. They contended that the Petitioner's entire case was that the 1st Respondent appointed an administrator without following the procedure under the *Insolvency Act* yet the reality was that the 1st Respondent appointed the 2nd Respondent as a Receiver under the Debenture and not an administrator under the *Insolvency Act*. They added that the Petitioner's prayers only sought to stop the non-existent administration but not the receivership.

52. They further submitted that in the circumstances, it could not be said that the Petitioner had any *prima facie* case with a likelihood of success as it was based on fatal misconception of facts and the law and at worst, was frivolous, vexatious, a mere fabrication and an abuse of the court process as it did not disclose any reasonable cause of action.

53. They submitted that there was sufficient authority to demonstrate that a holder of a debenture created prior to the *Insolvency Act* which provided for appointment of a receiver as a remedy for default could do so without making an application to the court and that a number of appointments of receivers pursuant to powers contained in debentures that were executed before the Act came into force had been upheld by the courts.

54. In that respect, they placed reliance on the case of *Re Arvind Engineering Limited* [2019] eKLR where the court upheld the power of a holder of debenture created prior to the *Insolvency Act* to appoint such receiver and manager (and indeed even an administrator) as a remedy without making an application to court and without supervision.

55. They also referred the court to the case of *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* [2021] eKLR where it was held that Section 690 of the *Insolvency Act* did not apply to the holder of a floating charge that was created before the commencement of the Section or to an appointment of an administrative receiver made before that commencement.

56. It was their contention that once property was offered for a credit facility, it became a commodity of trade and was available to the creditor in the realisation of the debt and that any claim by the property owner with regard to the manner in which the property was handled in the process was one that could be quantified in monetary terms and compensated by an award of damages.

57. They pointed out that courts had declined to interfere with the exercise of the power of sale even with regard to matrimonial property charged to banks. In this regard, they relied on the case of *Wilstone Mdindi Mwawugunga v Kenya Women Microfinance Bank PLC* [2022] eKLR where in declining to grant an injunction to stop the sale of matrimonial property, the court held that by charging their matrimonial property willingly, the applicant and his family lifted the protection veil and converted the property into a trading commodity.

58. They contended that it was not in dispute that the Petitioner executed the Debenture dated 10th February 2014 as a fixed and a floating charge over all of its assets to secure the credit facilities the 1st Respondent advanced it and that the remedies for default under the said Debenture included the appointment of a receiver. They asserted that the Petitioner could not now seek to stop the receivership process by alleging that it would suffer irreparable loss.

59. They added that the Court of Appeal captured the relationship between a bank/creditor and a defaulting borrower that sought to stop the bank from realising the securities in the case of *John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd* [2006] eKLR where it held that the bank was capable of refunding such sums as may be found due to the applicant, if any, and that capability had not been challenged.

60. They further contended that the Petitioner knew fully well that the 1st Respondent would pursue the remedies available to it in the event of default and that the court ought not interfere with the 1st Respondent's rights under the Debenture and the law at the whims of the Petitioner.

61. They were emphatic that the court could not rewrite the parties' contract and that in any event, should the Petitioner have any claim with regard to the manner in which the Respondents conducted the receivership, it could be adequately compensated by an award of damages.

62. They argued that bad faith, non-disclosure of material facts, mischief and abuse of the court process on the Petitioner's part was proof that it had not approached the court with clean hands and in good faith. It submitted that "he who seeks equity must do equity". They were therefore emphatic that the Petitioner ought not benefit from the court's discretion to grant equitable remedies. They urged the court not provide protection for a party that had little or no regard for the law, contractual obligations and indeed the court.

63. They were categorical that the 2nd Respondent was an experienced receiver and insolvency practitioner who would be able to run the business in a manner to ensure that the 1st Respondent was able to recover the debt and that should the receivership process lead to any valid claims by the Petitioner, the 1st Respondent would be in a position to pay any damages that may be ordered by the court.

64. It was their argument that where court was in doubt, the balance of convenience would tilt in favour of dismissing the application and allowing the receivership because the Petitioner had defaulted in the repayment of the credit facility and continued to default. They pointed out that granting the injunction would amount to the court allowing the Petitioner to continue to default on the credit facility and deny the 1st Respondent the right to pursue the remedies available to it. They added that it was in the interest of justice that the receivership process be allowed to continue so that the 1st Respondent could recover the debt.

65. Notably, under Order 40 Rule 1 of the *Civil Procedure Rules*, an applicant is required to prove that the property is in danger of being wasted or alienated by the other party to the suit or a wrongful sale for an injunction to be granted.

