



**In re Cytonn High Yields Solution (In Liquidation) (Insolvency Petition E063 of 2021)
[2023] KEHC 26199 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E063 OF 2021
A MABEYA, J
NOVEMBER 30, 2023
IN THE MATTER OF THE INSOLVENCY ACT 2015
IN THE MATTER OF THE LIMITED LIABILITY PARTNERSHIP ACT CAP 30A OF 2012
IN THE MATTER OF CYTONN HIGH YIELDS SOLUTIONS (IN LIQUIDATION)
IN THE MATTE OF CYTONN INVESTMENT PARTNERS FIFTEEN LLP**

RULING

1. On 6/1/2023, Cytonn High Yields Solution (“the Company”) was placed in liquidation and the Official Receiver appointed as the liquidator. What transpired thereafter is the filing of a myriad of applications for various orders. On 16/6/2023, the Court directed that all then pending applications be heard together and be determined in one ruling.
2. Since then, there are more than 10 other applications that have been filed and are pending determination. This ruling is in respect of the applications dated: -
 - a. 17/2/2023 by SBM;
 - b. 23/2/2023 by Cyton Intergrated Project (“CIP”);
 - c. 23/2/2023 by Goal Advisory
 - d. 18/4/2023 by the Cytonn Investment Management PLC (“CIM”);
 - e. 3/5/2023 by the Official Receiver; and
 - f. 3/5/2023 by the Official Receiver.



Application dated 17/2/2023 by SBM Bank Ltd

3. For reasons to be adduced later, the Court adopts the consent between SBM Bank Ltd and the Official Receiver dated 1/8/2023. The said consent settles the issues raised in the application in total.

Application dated 23/2/2023 by Cytonn Intergrated Project LLP (CIP)

4. The application was not premised on any provision of the law. The applicant sought for the stay of the preservation orders made on 6/1/2023 and for the Court to allow the purchasers who had already bought into the project 'the Alma', prior to the preservation orders, to complete the transfers and receive their titles.
5. The application was supported by the grounds on the face of it and the affidavit of Solomon Kimani sworn on 23/2/2013. It was the applicant's case that it was not a party to the proceedings yet its assets had been listed in the creditors' application thereby condemning it without being heard. That the property 'the Alma' was not only funded by the funds advanced to it by the Company but with further funds from SBM Bank who held a secured charge over the property.
6. That by issuing the preservation orders, the Court failed to consider that the creditors of the Company had been assisted to acquire property equal to the value of the investments. That the order affected the applicant's projects which had stalled. It was contended that there were contractors on site who had downed their tools because of the said blanket orders. Finally, that the applicant would continue to run into losses and eventually there will be nothing to be realized for the creditors.
7. The application was opposed by the Official Receiver in a replying affidavit sworn by Judy Mugo on 22/5/2023. She swore that the application was void to the extent that leave was not sought for the applicant to be enjoined in the suit. That the preservation orders touched, inter alia, on LR NO Kiambaa/Ruaka 6667 belonging to the applicant. That CIP had received from the Company a sum of Kshs. 3b which was used to acquire and develop 'the ALMA'.
8. She further stated that SBM Bank Limited lent CIP Kshs. 650 million and a charge was registered in respect thereof. That the Official Receiver was not provided with financing documents to show the actual amounts accruing. That the registration of a collateral by CIP was done on 6/12/2021 when the Company was under administration.
9. It was contended that in liquidation, the rights and interests of all the parties would be taken into account. That contracts with contractors was not reason enough to warrant lifting of the preservation orders. That the applicant had failed to demonstrate the purported irreparable loss or that it had an arguable appeal.
10. The application was also opposed by Michael Mutua Mwinzi , a creditor, in a replying affidavit sworn on 14/6/2023. He stated that CIP had reneged its obligation in creating a legal charge over the partnership interest (the Alma) under the loan note and therefore could not claim that the loan advanced to it by the Company was unsecured.
11. That the contractors were unsecured creditors and their right fall under the ambit of liquidation. That CIP had been asking willing creditors to make payments in order to get apartments which are not immediately available. It had not been demonstrated that there was a meritorious appeal to warrant the stay sought.



12. The applicant filed a further affidavit of Solomon Kimani sworn on 29/5/2023 wherein it reiterated the contents of its supporting affidavit. It also urged the Court to exercise its discretion and admit it into the proceedings.

