



Said & another v P.V.R RAO (As Administrator, TSS Grain Millers Limited (Under Administration); KCB Bank Kenya Limited & another (Interested Parties) (Insolvency Cause 1 of 2016) [2022] KEHC 17032 (KLR) (30 November 2022) (Ruling)

Neutral citation: [2022] KEHC 17032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
INSOLVENCY CAUSE 1 OF 2016**

MN MWANGI, J

NOVEMBER 30, 2022

**IN THE MATTER OF TAHIR SHEIKH SAID GRAIN MILLERS
LIMITED (UNDER ADMINISTRATION) COMPANY NO. 59490**

AND

**IN THE MATTER OF SECTIONS 537 & 591 OF THE INSOLVENCY ACT
NO. 18 OF 2015**

AND

**IN THE MATTER OF APPLICATION BY FATMA TAHIR SHEIKH
SAID & OSMAN TAHIR SHEIKH SAID AS MEMBERS OF TSS GRAIN
MILLERS LIMITED (UNDER ADMINISTRATION**

BETWEEN

FATMA TAHIR SHEIKH SAID 1ST APPLICANT

OSMAN TAHIR SHEIKH SAID 2ND APPLICANT

AND

**P.V.R RAO (AS ADMINISTRATOR, TSS GRAIN MILLERS LIMITED (UNDER
ADMINISTRATION) RESPONDENT**

AND

KCB BANK KENYA LIMITED INTERESTED PARTY

JAMII FLOUR MILLERS LIMITED INTERESTED PARTY



RULING

1. This ruling is in respect to two applications and a Notice of Preliminary Objection. The Notice of Motion dated 3rd November, 2020 is brought under the provisions of Section 591(1), (2) & (3) of the [Insolvency Act](#) No. 18 of 2015 and Regulation 10 of the Insolvency Regulations, 2016. The applicants seek the following orders-
 - i. Spent;
 - ii. That there be an injunction pending the hearing and determination of this application, restraining the Administrator TSS Grain Millers Limited (Mr. P.V.R Rao) from selling, transferring, handing over, delivering or in any way disposing the movable and immovable assets of TSS Grain Millers Ltd (Under Administration) either in furtherance of the Agreement of Sale dated 27th December, 2019 between the Administrator and the 2nd interested party, or to any other party.
 - iii. The Court be pleased to set aside the agreement for sale dated 27th December, 2019 between the Administrator and the 2nd Interested Party and to order the unconditional return of any movable or immovable assets that may have been transferred pursuant to the agreement for sale dated 27th December, 2019;
 - iv. The Administrator, Mr. P.V.R. Rao, be ordered to forthwith, but in any event, not later than thirty (30) days from the date of the order, furnish the applicants and the Court with copies of the documents listed in Schedule I herein below;
 - v. The Court be pleased to issue such other order as it may deem just to advance the objects of Administration under the [Insolvency Act](#) No. 18 of 2015; and
 - vi. The costs of this application be awarded to the applicants against the Administrator and the 1st interested party jointly and severally.
2. The application is brought on the grounds on the face of it and is anchored on two affidavits sworn on 2nd November, 2020 and 15th February, 2022, by Fatma Tahir Sheikh Said, the 1st applicant herein. In response thereto, the respondent filed two affidavits sworn on 22nd January, 2021 and 21st April, 2022 by Ponangipalli Venkata Ramana Rao, the respondent herein. The 1st interested party filed two affidavits sworn on 22nd January, 2021 and 28th March, 2022 by Francis Kiranga, a Section Head Credit Support Unit for the 1st interested party, whereas the 2nd interested party filed a replying affidavit sworn on 22nd January, 2021 by Rakesh Kumar Bvats, the Group Finance Controller of Comply Industries Limited, with the 2nd interested party being one of the companies that form part of the said group. The 2nd interested party also filed a Notice of Preliminary objection dated 21st January, 2021 in opposition to the application dated 3rd November, 2020 on the following grounds-
 - i. The parties christened as applicants and interested parties in the application are strangers to these proceedings and no leave has been sought or obtained to enjoin them either as pleaded or at all. The application as drawn is therefore incurably defective, misconceived and bad in law and it is incapable of sustaining the orders sought.
3. On 22nd January, 2021, the respondent filed a Notice of Motion application brought under the provisions of Section 564 of the [Insolvency Act](#), 2015, Regulations 10 (4) and 109 of the Insolvency Regulations, 2016. The respondent seeks the following orders-



