



**NCBA Bank Kenya PLC v Sheng Shuang Quarry Ltd (In Receivership)
& 2 others (Civil Case E407 & 25 of 2019 (Consolidated))
[2022] KEHC 14601 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E407 & 25 OF 2019 (CONSOLIDATED)**

**A MABEYA, J
OCTOBER 28, 2022**

BETWEEN

NCBA BANK KENYA PLC PLAINTIFF

AND

SHENG SHUANG QUARRY LTD (IN RECEIVERSHIP) 1ST DEFENDANT

DAVID MUIGAI NG'ANG'A 2ND DEFENDANT

JECINTA NJERI NG'ANG'A 3RD DEFENDANT

RULING

1. The application before Court is dated 27/9/2021 and is brought under sections 560 (1) (d), 561(4) of the *Insolvency Act, 2015* section 34 of the *Civil Procedure Act* and Articles 159 of *the Constitution of Kenya*.
2. The application sought orders that leave be granted to continue with the proceedings in the name of Sheng Shuang Quarry Limited which is under receivership. The application is premised on the grounds on the face of it and on the affidavit of David Muigai Ng'ang'a who is the director and shareholder of the 1st defendant.
3. It is the applicant's case that the 1st defendant was advanced a facility of Kshs. 247,400,000/= in 2014 and their property was used as security for the loan. The 1st defendant continued to service the loan until 2017 when the company's operations stalled. The plaintiff took possession of the company's operations and repossessed all its equipment. The defendants challenged the plaintiff's exercise of its statutory power of sale in Machakos HCC No 25 of 2019 wherein orders of status quo were issued.



4. The 1st defendant was placed under receivership by the plaintiff and Kereto Marima was appointed receiver/manager. The 2nd defendant filed an application in the Court of appeal which was likely to take time. There was apprehension that the security which is valued at Kshs 3.1 billion would continue to diminish at the expense of the shareholders as the loan and penalties continue to accrue. It was the defendants case that the receiver manager would be biased to the plaintiff and thus could not prosecute the two suits against the authority that appointed him. It is for this reason that the applicant filed this application.
5. The plaintiff filed grounds of opposition dated 4/10/2021. It contended that section 560(1)(d) of the *insolvency Act* was only applicable in the context where the court has given its approval or with the consent of the receiver and where the party wishes to enforce, begin or continue legal proceedings against a company in receivership.
6. That the 2nd defendant had no power to continue the proceeding without the receiver's permission. That the powers and authority of the directors of the 1st defendant were suspended by operation of the law when the 1st defendant was placed under receivership.
7. The Court has considered the rival contentions and the submissions on record. The main issue for determination is whether leave should be granted to the 1st defendant to continue with the proceedings in the consolidated suits.
8. It was the 2nd defendant's submission that receivership did not deprive the directors of their power to institute proceedings on behalf of a company. In support of that submission, the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* [2012 eKLR was cited. In that case, the Supreme Court held: -

“The question as to whether the receiver's power to commence or defend proceedings in the name of a company under receivership is exclusive has received judicial attention in foreign jurisdictions. While it remains the position that a receiver and manager supplants the board of directors in the control, management and disposition of the assets over which the security rests, it is also acknowledged that the receiver and manager does not usurp all the functions of the company's board of directors. The extent to which the powers of the directors are supplanted will vary with the scope of the receivership and management vested in the appointee. Directors have continuing powers and duties. Their statutory duties include: the preparation of annual accounts; the auditing of those accounts; calling the statutory meetings of shareholders; maintaining the share register and lodging returns. (see *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* (1969) 2 NSW 782.”

9. The defendant's application is premised on section 560(1) of the *Insolvency Act* which provides: -

“While a company is under administration

- a. A person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;
- b. A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval subject to such conditions as the Court may impose;



- c. A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and
 - 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. In the present case, the 1st defendant being under administration, the defendants are of the view that the receiver may not be interested in defending the company having been appointed by the plaintiff. I have perused the record, and I note that the defendants commenced action against the plaintiffs before the receiver was appointed. What is in dispute is whether the receiver's power to commence or defend the company is exclusive or the same can be extended to the company's directors.
11. In the case of *Newhart Developments Ltd v Co-operative Commercial Bank Ltd*, (1978) 2 All ER 896, (CA), which was cited with approval by the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* (*supra*), the court observed that: -
- “It was held that the power given to the receiver to bring proceedings was an enabling provision so that he could realize the company's assets and carry on business for the benefit of the debenture-holders. The provision did not divest the directors of the company of their power to pursue a right of action if it was in the company's interest and did not in any way impinge prejudicially upon the position of the debenture-holders by threatening or imperilling the assets which were the subject of the charge. The Court further opined that if in the exercise of his discretion, the receiver chooses to ignore some asset such as a right of action, or decides that it would be unprofitable from the point of view of the debenture-holders to pursue it, there is nothing in the case law suggesting that it is not then open to the directors of the company to pursue that right of action if they think that it would be in the interests of the company.”
12. Further, in the case of *Flagship Carriers Ltd. vs. Imperial Bank Ltd. & 2 Others* Nairobi (Milimani) HCCC No. 1643 of 1999, Hewett, J delivered himself as follows: -
- “...Notwithstanding the appointment of receivers of a company, directors have a residual authority as directors...A provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring an action and did not divest the Company's directors of their power to institute proceedings on behalf of the Company provided that the proceedings did not interfere with the receiver's function of getting into the Company's assets or prejudicially affect the debenture holder by imperiling the assets. Furthermore, the directors are under a duty to bring an action, which is in the Company's interest because it is in the benefit of the creditors generally, and to pursue that right of action does not amount to dealing with the Company's assets so as to require the receiver's consent or concurrence. Since the plaintiff's action would not stultify the receiver's function of gathering in the assets the plaintiffs are not required to obtain his consent to bring the action...”
13. In view of the foregoing, I firmly hold that the directors have the capacity to safeguard the company's interests by pursuing a right of action just the same as the receiver provided that the same observes to the objects of administration. In this regard I am of the view and hold that, the substratum of the



suit between the plaintiff and defendant is with regard to the plaintiff exercising the statutory power of sale the defendant had offered as security which is part of the floating charge. Since the defendant had already commenced the proceeding against the plaintiff, it is my finding that granting leave to the defendants to continue with the proceedings in the name of the 1st defendant would not be prejudicial to the plaintiff.

14. In the upshot I find merit in the application and the same is allowed as prayed. I make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

A. MABEYA, FCIArb

JUDGE