Application dated 23/2/2023 by Goal Advisory Trustee

13. The application was brought under Article 50 of *the Constitution* of Kenya 2010, section 1A, 1B, 3A and 63e of the *Civil Procedure Act* CAP 21 Laws of Kenya Order 42 of the Civil Procedure Rules.
14. It sought to stay the preservation orders against the properties known as ‘the Alma’ on LR. No Kiambaa/Ruaka/6667, Applewood on LR No. 1055/29, Taraji on LR. No 28222/3 on Ridgeways and ‘The Ridge’ on LR. No. 28222/3 pending the intended appeal.
15. The application was premised on the grounds on the face of it and the supporting affidavit of Nelson M. Ng’ang’a sworn on 22/2/2023.
16. It was averred that the applicant was a trustee mandated by the Capital Markets (Collective Investment Schemes) (Alternative Investment Funds) Regulations 2021 to a number of regulated products and collective investment schemes involving the the Company. That the Company had invested over Kshs. 280,000,000/- from its portfolio including the assets that are the subject of the preservation orders.
17. That due to those orders, the applicant stood to suffer huge irreparable loses which are detrimental to the regulated investors as well as the creditors of the Company. That the applicant has a good appeal with a high chance of success. That the blanket order had the effect of crippling the operations of the projects, resulting in default of legal obligations such as payment of loans. That the orders amounted to economic sabotage.
18. The application was opposed by the Official Receiver in a replying affidavit sworn on 22/5/2023 by Diana Mumo. She averred that the application was defective as it was filed by a stranger to the proceedings without seeking leave to be enjoined as a party.
19. That pursuant to the liquidation order, the Court preserved the assets in a bid to protect all creditors. That in lifting the preservation orders, the creditors of the Company and the applicant would be exposed as the Special Purpose Vehicles would be left exposed. That the applicant failed to prove the actual drawdowns and the specific amounts for each project or property.
20. That the Official Receiver was required by law to protect the interests of all the creditors both secured and unsecured. The applicant also failed to particularize the loss that would be incurred and the interest it has in the various projects. That the application only sought to prioritize the interests of a few senior lenders whose particulars have not been disclosed.
21. Michael Mutua Mwinzi , a creditor also opposed the application vide a replying affidavit sworn on 16/6/2023. He stated that the applicant did not have locus standi in the proceedings thus could not seek the orders listed in the application. That the aggregate sum for the capital contribution to the Company was Kshs 11,172,133,445/- as at 31/7/2021 and Kshs. 10,611,635,000/- was advanced to various Special Purpose Vehicles (SPVs) created by the promoters of the Company.
22. That ‘the Alma’ had been advanced Kshs. 2,767,469,551/- by the Company. That the loan advanced to the SPVs were secured since the SPVs had reneged their obligation on the partnership agreement. That the applicant had not shown that it had an arguable appeal.



23. The applicant further buttressed the facts laid out in the supporting affidavit in a further affidavit dated 30/5/2023 sworn by NELSON NG'ANG'A. It urged that under Article 159, the Court ought to administer justice without due regard to technicalities of procedure.

Application dated 18/4/2023 Cytonn Investments Management PLC (CIM)