- i. Pending hearing and determination of this application, the order of this Honourable Court made on 4th November, 2020 be and is hereby stayed;
 - ii. The applicants' Notice of Motion dated 3rd November, 2020 be and is hereby struck out;
 - iii. The order of this Honourable Court made on 4th November, 2020 be and is hereby set aside;
 - iv. In the alternative to prayers (3) and (4) above, the order of this Honourable Court made on 4th November, 2020 and the hearing of the applicants' Notice of Motion dated 3rd November, 2020 be stayed until the applicants supply and/or furnish the respondent with the statement of affairs of Tahir Sheikh Said Grain Millers Limited; and
 - v. Costs of this application and of the applicants' Notice of Motion dated 3rd November, 2020 be paid by the applicants jointly and severally.
4. The applications and the Preliminary Objection herein were canvassed by way of written submissions. The applicants' submissions were filed on 16th February, 2022 by the law firm of Gikandi & Company Advocates. The respondent's submissions were filed on 15th April, 2021 and on 7th February, 2022 by the law firm of Oluga & Company Advocates. The 1st interested party's submissions were filed on 8th February, 2022 and on 25th April, 2022 by the law firm of Munyao, Muthama & Kashindi Advocates, whereas the 2nd interested party's submissions were filed by the law firm of Hamilton Harrison & Mathews Advocates on 25th April, 2022.
 5. Mr. Gikandi, learned Counsel for the applicants submitted that the 1st applicant is a shareholder and director of TSS Grain Millers Limited (Under Administration) and hereafter referred to as the company, while the 2nd applicant is a director of the TSS Investments Limited, which is the owner of all that parcel of land known as Mombasa/Block I/316 and which permitted TSS Grain Millers Limited to erect a maize and wheat milling plant on the said land. He stated that the company obtained financial facilities from KCB Bank Kenya Limited on the security of TSS Investments Limited as well as various debentures over the assets of the company but it ran into financial distress and was unable to meet its repayment obligations.
 6. Mr. Gikandi submitted that sometime in May, 2016, the company was placed under administration by the 1st interested party, with the consent of the company's directors, and Mr. P.V.R. Rao was appointed as the Administrator, which administration subsists to date. He stated that the applicants' contention is that the Administrator has conducted the administration in a way that detrimentally affects the applicants' interests and without the efficiency reasonably expected of him, such as the sale of the milling plant to the 2nd interested party herein.
 7. On whether the parties are properly before the Court, Mr. Gikandi submitted that all the authorities relied on by the respondent's Counsel and the 2nd interested party's Counsel are distinguishable since they relate to ordinary civil proceedings.
 8. In addition, he submitted that in insolvency proceedings, Section 591(1) of the *Insolvency Act*, 2015 expressly grants locus to members and creditors to question the conduct of an administration without necessarily seeking leave of Court first. He relied on the case of *Ideal Locations Limited v Peter Obondo Kahi & another* [2020] eKLR, where the appointment of an Administrator was set aside on the application of a creditor and the case of *Nakumatt Holdings Limited & another v Ideal Locations Limited* [2019] eKLR, where the Court held that the administration of an insolvent company is for the benefit of all the creditors of such company and a situation where creditors separately attack or take assets of a company would defeat the overall objective of the administration.



