



Cytonn Real Estate Project Notes LLP (in Liquidation) v Official Receiver; Cytonn Investments Management PLC (Intended Interested Party) (Insolvency Petition E064 of 2021) [2023] KEHC 26393 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E064 OF 2021**

**A MABEYA, J
NOVEMBER 30, 2023**

BETWEEN

CYTONN REAL ESTATE PROJECT NOTES LLP (IN LIQUIDATION) APPLICANT

AND

OFFICIAL RECEIVER RESPONDENT

AND

CYTONN INVESTMENTS MANAGEMENT PLC INTENDED INTERESTED PARTY

RULING

1. This ruling determines the application dated 18/4/2023. The application seeks the enjoinder of Cytonn Investment Management PLC as an interested party. It further seeks a stay of execution and injunctive orders be granted restraining any investor of Cytonn Real Estate Project Notes LLP (CPN) from undertaking any execution proceedings on the strength of the deed of guarantee dated 21/4/2020.
2. The application is supported by the affidavit sworn by the applicant’s Chief Executive Officer Edwin H. Dande on 18/4/2023 and based on the grounds on the face of it.
3. It was the applicant’s case that Cyton Investments Management Plc (“CIM”) was a creditor/investor of CHYS and CPN and was the principal partner in both companies. That CIM promoted a number of real estate projects into which CHYS and CPN invested monies from creditors and offered to guarantee all the creditors investments by way of asset backed guarantee dated 21/4/2020.



4. It was averred that as a result of the orders made on 6/1/2023, CIM had been unable to realize any of the assets/projects to satisfy the CHYS and CPN creditors. That several investors had lodged claims against CIM seeking to enforce the deed of guarantee dated 21/4/2020 which according to the applicant was a violation of the orders issued on 6/1/2023. It was contended that the orders sought ought to be granted to avoid a scenario where several courts or tribunals would issue execution orders in various parts of the country.
5. The Official receiver filed grounds of opposition dated 30/5/2023. It was averred that the interested party could not seek substantive orders in the matter and could only either oppose or support the Motions filed by the proper parties. That the issue of guarantee involved a contract that was a separate cause of action and did not form part of the assets preserved by the court on 6/1/2023. It was averred that CPN was not a party to the guarantee.
6. The application was further opposed by grounds of opposition filed by Suresh Kerai a creditor of CPN. He contended that the applicant did not produce evidence to show its stake in the liquidation proceedings. That the interested party could not seek substantive orders and no evidence had been availed to support its claim of being a principal partner, creditor and investor in CPN. It was averred that the application sought to bring up issues that had already been conclusively dealt with.
7. In his submissions, the Official Receiver stated that the intended interested party brought a new issue concerning the deed of guarantee which issue had not been canvassed in the Insolvency Cause. That the validity and enforcement of contracts ought to be addressed between the parties privy to the contract in a different suit.
8. I have considered the Motion, the responses thereto and the submissions on record. The main issue for determination is whether the intended interested party has made out a case for the orders sought. The Court has been moved with respect to three things, first the enjoinder of the intended interested party to this suit, an order for injunction as well of stay of execution.
9. In *Communications Commission of Kenya and 4 Others v Royal Media Services Limited & 7 Others* Petition No. 15 of 2014 [2014] eKLR, the Supreme Court of Kenya held: -
 - “An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;
 - i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law;
 - iii. Joinder to prevent a likely course of proliferated litigation.”
10. Further, in *Skov Estate Limited & 5 others v Agricultural Development Corporation & another* [2015] eKLR, it was held: -
 - “In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough



for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.”

11. In the present case, it is evident that the CIM was not part of the proceedings before the Court that resulted in the Liquidation Order of 6/1/2023. The Insolvency Cause was properly advertised and was prosecuted for over a year. All creditors supporting or opposing the same were invited and those interested did participate either directly or through the Committee of Creditors. All the issues concerning the activities and the wherewithal, the activities of CPN were raised and dealt with in those proceedings before the Court pronounced the liquidation order. It is too late in the day to now raise issues concerning the activities of CPN that were undertaken before the liquidation order was made.
12. What the applicant has brought now is issues regarding some deed of guarantee and seek injunctive orders and stop execution processes which are not part of or have nothing to do with the liquidation process of CPN. It has not demonstrated that it has a stake to the proceedings or any identifiable interest in the liquidation process.
13. In *Francis Kariuki Muruatetu & Another v. Republic & 5 others*, [2016] eKLR, the Supreme Court held: -

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court”

14. From the foregoing, it is clear that the intended interested party is not permitted to bring any claim in these proceedings. This being an insolvency matter, the order for liquidation has already been and the process of liquidation only needs to be expedited. The Court’s jurisdiction is based on the matters that arise during the liquidation process and no more. The issue of whether the injunction should be granted or stay of execution is a new matter that should be determined in another forum.
15. In the premises, the court finds no merit in the application and the same is dismissed with costs.
It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

A. MABEYA, FCI Arb

JUDGE