24. The application sought that CIM be admitted as an interested Party and for stay of all the execution proceedings against CIM on the strength of the deed of guarantee dated 21/4/2020. It also sought orders restraining the creditors of the Company from taking any execution proceeding against it pending the determination of the petition.
25. In support of the application, the applicant relied on the grounds on the face of the application and the supporting affidavit dated 18/4/2023 sworn by Edwin H. Dande. It's case was that CIM was the principal partner of the Company and CPN. That it was offering administrative and management services to the two entities. That as a promoter of a number of real estate projects into which the Company and CPN invested their monies, it offered to guarantee all the creditors investments by the deed of guarantee dated 21/4/2020 based on the assets.
26. That because of the orders of 6/1/2023, CIM was unable to realize any of the assets to satisfy the creditors of the Company and CPN as per the deed of guarantee since all the assets had been preserved. It was contended that the creditors had been lodging separate execution proceedings against CIM on the strength of the guarantee. That the Court had directed that all claims be lodged with the liquidator.
27. The application was opposed by Suresh Kerai, a creditor, who stated that the deed of guarantee was issued by CIM in favor of creditors of CHYS Solutions LLP Investment PARTNERS who were natural persons. That there was no proof of imminent threat and the Company was not a party to the said guarantee.
28. The Official Receiver filed grounds of opposition dated 29/5/2023 stating that CIP could not seek substantive orders as it had no distinct stand in this matter. That the preservation order of 6/1/2023 did not affect the deed of guarantee which it issued to investors as it remains alive as long as the cause of action to enforce the guarantee remains active. That the Company was not a party to the guarantee and any right accruing from the said guarantee should be prosecuted in the right forum.
29. In opposition to the application also, Catherine Njeri Njaimwe, a creditor, filed a replying affidavit dated 1/6/2023. She stated that the actual deed of guarantee given to the creditors was dated 9/7/2018 and not the document dated 21/4/2020. That the order of 6/1/2023 did not touch on the issue of the guarantee and that CIM seeks to evade liability in the dispute that is covered by a contract.
30. She also raised a preliminary objection dated 1/6/2023 stating that CIM was relying on a document known as the asset backed guarantee which was illegal. That the application was based on a falsified document and its sole intent was for CIM to evade liability.
31. Transforming Women Welfare Society, a creditor, raised a preliminary objection dated 29/4/2023 to the application. It contended that, upon granting the liquidation order, the Court became functus officio and could not therefore grant the orders sought. That the Court lacks jurisdiction to issue protective orders and that CIM was guilty of laches.
32. CIM filed a further affidavit dated 18/5/2023 sworn by Edwin DandE. He stated that CIM's ability to honour the guarantee had been affected by the subject order since any attempt to realize the properties would be a direct contravention of the court order. That the main issue was the preserved assets which the deed of guarantee applied to.



1st Application dated 3/5/2023 by the Official Receiver

33. This application was brought under section 420, 443(1)(a), 465(3) third schedule part three paragraph 8 of the *Insolvency Act* 2015, Fifth Schedule paragraph 17 of the Limited Liability Partnerships 2011, section 3A of the *Civil Procedure Act*.
34. It sought to vest on the Official Receiver, for the benefit of the creditors, L.R NO 2/85 (Originally 2/44/2), L.R 2/86 (Originally 2/44/3) and L.R 2/87 (Originally 2/44/4), (“the Kilimani property”) held by Cytonn Investment Partners sixteen. That CIM be compelled to surrender the original title documents for the Kilimani property to the Official Receiver and the latter be authorized to carry out a valuation of the same.
35. The application was supported by the affidavit of Judy Mugo sworn on 3/5/2023. She stated that, vide the orders of 6/1/2023, the Company was placed under liquidation and its assets preserved. That while undertaking the tracing of the assets, it was noted that the Company was a partner of CIM plc and Cytonn Investment Partner Sixteen (CIP 16) was one of the SPVs that had bought the Kilimani property.
36. That CIP16 had been lent by the Company Kshs 3,000,000,000/- at an interest rate of 21% p.a for the purchase of the Kilimani property. That therefore, the property formed part of the assets owned of the Company. That the CIM PLC had declined to surrender the title documents to the said properties despite requests from the Official Receiver. That vesting the Kilimani property with the Official Receiver would protect the creditors interests.
37. The application was opposed by CIP 16 in a replying affidavit sworn by its Legal Officer Anthony Kimani on 14/6/2023. It also filed grounds of opposition dated 15/6/2023. It contended that, contrary to the contention by the Official Receiver, the Kilimani property was owned by CIP 16 and not the Company.
38. That any recovery of the loan advanced should start with a formal statutory demand notice which process had been bypassed. That vesting the Kilimani property on the Official Receiver would be making an insolvency order against CIP 16 which is still solvent.
39. That the preservation order had greatly prejudiced CIP 16 as it was not a party to the proceedings. That it had legitimate expectation that the recovery process would follow due process. That an agreement to loan Kshs. 3,000,000,000/- was not proof that the amounts were disbursed in full. That the duties of the Official Receiver did not extend to administering the assets of CIP 16.
40. Judy Mugo filed a further affidavit dated 11/7/2023 in answer to CIP’s contestations. She stated that there was an admission that the Company had lent out Kshs 3,000,000,000/- for the acquisition of the Kilimani property. That the common law doctrine of tracing allowed the creditors of the Company to trace its assets to the appropriate destination. That despite the liquidation order, CIM continued to intermeddle with the property.

