



**Ng'ang'a v Cytonn High Yield Solutions LLP (Miscellaneous Application E616 of 2021)
[2022] KEHC 3368 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E616 OF 2021**

A MABEYA, J

MAY 26, 2022

BETWEEN

JANE GATHONI NG'ANG'A APPLICANT

AND

CYTONN HIGH YIELD SOLUTIONS LLP RESPONDENT

RULING

1. Before Court is a Chamber Summons dated 15/10/2021. It was brought under section 560 (d) of the *Insolvency Act*, 2015. The summons sought orders that the Court do approve the continuance of these proceedings against the respondent and the commencement of arbitral proceedings against the respondent.
2. The application was supported by the affidavit of Jane Gathoni Ng'ang'a sworn on 15/10/2021. The grounds were that these proceedings related to the respondent's performance of the Contribution Agreement wherein the respondent admitted to owing the applicant a sum of Kshs. 15,017,846/= as at 31/8/2021. That these proceedings were filed by the applicant seeking interim measures of protection under section 7 of the *Arbitration Act* and the parties commenced arbitral proceedings over the dispute.
3. Subsequently however, the respondent was placed under administration on 7/10/2021 and Kereto Marima appointed as administrator in Commercial Insolvency Cause No. E063 of 2021. That the continuance of these proceedings and sustenance of the Arbitral proceedings between the parties will not prejudice or defeat the administration.
4. The respondent opposed the application vide the affidavit of Kereto Marima, the respondent's administrator, dated 28/10/2021. He contended that the appointment of an administrator on behalf of the respondent had the effect of suspending all legal proceedings against the respondent by virtue



- of section 560 (1) of the [Insolvency Act](#), 2015. That this Court lacked jurisdiction to entertain the application as the same could only be addressed in the administration proceedings.
5. The respondent also filed a preliminary objection dated 28/10/2021 to the effect that this Court lacked jurisdiction to entertain the application or grant the reliefs sought. That until leave was sought and granted in the administration proceedings, this instant proceedings remained stayed and no relief could be granted.
 6. I have considered the pleadings, evidence and parties written submissions. I will begin by addressing the preliminary objection. A preliminary objection was defined in *Mukisa Biscuits Manufacturing Co. Ltd... Vs... West End Distributors Ltd* (1969) EA 696 to consist a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.
 7. A preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.
 8. The respondent's case was that the effect of the administration order was that all suits against the respondent became suspended by virtue of section 560 (1) of the [Insolvency Act](#). It was submitted that only the court exercising insolvency proceedings could grant the reliefs sought.
 9. Section 560(1) (d) of the [Insolvency Act](#) provides: -
 - (1) While a company is under administration—
 - (d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.”
 10. “Court” is defined under section 2 of the [Insolvency Act](#) to mean “the High Court, and if there is an insolvency division of that Court, means that division.” The intention of the Legislature is clear. If there exists an Insolvency Division in the High Court, then only that division can grant leave to begin or continue a suit against a company under administration. This is in line with the objectives of administration which is to rescue a company from financial distress.
 11. This is so because it is expected that the Insolvency Court will be well versed with the finer details as regards the company under administration. In this regard it will be able to determine whether the intended suit promotes the best interest of the company, or is only frivolous and intended to overburden the already struggling company with unnecessary litigation.
 12. The purpose and function of that provision is to ensure that a company under administration is not subjected to a multiplicity of actions which would be both expensive and time-consuming. They may be sometimes unnecessary, taking the administrator's attention and available funds away from the orderly administration thereof.
 13. The object of the [Insolvency Act](#) was stated in [Midland Energy Limited -vs- George Muiruri T/A Leakey Auctioneers & Another](#) [2019]eKLR as follow: -

“The design of our current Insolvency Law is to give a second chance to financially distressed companies. A break from past where the fate of an ailing company would invariably be a winding up or liquidation order.



Administration is one of the alternatives to liquidation and is provided for in part VIII of the Act. The objectives of administration are set out in section 522 of the Act as to be as follows:

- a) Maintain the company as a going concern
- b) To achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated.
- c) To realise the property of the company in order to make a distribution to one or more Secured or Preferential Creditors."

14. In *Nakumatt Holdings Limited & another v Ideal Locations Limited* [2019] eKLR, it was held: -

"There is good reason, in our view, why Section 2 of that Act specifies the court to grant approval should be the court seized of the insolvency matter, namely the High Court. The administration of an insolvent company is for the benefit of all creditors of such a company and a situation where creditors separately attack or take assets of a company would defeat the overall objective of the administration."

15. In *Lambart Lwanga Ogochi & 4 Others v. Ponginangipalli Venkata Ramana Rao* [2022] Eklr, after reviewing several authorities in the area, the court held: -

"From the foregoing, several matters come to the fore. That the primary role of the Insolvency Court is to enforce the objectives of the Act as set out in section 522 of that *Act*. That in all proceedings under the *Act*, the primary concern is to uphold those objectives. That primary in those objectives is to ensure that, the company under administration is not unnecessarily harassed by way of legal proceedings and or obliterated by uncoordinated disposal of its assets.

Further, that all matters concerning a company under administration are under the watchful eye of the Insolvency Court. It is for that reason that before any proceedings are under-taken against a company under administration, the Court has to give its nod or the consent of the administrator, who is an agent of the court.

In this regard, the core objective of the *Insolvency Act* is that a company under administration is not to be harassed and its assets wasted by unnecessary litigation. The leave of the court is therefore required as a safeguard. Before any action can be brought or continued against a company under administration, the court must investigate the intended litigation. The interest of all creditors is central in anything done or intended to be done to such a company.

In view of the foregoing, I hold that the Court that is referred to in section 560 of the *Act* is the Insolvency Court, that is, the court that is exercising insolvency jurisdiction. This is so because, being in-charge of the administration of the subject company, it is expected that the Insolvency Court will have the knowledge and circumstances surrounding the placement of the company under administration.

That court would be expected to know how the objects of the *Act* under section 522 may be achieved through the administration. That court will definitely not treat the subject company in the normal manner, since it is no longer business as usual for such a company. It would take the necessary precautions and weigh all that goes towards achieving the objectives set out in section 522 of the *Act* before granting the leave under section 560 of the *Act*.



In this regard, leave should be sought in the insolvency proceedings themselves. This is why there is a requirement for advertising the fact of administration once it takes place. The notice is given to everyone so that everyone knows how to deal with the subject company.

If any proceedings are instituted in any other court other than the court exercising insolvency proceedings, that other court will be acting with minimal or insufficient information regarding the company which might defeat the legislative intention in sections 522 and 560 of the *Act*. It is the Insolvency Court that will be better placed to weigh whether the intended proceedings will be promoting the objects of the Act in relation to the company or not.”

16. I am fully in agreement with the foregoing rendition of the law. The leave should have been sought in the insolvency proceedings themselves, viz Commercial Insolvency Cause No. E063 of 2021.
17. In the circumstances, this Court lacks jurisdiction to entertain the present application and strikes out the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2022.

A. MABEYA, FCIArb

JUDGE