9. On whether the reliefs sought can be granted without a substantive suit, Mr. Gikandi relied on the provisions of Section 591(3) of the *Insolvency Act*, 2015 and the case of *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* [2021] KEHC 242 (KLR), and submitted that the powers of this Court are not limited to the existence of a substantive suit. He also cited the case of *Lehman Brothers Australia Ltd (in liquidation) v MacNamara and others* [2020] EWCA Civ 321, where the English Court of Appeal approved the resolution of disputes and making of final orders on an application to the insolvency Court without a substantive suit.
10. On whether the reliefs sought herein should be granted, Mr. Gikandi submitted that Mr. Rao had made the decision to sell the milling plant and an agreement for sale dated 27th December, 2019 had been executed between him and the 2nd interested party. He referred to the decision in *Lehman Brothers Australia Ltd (in liquidation)* (supra) and submitted that in granting the orders sought herein by the applicants, the Court shall be intervening in Mr. P.V Rao's decision since what he has done or proposes to do does not accord with the standards which right-thinking people would think should govern the conduct of the Court or its officers.
11. Mr. Gikandi referred to the provisions of Sections 522(1) as read with Section 522(4) of the *Insolvency Act*, 2015 and submitted that Mr. P.V Rao would only make a decision to sell the company's significant assets if he was satisfied that it was not possible to achieve the objects of administration and that he would not unnecessarily harm the other creditors of the company. He further submitted that since the said conditions are conjunctive, he has to demonstrate the existence of both but in his response, Mr. P.V Rao only concerned himself with the first condition and did not address the second condition.
12. The applicants' Counsel asserted that the evidence presented by Mr. P.V Rao was that the company was owed Kshs. 209,817,552.90, while it owed Kshs. 830,365,462.69. Mr. Gikandi stated that the said figure excludes the contested claims by NIC & NBK. He wondered what would happen to the other creditors who are owed Kshs. 830,365,462.69, if Mr. Rao was to sell the mill for Kshs. 350,000,000/= as the money would go to KCB as the secured creditor,
13. In submitting that the current judicial trend is to sustain rather than destroy financially distressed companies, Mr. Gikandi referred to the case of *Kimeto & Associates Advocates* (supra) and the case of *Synergy Industrial Credit Limited v Multiple Hauliers (E.A) Limited* [2020] eKLR. He cited the case of *Lehman Brothers Australia Ltd (in liquidation)* (supra) and submitted that although Mr. Rao had a legal right to take the action he did, he did not exercise the said right fairly and in accordance with the law that donated the right, thus his decision calls for countermanding by the Court.
14. It was stated by Mr. Gikandi that in as much as the Administrator contends that he arrived at his decision because the 1st interested party was unable to inject Kshs. 150,000,000/= that was needed and the company was not able to do so, he did not say that he was unable and/or attempted to obtain financing from any entity other than the 1st interested party. The applicants' Counsel contended that the said Administrator is sitting on a debtor's list running into Kshs. 209,817,552.90 which if he had made efforts to recover, he may have realized the capital expenditure he allegedly required. He submitted that the Administrator had a lessee, Bakhresa Grain Milling Limited that was paying approximately Kshs. 30,000,000/= monthly, which money he used to pay himself, the 1st interested party, NIC & NBK despite the known objections to their debts. Mr. Gikandi contended that if there was impracticality in achieving his objectives, it was of Mr. Rao's making.
15. He submitted that Mr. Rao's initial report and statement of proposals that was approved by the creditors was aimed at achieving the objects of administration by maintaining the company as a going concern but he revised the said proposal without subjecting it to the creditors for approval. The



- applicants' Counsel relied on the provisions of Section 571 of the *Insolvency Act*, 2015 and submitted that Section 571(1) is applicable herein because the proposal was approved at the initial meeting, yet the Administrator had revised the proposal, and the revision was no doubt substantial.
16. Mr. Gikandi relied on the case of *Mariam Saidi Mwabora & 70 others v Hotel Span Limited & 3 others* [2017] eKLR and submitted that there was no explanation of how Mr. Rao arrived at the decision to sell the milling plant at Kshs. 350,000,000/=. He further referred to the case of *Lehman Brothers Australia Ltd (in liquidation) (supra)* and submitted that they do not need to show a catalogue of unfair conduct for the Court to intervene since even one instance of unfair conduct is sufficient for the Court to intervene.
 17. Mr. Oluga, learned Counsel for the respondent submitted that the applicants have no locus standi to seek any remedies before this Court since they are strangers to this Insolvency Cause, which when it was originally commenced did not have any other party other than the company. He relied on the case of *Serve in Love Africa Trust (Sila Trust) v County Government of Uasin Gishu* [2016] eKLR and the case of *Sammy M. Makove, Commissioner of Insurance & another v Kiragu Holdings Limited* [2013] eKLR and submitted that the applicants were never impleaded as parties to this cause, they did not apply or seek leave of this Court to be made parties to this cause, and the persons named as respondent and interested parties are not parties herein thus they cannot seek any remedy from this Court.
 18. He submitted that the application herein must also fail because the 2nd applicant is not a member of TSS Grain Millers Limited therefore, he has no capacity to make the application herein. In addition, he contended that the orders sought in the application dated 3rd November, 2020 are substantive orders which cannot be granted in an Insolvency Cause and cannot be granted in the absence of a substantive suit upon which they are founded thus the said application must be dismissed
 19. Mr. Oluga contended that Section 591(1) of the *Insolvency Act*, 2015 cannot be used to disregard well known Court procedures and processes, in addition, in light of the fact that the 2nd applicant is neither a creditor nor a member of TSS Grain Millers Limited he has no right to invoke Section 591(1) of the *Insolvency Act*, 2015 to move this Court thus rendering the application herein fatally defective. He submitted that the authorities relied on by the applicants are distinguishable from the case herein since none of them dealt with the question of whether an applicant who is seeking remedies under Section 591(1) of the *Insolvency Act*, 2015 in an existing case needs to be made a party to the existing case first.
 20. On the merits of the application, Mr. Oluga submitted that the applicants declined to furnish the Administrator with the statement of affairs of the company which they are mandated to supply under Section 554 of the *Insolvency Act* thus the Administrator was unable to discharge his duties effectively. He submitted that he who seeks equity must do equity and contended that since the applicants had failed to do equity, they lack the equitable, legal and moral right to come to Court and challenge how the respondent has discharged the duties of his office as the Administrator of the company. He further submitted that in several instances, the applicants did letters addressed to the respondent and the 1st interested party with a bid to pressure and unnecessarily interfere with the Administrator in carrying out his duties.
 21. Mr. Oluga submitted that the respondent held meetings with other members of the company, and more specifically upon his appointment, he held a meeting with the late Tahir Sheikh Said Ahmed who held 19,999 out of the 20,000 shares of the company, which meeting was also attended by Mohamed Tahir Sheikh Said, a director of the company and Sabir Tahir Sheikh Said, one of the applicant's brothers. In addition, Mr. Oluga submitted that there is no requirement for the respondent to meet all the members of the company. He asserted that the respondent was always willing and ready to meet