2nd Application dated 3/5/2023 by the Official Receiver

41. The application was brought under section 420, 443(1)(a), 465(3) third schedule part three paragraph 8 of the *insolvency act* 2015, Fifth Schedule paragraph 17 of the Limited Liability partnership 2011, section 3A of the *Civil Procedure Act*.



42. It sought orders to vest 12.5% shares (being 250,000,000 ordinary shares) in Superior Homes (Kenya) PLC held by Cytonn Investment Partners fifteen PLC with the Official Receiver for the benefit of the creditors of the Company. That the Official Receiver be authorized to make a valuation of those shares.
43. The application was supported by the affidavit sworn by Diana Mumo. She averred that the Company had advanced CIP 15 a loan of Kshs. 500,000,000/- on 2/2/2017. That Kshs.250,000,000/- thereof was utilized in the purchase of the 12.5% Ordinary shares held by CIP 15 in Superior Homes (Kenya) PLC. That there was a transfer of 5000 ordinary shares of 100 each held by Ian Hazilitt and in consideration of Kshs 50,000,000/- a transfer of 1250 ordinary shares of Kshs 100 each. That there was a clear and direct link of the funds deposited advanced by the Company to the purchase of the said shares in Superior Homes Kenya PLC.
44. The applications were canvassed by way of written submissions which I have considered.
45. There are five issues for determination namely: -
 - a. Whether the preliminary objections dated 29/4/2023 and 1/6/2023 are sustainable;
 - b. Whether a case to stay the preservation orders of 6/1/2023 has been made;
 - c. Whether injunctive orders should be granted to restrain the investors of CHYS LLP from taking any execution proceedings against the intended interested party pending the determination of the petition.
 - d. Whether the official receiver has made out a case for grant of the orders sought in the applications dated 3/5/2023.
46. Before delving into these issues, it is imperative to mead some preliminary but pertinent remarks. On 1/10/2021, the Company and a related Company CPN came to Court seeking orders for administration. The orders were made pursuant to resolutions made by the respective boards of directors. The two companies convinced the Court that they needed be under administration in order to enable them restructure as their then debts amounting to over Kshs.13billion could not be repaid and the creditors had come calling.
47. The Court gave the administration orders and appointed Mr. Kerita Marima who had been proposed by the said Companies as the Administrator for both Companies. During the course of administration, the Administrator confirmed to this Court and the Court found as a fact that; the promoters of the two companies were related, that they had established a milliard of SPVs in the name of Partneship LLPS. That the two Companies were receiving monies from the public for investment. That the monies would then be channeled to these SPVs to acquire properties which would be developed and then sold out to purchasers and the proceeds paid to the investing public.
48. As at the time the two Companies came to Court, they were holding deposits or investments from the public in excess of Kshs.13 billion. The Administrator and the Court found that these funds had been 'lent' to the SPVs who had in turn purchased the properties that they were developing. There were no securities whatsoever that was offered for these 'lendings'. This was probably because the Companies and these SPVs were not only related, but belonged to the same promoters.
49. In its decision of 6/1/2023, the Court found that the two Companies were involved in a scheme which was akin to a fraud, such that, their promoters, who were the same promoters or were closely related to the SPVs, intended to keep the investors away from their monies by pumping the investors' money into SPVs in which the promoters were in control of. They would, in the event the Companies collapsed, as



- they eventually did, claim, that the SPVs were separate entities from the Companies and therefore laugh all the way to the bank and leave the investors of the Company languishing in the perpetrated poverty!
50. It is for this reason that the Court invoked the doctrine of tracing and preserved these properties so as not to defeat the rightful claims of the creditors by the clever dealings of the promoters of the two Companies and the related SPVs. It is also against this background that the Court ordered the two Companies liquidated and the said properties preserved pending the proof that these properties were acquired by the monies advanced by the Companies to these SPVs.
 51. The Court would not countenance a well-orchestrated scheme of fraud, based on the intangible doctrine of separate legal personality of Companies, to defeat the lawful and constitutional rights and claims of the creditors of these Companies.
 52. In granting the preservation orders, the Court was alive to the fact that; the Insolvency Petitions were supposed to have been advertised and all and sundry who had claims against the Companies were supposed to appear and oppose or support the proceedings.
 53. The order of liquidation was therefore made in rem and it binds all including the SPVs. They were aware of the claims which the Companies presented to the Administrator and the Court's findings. The Court observed that those who had claims in the preserved properties would have an opportunity of showing that the said properties were not acquired by the proceeds of the monies advanced by the Companies under liquidation. The time for such proof is now!

