



**Gadhoke v Malde Holdings Limited (Insolvency Cause E030 of 2021)
[2022] KEHC 13292 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 13292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E030 OF 2021**

WA OKWANY, J

JULY 28, 2022

BETWEEN

HARVEEN GADHOKE APPLICANT

AND

MALDE HOLDINGS LIMITED RESPONDENT

RULING

1. The applicant herein VICTORIA COMMERCIAL BANK, moved this court through the application dated June 28, 2021 seeking orders for administration of the company MALDE HOLDINGS LIMITED and that HARVEEN GADHOKE be appointed as the administrator.
2. The application is supported by the statement of facts sworn by the applicant's representative Ms Ruth Mumbua Muasya who states that the bank advanced the company facility in the tune of Kshs 765,000,000. The said facility was secured by a first legal charge over the parcel of land known as LAND REFERENCE NUMBER 2019/10574/2 and a fixed charge over the properties securing the obligations of Malplast to the bank for the sum of Kshs 150,000,000.
3. She avers that the current outstanding debt is Kshs 910,881,305 due from the company and Kshs 463,286,965.85 due from Malplast. She further states that the company and Malplast are sister companies and have common directors and shareholders and further, that the only source of income for the company is the lease to Malplast which has breached the terms of the lease. She states that the company and Malplast directors and shareholders breached their fiduciary duties as directors of the company. It is the applicant's case that the Harveen Gadhoke, who is also the administrator of Malplast Company, should be appointed as the administrator herein.
4. The company opposed the application through the replying affidavit sworn by its director Mr Dhruvun Sudhir Shah who states that the company's primary business is commercial rental facilities



- and that currently, the company has had two rent-paying tenants. He avers that the applicant is an adequately secured creditor and that the company had ten other creditors. He states that the applicant has not demonstrated that it is able to maintain the company as a going concern or that it would be able to achieve a better outcome for the creditors as a whole.
5. He further contends that the applicant who is in control of Malplast Company has, in bad faith, failed to pay rent due to the company thereby resulting in the company's inability to service its loan. He adds that the administrator had not paid monthly rent of Kshs 3,285.835 which would have enabled the company to service its loans.
 6. He avers that the company has been dutifully paying the loan to the applicant bank until the refusal by the proposed administrator to pay the rent arrears. He states that the proposed administrator is not suitable to manage the affairs of the company as shown in his partiality and outright bad faith towards the company. He maintains that the application is premature as the applicant has not demonstrated that the security it holds is insufficient to cover alleged debt since the rights of a secured creditor are covered by law.
 7. The applicant also filed a supplementary affidavit sworn by Mr Clement Gitau a Senior Legal Officer of Victoria Commercial Bank. The deponent states that the respondent does not deny its indebtedness to the applicant to a tune of Kshs 910,881,305.45 and neither has the applicant denied that it has not made any payments towards settling the debt since May 4, 2021.
 8. He states that by leasing Properties to Cheyne Row Investments Limited, the company orchestrated a fraudulent scheme to illegally divert funds from the applicant. He asserts that Cheyne Row Investments Limited and the respondent are entities controlled by the same directors. With respect to security, he avers that the applicant is not adequately secured since the directors have diminished the value of the applicant's security in a bid to defraud the applicant. He contends that no evidence has been placed before the court concerning the identities of the alleged ten other creditors. He contends that no evidence has been placed before court to show that the respondent has been discharging its repayment obligations and that the current outstanding debt has surpassed the value of the properties.
 9. He states that the rights and remedies available under the *insolvency Act* 2015 are independent of the rights and remedies available under the *Land Act*.
 10. The parties reiterated their respective positions through their written submissions.
 11. I have considered the application to place the Company Malde holdings under administration, the affidavits by the parties as well as the written submissions. The main issue for determination is whether the applicant has made out a case for the granting of the administration orders.
 12. The objectives of administration are set out under section 522 of the *Insolvency Act* to be as follows:-
 - “(1) The objectives of the administration of a company are the following:
 - (a) to 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 (without first being under administration);
 - (c) to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.



