



**Corporation of Africa v Rao & another (Insolvency Cause E017 of 2020)
[2022] KEHC 13043 (KLR) (Commercial and Tax) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E017 OF 2020
DAS MAJANJA, J
SEPTEMBER 21, 2022**

BETWEEN

CORPORATION OF AFRICA APPLICANT

AND

PONANGIPALLI VENKATA RAMANA RAO 1ST RESPONDENT

**ATHI RIVER STEEL PLANT LIMITED (IN RECEIVERSHIP 2ND
RESPONDENT**

RULING

1. The applicant has filed the Notice of Motion dated July 29, 2022 seeking the following main reliefs:

- [1] Spent.
- [2] Spent.
- [3] That the receiver manager does furnish he following to the applicant:
 - a. valuation reports of the assets of the 2nd respondent.
 - b. The creditors list of the 2nd respondent.
 - c. Minutes/resolutions/reports in respect of the intended sale of assets of the 2nd respondent.
 - d. Financial statements both audited and unaudited together with all supporting documents for the period of receivership i e, from May 18, 2018 to date.



[4] That the honourable court does nullify and or cancel the sale of assets of the 2nd respondent until there is compliance with order no 3.

[5] That the receiver manager be removed for.

- a. non-compliance with the orders of the court given on December 18, 2021.
- b. Failure to comply with the repealed *Companies Act* on filing receivership accounts and *Insolvency Act* Sections 723 and 723A.
- c. Failure to give a step by step up date to the creditors on the process of receivership.

[6] That cost(s) of the application be provided for.

2. The application is supported by the affidavit of the applicant's general manager, claims, collections and bonds, Gideon Bochedi, sworn on July 25, 2022. It is opposed by the respondents through the 1st respondent's affidavit sworn on August 24, 2022. The parties' respective advocates made brief oral submissions in support of their respective positions.
3. Since the applicant seeks, in effect, to enforce the order made December 18, 2020 directing that, "The 1st respondent, the receiver, is directed to the respond to the applicant's request for information requested in the letters dated May 7, 2020, June 25, 2020 and September 3, 2020 as required by section 723A of the *Insolvency Act*, 2015," it is necessary to reprise the background of the matter for completeness.
4. It is not disputed that on May 18, 2018, the 1st respondent ("the receiver") was appointed receiver of the 2nd respondent ("the company") by several lenders; Bank of Africa, Commercial Bank of Africa (now NCBA Bank PLC), I & M Bank and KCB Bank Kenya Limited ("the lenders") under powers conferred on them under their respective debentures executed by the company. The appointment has been extended by the lenders and sanctioned by the court from time to time.
5. In due course, the applicant moved the court for an order, "that the 1st and 2nd respondents do provide financial statements both audited and unaudited together with all supporting documents for the period of receivership from May 18 to date."
6. At the material time, the applicant claimed that its debt was admitted and appears in the company's books of account and list of debtors but since it was placed under receivership, the receiver had not supplied any information or steps being taken in regard to the process. It further averred that the receiver had commenced the process of sourcing for buyers to purchase the company without involvement of or communication with the creditors hence it requested for information from the receiver but which the receiver declined to supply contrary to his statutory duties under the *Insolvency Act* as administrator of the company.
7. I considered the application in light of section 723A of the *Insolvency Act* which provides as follows:

723A (1) A creditor may request information from a relevant insolvency practitioner and the insolvency practitioner shall provide the information within —

 - (a) five business days after receiving the request; or
 - (b) such longer period as may be agreed upon between the creditor and the insolvency practitioner.



- (2) If the relevant insolvency practitioner is satisfied that an extension of time is required due to the nature of the request under subsection (1), the insolvency practitioner may, by notice to the creditor in writing, extend the period for providing the information.
- (3) A notice under subsection (2) shall —
 - (a) be given to the creditor making the request;
 - (b) specify the period within which the requested information shall be provided; and
 - (c) specify the reasons for the extension of time.