Whether the preliminary objections dated 29/4/2023 and 1/6/2023 are sustainable.

54. A preliminary objection is based on a point of law on the presumption that the facts pleaded are correct. See *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696.
55. On the preliminary objection dated the 29/4/2023, the objector challenged the jurisdiction of this Court to hear and determine the application dated 18/4/2023 on the ground that the Court became 'functus officio once it made the liquidation order'.
56. The *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, the Supreme Court of Kenya cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 which stated that: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”
57. In view of the foregoing, can this Court be said to be functus officio after granting the liquidation order of 6/1/2023? Section 420 of the *Insolvency Act* ("the Act") provides that questions relating to liquidation may be referred to court for determination.
58. In that case, the Court is prevented from revisiting the matter on a merit bases but it is empowered to inquire into questions that arise from the liquidation process. That being the case, the Court is not functus officio. It would functus officio if it was being called upon to revisit the issues already determined. Furthermore, the Court had stated that those parties who had not been heard on the



issue of the preserved properties could be heard on the status of their ownership. Accordingly, that preliminary objection lacks merit and is dismissed.

59. On the second preliminary objection dated 1/6/2023, it was contended that CIM had based its case on the guarantee document dated 21/4/2020 which document did not meet the mandatory requirements of the *Companies Act*, *Capital Markets Act* and the *Capital Markets Act* (asset backed Securities) regulation 2007. The said document was also termed to be fraudulent.

60. In *Oraro vs Mbajah* [2005] eKLR, the court held that: -

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

61. In the present case, the objection has challenged the deed of guarantee relied on by CIM. For the Court to establish the authenticity of the said document, it has to examine the evidence presented by parties interrogate the same before making a determination. In this regard, I find that the preliminary objection is based on matters of fact and not law and is therefore untenable. The same is hereby struck out.

Whether the Court should stay the preservation order of 6/1/2023 in order to allow the purchasers to complete transfers of their titles and the intended appeal.

62. In the applications dated 23/2/2013 by Goal Advisory (trustee) and CIP LLP, the applicants sought to stay the preservation orders pending appeal. They were apprehensive that they would suffer losses if the stay sought is not granted. It was submitted that because of the orders, the projects were not generating any value and continued to deteriorate. That it would be in the best interest to have them remain operational.

63. The applications were challenged by the Official Receiver and the creditors on the ground that; they were incompetent for want of leave for joinder and that the appeal had no chances of success. That the loss to be suffered had not been particularized.

64. In *Francis Kariuki Muruatetu & Another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR, the Supreme Court held of joinder: -

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.



iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

65. In view of the foregoing, for a party to be admitted as a party to a proceeding, leave should be sought by a formal application which should demonstrate the stake the party has in the proceedings, the prejudice to be suffered in case of non-joinder and its input in the matter.

66. In the present case, both applicants did not seek leave to be admitted as parties. However, I believe in a proper case, the Court has the discretion to admit parties even on its own motion. The Court therefore declines to uphold that objection.

67. On stay pending appeal, the principles are well known. The application must be made timeously, substantial loss to be suffered must be demonstrated and security for the due performance of the order or decree that will ultimately be found to be binding upon an applicant must be offered. (See Order 42 rule 6).

68. In *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi* (Milimani) HCCC 795, it was held: -

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. ... The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. ... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court.”

69. The purpose of stay pending appeal is to preserve the substratum of the case. In this case, the applicants in the two applications dated 23/2/2023 intend to appeal against the order of 6/1/2023. They alleged that they would suffer damages if the stay is not granted.

70. In making the order of liquidation on 6/1/2023 and appointing the Official Receiver as the Liquidator, the Court observed that the creditors were entitled to trace their funds in the projects where their monies had admittedly been sunk. It therefore decided to conserve those properties to await the realization of the assets of the Company.