66. The celebrated case of *Giella v Cassman Brown & Co Ltd*(*supra*) set down three (3) important principles namely that in order to support the grant of a temporary injunction an applicant had to show that it had a *prima facie* case with a probability of success, that the applicant would otherwise, suffer irreparable harm which cannot be compensated for in damages if the interlocutory injunction was not granted and that where the court was in doubt, it would grant the interlocutory injunction on a balance of convenience.

67. The best principle which runs through applications for the grant of injunction is that the courts should take whichever course that is likely to cause the least risk or prejudice or injustice to the other party. Indeed, an order for injunction is not meant to fully determine the dispute but to put a moratorium on all activities to the assets of the company of the Petitioner herein awaiting the hearing and adjudication of the issues on the merits.

68. In applying the above mentioned principles, this court bore in mind that the resolution of the Petition on merit was still pending before court. The issue of whether or not the *Insolvency Act* was applicable herein and/or whether the 1st Respondent appointed the Receiver prematurely would ideally be under the purview of the Petition and delving into its merits would in the normal cause of events be pre-emptying the court's mind on its final determination therein.

69. Having said so, this court cannot close its eyes to the position of the law and the reliefs that an applicant has sought to establish whether or not such an applicant had demonstrated the criteria that has been set out in the case of *Giella v Cassman Brown* (*supra*). It was for that reason that this court interrogated the Petitioner's assertions on the question of whether or not the Respondents had violated the *Insolvency Act* so as to be entitled to an interlocutory injunction pending the hearing and determination of the Petition herein.

70. Under Section 534(1) of the *Insolvency Act*:-

> " The holder of a qualifying floating charge in respect of a company's property may appoint an administrator (emphasis court) of the company."

71. However, Section 690(4) of the *Insolvency Act* provides that:-

> " This section does not apply to the holder of a floating charge that was created before the commencement of this section or to an appointment of an administrative receiver (emphasis court) made before that commencement (emphasis court)."

72. Notably, the 2nd Respondent was appointed as a receiver under the Debenture that was dated 10th February 2014 and not as an administrator under Section 534(1) of the *Insolvency Act* (emphasis court). Notably, an administrator and an administrative receiver are different, a distinction that Mabeya J also made in the case of *Thika Nursing Homes Limited v Rao & 2 others* (*supra*). The provisions of Sections 536,537, 538 and 539 of the *Insolvency Act* were therefore inapplicable in the circumstances of the case herein.

73. It was evident that the Debenture that was in contention herein was dated 10th February 2014. The *Insolvency Act* was assented on 11th September 2015. It cannot be any clearer to this court that any remedies under the Debenture dated 10th February 2014 were outside the ambit of Section 690(4) of the *Insolvency Act*.

74. It was therefore this court's position that Section 690(4) of the *Insolvency Act* was not applicable to debentures that were created before the commencement of the said *Insolvency Act* a conclusion that Makau J (as he then was) also arrived at in the case of *KSC International Limited (Under Receivership) & 5 others v Bank of Africa (K) Limited & 6 others* [2018] eKLR. Indeed, Mabeya J did also hold in the case of *Kimeto & Associates Advocates v KCB Ltd & 2 others* (*supra*) that the current Insolvency laws preserved the right to appoint a receiver manager under the old regime for transactions entered into before the new regime came into effect.

75. As the only issues the Petitioner wished to be determined in the Petition were whether or not the Respondents' action to place it on receivership was premature and whether the *Insolvency Act* was applicable herein and was complied with by the Respondents during the process of placing it on receivership and this court found that the said *Insolvency Act* was inapplicable herein, the probability of the Petitioner's case at the hearing of the Petition herein was greatly weakened as it was a question that could be determined at this interlocutory stage. It was a legal but not factual issue that did not require the adducing of oral and/or documentary evidence during the hearing of the said Petition for determination.

76. A perusal of the Petition showed that the Petitioner had sought the following reliefs:-

    a. A declaration that the decision of the 1st Respondent to place the Petitioner on Administration on 25th November 2022 without complying with the mandatory provisions of sections

536,537,538 and 539 of the *Insolvency Act* No 18 of 2015 as read with the Insolvency Regulations, 2016 thereunder violated the Petitioner's right to a fair hearing and fair administrative action that is guaranteed by Article 47(1) of the *Constitution*.

b. A permanent injunction do issue restraining the Respondents from administering or purporting to administer and/or interfering with the affairs of the Petitioner's business herein Sovereign Hotel Limited.

c. The appointment of the 2nd Respondent by the 1st Respondent as the administrator of the Petitioner be terminated and/or revoked.

d. An injunction do issue restraining the 1st Respondent from appointing an administrator without exhausting the ongoing negotiation settlement and complying with the law on Insolvency that deals with Administration.

e. Costs of the Petition.

f. Any other orders that the Honourable Court may deem just and fit to grant.