8. I came to the conclusion that the receiver is bound to supply information requested by a creditor under section 723A of the *Insolvency Act* notwithstanding the fact that the said receiver was appointed under the *Companies Act* (repealed) and before coming into force of the *Insolvency Act*. As stated earlier, it is apparent the applicant seeks to enforce the earlier order directing the receiver to respond to the letters dated May 7, 2020, June 25, 2020, September 3, 2020 wherein it sought documents relating to the financial status of the company before and after receivership, financial statements and supporting documents, audited financial statements and supporting documents and list of potential buyers.
9. In its replying deposition, the receiver contended that he has not failed to provide financial accounts/information or an update of the receivership process since taking over of the Company and that he has performed the duties of receiver/manager to the best of its abilities in the circumstances.
10. The receiver depones that despite the failure of the directors of the company to furnish him with a statement of affairs, he forwarded to the applicant's advocates, through the letter dated January 8, 2021 unaudited financial statements (profit & loss and balance sheet) relating to the receivership period. In addition, he informed the applicant that he had appointed Shah Bhasin & Associates to conduct an audit of the company's books of accounts who would require 6 months to undertake the said audit. He however informed the applicant on June 22, 2022 that Shah Bhasin & Associates were yet to conclude the audit exercise for the following reasons including difficulty in retrieving some data and disruption of the company's business due to the ban of scrap metal and rise in international billet prices accompanied by the steep hike in USD exchange rate which affected the company negatively.
11. The receiver further explained that in addition to the reasons advanced in the letter dated June 22, 2022, the audit process by Shah Bhasin & Associates was also delayed for reasons beyond his control including the challenges occasioned by Covid-19 pandemic, closure of the company plant on July 14, 2022 following a fatal accident that resulted in closure of the plant for two weeks, introduction of electronic tax devices by the Kenya Revenue Authority and the general elections held on August 9, 2022. Notwithstanding these difficulties, Shah Bhasin & Associates indicated that a final report would be tendered before October 31, 2022. They however provided that draft accounts for the period up to June 30, 2022.
12. Apart from the auditor's report, the receiver has issued an operation report covering the entire receivership period till June 30, 2022 in which he has outlined the rehabilitation and improvements made to the company plant during the receivership period, the various facilities at the company plant and their current status, the operational achievements, challenges and the overall outlook. The receiver outlined the following operational achievements during the receivership period including:
 - a. All facilities extended to run the company's operations during receivership were paid back;



- b. During this period, the operation accumulated profits which were used to reduce prior loans to lenders.
 - c. The plant capacity was increased from 9,000 MT per month to 12,000 mt per month thus increasing the value of the plant and machinery;
 - d. While the plant remained operational, 500 jobs were maintained including for those who had worked for the company prior to the receivership.
 - e. The costs of receivership were recovered by running the company as opposed to accumulating additional costs.
13. As regards the proposed sale of the company's assets, the receiver states that he placed advertisements in local and international newspapers/magazines in July 2022 inviting bids for purchase of the company's land, buildings, plant & machinery. He states that he intends to conduct the sale transparently by, *inter alia*, advertising the sale in both local and several international newspapers in order to give opportunity to a wider investor base to bid for the assets, conducting valuation of the assets in order to establish the reserve price, evaluation of bids against the reserve price, granting the directors of the Company the right of first refusal and if they do not take the offer, awarding the bid to the successful bidder.
14. From the applicant's prayers, depositions and submissions, three issues call for resolution. First, whether the receiver has provided information requested by the applicant. Second, whether the intended sale of the company's assets should be stopped and or set aside. Third, whether the receiver should be removed.
15. On the first issue, I reiterate that the receiver is bound to supply information requested by a creditor under section 723A of the *Insolvency Act* notwithstanding the fact that the said receiver was appointed under the *Companies Act* (repealed) and before coming into force of the *Insolvency Act*. In this instance, the receiver has set out in detail how he responded to the applicant's request for information and has indeed provided detailed information supported by documents on the financial status of the company. The applicant has not shown that the receiver has failed and or refused to provide the information it has requested. Further, the duty to provide information is a continuous one and the applicant may request for information from time to time as the receivership process goes on. From the totality of the evidence, I am satisfied that the receiver has complied with the duty to provide information and in particular with the order made on December 18, 2020.
16. The second and third issues relate to the nature and functions of a receiver. It is not in dispute that the receiver was appointed by various lenders and the appointment took place before the coming into force of the *Insolvency Act*. Thus, the general duties of the administrators to the general body of creditors under the *Insolvency Act* do not apply to the Receiver appointed under the security documents. In *I & M Bank Limited v ABC Bank Limited and Another* [2021] eKLR, the court expressed this position as follows:
- (34) On the other hand, a receiver/manager appointed under a debenture is not an officer of the court although the court may intervene in certain instances in performance of its duties. It does not have the responsibilities and obligations to the general body of creditors, whether secured and unsecured and cannot be called upon to account as such but is an agent of the company or the debenture holder (see *Surya Holdings Limited and Others v CFC Stanbic Bank Limited* ML HCCC no 78 of 2014 [2015] eKLR and *Lochab Brothers v Kenya Furfural Company Limited & Others* [1983] KLR 257). Further unlike



the process of receivership, administration offers specific benefits including a moratorium on legal processes under section 560 of the *Insolvency Act*.

17. Since the receiver was appointed by the debenture holders and he is accountable to them, it is difficult to see how an unsecured creditor like the applicant, can apply not only to stop the receiver from selling the company's assets but also remove the receiver without participation of the debenture holders in the proceedings. Without participation of the debenture holders, the court cannot make an order adverse to them. I would therefore dismiss the prayers 4 and 5 of the application on this ground.
18. It is now clear that applicant's application dated July 29, 2022 lacks merit. It is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2022.

D S MAJANJA

JUDGE

Court assistant: Mr M Onyango.

Mr Wachira instructed by Abdullahi, Gitari & Odhiambo Advocates, LLP for the applicant.

Ms Lubano instructed by Oraro and Company Advocates for the respondents.