71. As already stated, when making the order of preservation, the Court quipped that those parties laying claim on the preserved properties may be given an opportunity to be heard before final appropriation orders are made. That opportunity was availed by way of the present applications. No evidence was



presented by the applicants to prove otherwise than that those projects were founded, acquired and/or developed by the funds of the creditors invested in the Company.

72. In this matter, there are two competing interests, the applicants on one hand, who want their interests in the properties preserved and the creditors on the other hand who await payment of their dues from the liquidation process. The applicants failed to particularize the loss they would suffer if the properties continue to be preserved.
73. As already stated, the applicants failed to show that the billions given to them by the collapsed Company was not the funds used to acquire and develop the subject properties. In my view, once the liquidation order was made, it was no longer business as usual for the SPVs. The chicken had come to roast for their promoters who are also the promoters of the collapsed Company. The burden laid on them to disassociate the SPVs projects from the monies advanced to them by the Company for which they only issued paper money, which this Court rejected on 6/1/2023 as being any security at all for the billions of monies advanced by the Company to the SPVs.
74. The greater prejudice in this matter would be to release the preserved properties or delay further the realization of the assets of the Company for the benefit of the suffering public.
75. In the upshot, the Court finds that the two applications dated 23/2/2023 by CIP and Goal Trustees have not made any case for stay pending appeal and are accordingly dismissed with costs.

Whether injunctive orders should be issued to restrain the investors of CHYS LLP from taking any execution proceedings against the SPVs pending the determination of the petition.

76. CIP sought to restrain the creditors or investors of the Company from undertaking execution proceedings against CIM PLC and stay of execution against it on the strength of the deed of guarantee dated 21/4/2020. It was contended that the deed of guarantee was secured by the properties preserved by the Court. On his part, the Official Receiver submitted that the deed of guarantee was not part of the assets that had been preserved by the orders of 6/1/2023.
77. Firstly, there is no petition that is pending which any injunction can be issued to await its determination. There are no proceedings that are pending in respect of which an interlocutory injunction can issue. What is ongoing is the liquidation process of the Company.
78. Be that as it may, I will consider the prayer for injunction on merit. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA.
79. In *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR, the Court of Appeal held: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to a), establishes his case only at a prima facie level, b) demonstrates irreparable injury if a temporary injunction is not granted and c) ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.



80. The application is founded on the grounds that CIM PLC issued an exclusively asset backed deed of guarantee dated 21/4/2020 to all its investors which assets had been preserved by the Court. It contended that several investors had purported to lodge separate claims against the applicant as guarantor on the strength of the guarantee.
81. From the record, the Court notes that the deed of guarantee was not part of the proceedings before it. Further, the documents presented before Court have been challenged and it is not the place of this Court to start inquiring of their authenticity or otherwise. This is an Insolvency Court which should only, at this stage, be concerned with issues that assist the liquidation process.
82. The Court further notes that, the applicant had the opportunity to present its issues before the Court during the administration and well before the Liquidation order was made. It was well within its knowledge that the Administrator was following the funds of the Company. When the proposals for the restructuring of the Company, that were rejected by the Court, were being made, the applicant should have come forward and presented the issues it is raising now. It is too late now to try and raise them now.
83. In any event, for the reasons set out above about the failure to exonerate the projects and/or the preserved properties from the funds of the creditors of the Company, no prima facie case has been established. In any event, no irreparable damage was proved and the balance of convenience tilts in favor of allowing the process of liquidation to be completed as soon as practically possible. The creditors of the Company have waited for too long now!
84. Accordingly, the prayer for an injunction is dismissed with costs.

Whether the Official Receiver has made out a case for grant of the orders sought in the applications dated 3/5/2023.

85. On the first application, the Official Receiver sought orders to vest in him, properties known as L.R NO 2/85 Originally 2/44/2, L.R 2/86(Originally 2/44/3 and L.R 2/87(2/44/4) held by CIP 16 for the benefit of the creditors.
86. In his submissions, he implored the Court to apply the doctrine of tracing in allowing the application as the Company had loaned CIP 16 Kshs 3,000,000,000/- to acquire the Kilimani property. That even though the two entities, the Company and CIP 16 were distinct, the creditors of the Company were entitled to trace their investments in CIP 16. That CIP16 was still dealing with the said property even after the preservation orders had been granted.
87. In the 2nd application, the Official Receiver sought orders to vest the 12.5% shareholding of CIP 15 PLC in Superior Homes (K) PLC, that is 250,000,000 ordinary shares. The same should vest in him for the benefit of the creditors. He submitted that there was a direct contribution of the funds of the Company to the purchase of those shares. That this fact had not been denied with any satisfactory evidence.
88. In *McTaggart v. Boffo* (1975) 64 D.L.R. (3d) 441 (Ont. H.C.J.), 10 O.R. (2d) 733, at para 67, the court stated: -

“Tracing is only possible so long as the funds can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:



- a. If, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;
- b. the chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value without notice.”