77. Notably, Clause 18 of the Debenture dated 10th February 2014 stipulates as follows:-

> " At any time after the moneys secured by this deed become payable either as a result of lawful demand made by the Bank or under the provisions of Clause 15 of this deed or if requested by the Company and so that no delay or waiver of its rights to exercise the powers conferred by this deed shall prejudice the future exercise of such powers and without prejudice to other remedies provided by the law, the Bank may, in writing under the hand of any of its officers or attorneys or under common seal, appoint any person or persons, whether an officer of the Bank or not to be a Receiver of all or any part of the Charged Assets upon such terms as to remuneration and otherwise as the Bank shall deem fit and may in like manner from time to time remove any Receiver so appointed and appoint another in his place. Where more than one Receiver is appointed, the Receivers shall have power to act severally unless the Bank shall specify otherwise in their appointment"

78. It was evident that ongoing negotiations between the Petitioner and the 1st Respondent could not divest the 1st Respondent the right to proceed as stated in the aforesaid Clause 18 of the Debenture dated 10th February 2014. All that was required was for the Petitioner to default in payment of the credit facilities, a fact that it admitted it had done but blamed the cause as the Covid-19 pandemic.

79. The court had no jurisdiction to enquire into communication or negotiation that was on a "without prejudice" basis so as to give the negotiating parties, in this case the Petitioner and the 1st Respondent herein, freedom to engage in out of court settlement away from the prying eyes of the court.

80. Bearing what constitutes a *prima facie* case as was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (*supra*), this court found and held that the Petitioner had not placed before it documentary evidence to enable it conclude that there existed a right which had apparently been infringed by the Respondents herein so as to call for their rebuttal during the hearing and determination of the Petition herein.

81. In fact, the Petitioner had sought to restrain the 1st Respondent from appointing the 2nd Respondent as an administrator yet the 2nd Respondent had been appointed as a Receiver under the Debenture that was dated 10th February 2014, which were two (2) distinct processes as had been shown hereinabove. In this regard, this court was not persuaded to find and hold that the Petitioner had shown a *prima facie* case with a probability of success at the hearing of the Petition on merit.

82. Going further, under Clause 19(f) of the Debenture dated 10th February 2014, the 2nd Respondent was under an obligation and duty to "do all acts in the ordinary conduct of the business for the protection of assets used therein and obtaining a return therefrom..."

83. The duty of the 2nd Respondent was to ensure that the Petitioner continued being a going concern and not for him to deal a death knell to the Petitioner's operations and existence. He was in a fiduciary position and had a duty to account to both the Petitioner and the 1st Respondent herein of all the monies that he received during the receivership and management of the Petitioner herein as contemplated in Clause 20 of the Debenture dated 10th February 2014. The Petitioner therefore had a right to sue him for damages in the event he acted negligently and to its detriment.

84. The 1st Respondent was a national financial institution. It had a sound financial base and could compensate the Petitioner for any loss in the course of receivership and management by the 2nd Respondent herein as damages were quantifiable.

85. This court was not therefore persuaded that the Petitioner would suffer any suffer irreparable harm which could not be compensated for in damages in the event this court declined to grant an order for interlocutory injunction and the Respondents continued with its receivership and management to recover the debt.

86. From the documentation that was presented to this court, it did appear that the Petitioner had struggled to settle the credit facilities and had at some point sought to have the instalments reduced from USD 115,000 to USD 20,000 (Kshs 2,000,000/=) per month. The fact that it had entered into negotiations to deviate from the terms of the original Letter of Offer dated 22nd November 2013 and the Debenture dated 10th February 2014 due to the Covid-19 pandemic and other factors was proof that intervention to safeguard the 1st Respondent's interests was necessary.

87. Indeed, in view of the fact that interest continued to accrue and the 2nd Respondent had the expertise to ensure that the Petitioner continued being a growing concern, the balance of convenience titled in not granting the Petitioner herein an order for interlocutory injunction.

88. This court did not want to delve into the merits or otherwise of the sale of the premises where the Petitioner was situated as the same was not an issue that was directly before it and in particular, the registered owners of the property namely, Patricia Ann McTough and James Michael McTough were not parties to the proceedings herein.

Disposition

89. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Notice of Motion application dated and filed on 28th November 2022 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.

90. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF MAY 2023.

M.S SHARIFF

JUDGE