- (2) Subject to subsection (4), the administrator of a company shall perform the administrator's functions in the interests of the company's creditors as a whole.
 - (3) The administrator shall perform the administrator's functions with the objective specified in subsection (1)(a) unless the administrator believes either —
 - (a) that it is not reasonably practicable to achieve that objective; or
 - (b) that the objective specified in subsection (1)(b) would achieve a better result for the company's creditors as a whole.
 - (4) The administrator may perform the administrator's functions with the objective specified in subsection (1)(c) only if—
 - (a) the administrator believes that it is not reasonably practicable to achieve either of the objectives specified in subsection (1)(a) and (b); and
 - (b) the administrator does not unnecessarily harm the interests of the creditors of the company as a whole”.
13. The applicant's case is based on the claim that the company is indebted to the bank to the tune of Kshs 910,881,305 and has been unable to pay its said debt. According to the applicant, despite the above sums being secured by the legal charge, the company's security created over the assets was insufficient to cover the outstanding loan amount.
14. Section 531 of the *Insolvency Act* provides for the conditions under which an administration order may be made as follows :-
- a) That the company is or is likely to become unable to pay its debts; and
 - b) That the administration order is reasonable likely to achieve an objective of administration.
15. Section 532 stipulates as follows on who may make an application to the court to for an administration order in respect of a company :-
- (1) An application to the court for an administration order in respect of a company may be made only by the following persons:-
 - (a) the company;
 - (b) the directors of the company;
 - (c) one or more creditors of the company;
 - (d) a combination of persons specified in paragraphs (a) to (c);
 - (e) any other person of a class prescribed by the insolvency regulations for the purposes of this section.
 - (2) As soon as is reasonably practicable after the making of an application for administration, the applicant shall notify—



- (a) any person who is or may be entitled to appoint an administrator of the company under section 534; and
- (b) such other persons (if any) as may be prescribed by the insolvency regulations for the purposes of this section.

16. In this instant case, the applicant moved the court for the administration order. It is not disputed that the company is indebted to the applicant. A perusal of the court record reveals that the outstanding debt as at June 20, 2021 is Kshs 910,881,305.45. The company does not deny being indebted to the applicant. It is the company's assertion that the applicants administrator, in charge of Malplast Company, failed to pay the rent due thus resulting in the company's inability to service its loan. In this regard, I am convinced that the applicant has met the first condition for making an administrative order as provided for under section 531 of the *Insolvency Act*.

17. The second condition, which the applicant ought to establish, is that that the administration order is reasonable and likely to achieve an objective of administration. It was the company's case that the applicant did not demonstrate reasonable prospects of achieving the objectives of administration. In response, the applicant observed that it was not upon it to demonstrate the objectives for administration but rather, to ensure that the objectives under section 522 of the *insolvency Act* are met.

18. I find that putting the company under management of a competent manager would aid in the objectives of the company. Having found that the company is unable to pay its debts, I find that placing it under administration will have the effect of securing the properties of the company.

19. In *Re Nakumat Holdings Limited* [2017] eKLR :-

The court, in my view, must thus have regard to a variety of diverse and contrasting factors before reaching an ultimate conclusion. The court is not to be limited to the provisions of s 531 of the Act though this section must be the first stop.

47. Without limitation, I may index the following factors to be considered in the exercise of discretion whether or not to make an administration order. First, the two factors outlined under s 531 as to whether the company is insolvent and if the administration order is likely to achieve an objective of administration as outlined under s 522. The court ought also to keep in mind the general objectives of administration as a process in company law oft invited as an alternative for an ailing company instead of liquidation.

48. Other factors include; the effect of an order under s 533 would have on society generally, the rights of the creditors as balanced with that of the company to continue to survive, the conduct of the parties through the litigation period and especially the period after the filing of the application for liquidation, the insolvency level of the company both commercially and under the balance sheet and, last but not least, the proposal if any made by the company and its proposed administrator. I do not however deem this list as exhaustive but the most essential factors which must be shown are those found under s 531 of the Act.

20. In the present case, it is not in dispute that the company is unable to pay its debts. The applicant has sufficiently demonstrated that indeed, there is a reasonable probability of turning around the company even though the applicant has not suggested the timeframes for such turn around.



21. In view of the foregoing, I find that the application dated June 28, 2021 is merited and I therefore allow it as prayed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mrs Gichuru & Okwalo for Chelanga for Respondent.

Mr. Muthuri for Ismael for Applicant.

Court Assistant- Sylvia