89. Further, in the *British Columbia case Tracy v. Instalcoans Financial Solutions Centres* (B.C.) Ltd. 2010 BCCA 357, the court noted with approval the case of *McTaggart*(*supra*) and held that: -

“I conclude, then, that the trial judge considered the correct legal “tests” in approving a constructive trust as a restitutionary remedy for the defendants’ unjust enrichment. As mentioned above, however, it is only if the Unlawful Finance Charges or their proceeds are identifiable in the hands of defendants farther up the transactional chain than the Storefront Lenders that a constructive trust may be asserted against those defendants. The process by which the plaintiffs may ‘follow’ the Charges up the chain is tracing – the “process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received ... can properly be regarded as representing his property”. (Per Millett L.J. (as he then was) in *Boscawen v. Bajwa* [1995] 4 All E.R. 769 (C.A.) at 776.) Although tracing is available both at law and in Equity (see Maddaugh and McCamus, *supra*, at chapters 6 and 7), the right which the plaintiffs are entitled to trace in this case is the constructive trust, an equitable property right. I agree with Professor Lionel Smith (*The Law of Tracing* (1997)) that the establishment of this proprietary right, which he refers to as the “proprietary base”, is sufficient to establish an entitlement to trace. It is not necessary, as was once argued, to demonstrate a pre-existing fiduciary relationship”

90. Based on the foregoing dictums, for an applicant to rely on the doctrine of tracing, he must prima facie establish that the money or property can be located.
91. In the present case, there was evidence that money invested in the Company was advanced to CIP 16 and CIP 15 who in turn used the same to acquire the Kilimani property and the subject shares. These are facts that were clearly established to the Court by the Administrator which persuaded the Court to issue the preservation orders.
92. Despite having the opportunity to prove otherwise, the SPVs did not provide any evidence to that end. Accordingly, under the doctrine of tracing, the creditors of and the Company have the right to trace their monies into the Kilimani property and the subject shares in Superior Homes (K) PLC.
93. In line with the tracing doctrine, the Official Receiver is entitled, on behalf of the Company and its creditors to trace the advanced funds to the said properties and be at liberty to recover the said monies from the same.
94. The main role of a liquidator during liquidation is set out by section 443 of the [Insolvency Act](#) which provides: -
 - “(1) The functions of the liquidator of a company that is being liquidated by the Court are-
 - (a) to ensure that the assets of the company are realized and distributed to the company’s creditors; and



- (b) if there is a surplus—to distribute the surplus to the persons entitled to it.

95. I find that in tracing the assets to the SPVs aforesaid, the Official Receiver is well within his mandate as set out in the *Insolvency Act*. Unless the amount advanced to the entities is paid over to the Official Receiver with interest as per the agreement between the Company and CIP 16 and 15, respectively, the Official Receiver has the right to recover the same from the identified properties for the benefit of the creditors of the Company.
96. Further to the foregoing, the Official Receiver is at liberty to value the said property and shares with a view to realize them.
97. Accordingly, all the said applications are determined and the Court makes the following orders: -
- a. The consent dated 1/8/20283 between SBM Bank Ltd and the Official Receiver is hereby adopted as an order of this Court and the application dated 17/2/2023 compromised accordingly in terms thereof.
 - b. The preliminary objections dated 29/4/2023 and 1/6/2023 are not sustainable and are hereby dismissed with costs.
 - c. The applications dated 23/2/2023 by Goal Advisory Africa Limited and Cytonn Intergrated Project LLP are dismissed with costs to the Official Receiver and the creditors who opposed them.
 - d. The application dated 17/4/2023 is dismissed with costs.
 - e. Applications dated 3/5/2023 by the Official Receiver are hereby allowed as prayed.

It is so ordered.

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

A. MABEYA, FCI Arb

JUDGE