- the applicants but could not do so since the applicants failed to facilitate the meeting by availing the statement of affairs and the issues which were to be discussed became the subject of a live Court case.
22. Mr. Oluga stated that the respondent was appointed in the interest of all the company's creditors to achieve the objects of administration, in addition, the creditors had not complained that the respondent was conducting the administration process in a manner that was not likely to achieve the objectives of administration. He further stated that Mombasa/Block I/316 was owned by TSS Investments Limited which is not under administration thus the respondent has no control over the assets of TSS Investments Limited since he is the Administrator of TSS Grain Millers Limited.
 23. He submitted that it is not in dispute that the 1st interested party exercised its statutory power of sale over Mombasa/Block I/316 which property was ultimately sold and transferred to Ustawi Grain Millers Limited and that the respondent sanctioned the sale of the plant to Ustawi Grain Millers Limited since it was only prudent, financially and legally for the control of the grain milling plant to be exercised by the same entity that has control over the property on which the plant is erected. He further submitted that although the main objective of the administration was to keep the company as a going concern by running the milling plant, it was no longer tenable since there were no funds to run the day to day operations, as neither the members of the company nor the 1st interested party availed funds to run the business. In addition, Counsel contended that since the debt due to KCB Bank was continuing to accrue interest at exponential rates, the respondent exercised his powers under Section 522(1)(c) & (4) as read with Section 587 of the *Insolvency Act* prudently, sold the plant and applied the proceeds thereof towards the loan owed to KCB.
 24. Mr. Oluga stated that the decision to sell the plant at Kshs. 350,000,000/= was informed since a professional valuation was done before the sale. He stated that Bakhresa Grain Millers Kenya Limited had offered to buy the milling plant at Kshs. 810,000,000/= but withdrew the said offer. He submitted that the purchaser of the plant cannot inherit liabilities of the company and that the respondent was under an obligation to give priority to secured creditors, since pursuant to Section 582(3) of the *Insolvency Act* creditors of the company who are neither secured nor preferential creditors can only be with the approval of the Court. He cited Section 582(4) of the *Insolvency Act* and contended that in the absence of a Court order permitting payment of wages owed to employees or debts owed to third party banks, the respondent would be guilty of contempt of this Court if he applied the assets of the company to cover wages and debts owed to third party banks who do not have preferential treatment.
 25. He submitted that the issues touching on the status of NIC Bank and National Bank Limited were raised in HCCC No. 9 of 2016 hence they should not be raised herein as they are sub judice. In addition, he asserted that the respondent paid NIC Bank Limited and National Bank Limited pursuant to an interlenders' agreement dated 3rd October, 2017 which allowed the respondent to lease out the grain milling plant and equipment of TSS Grain Millers Ltd and share out the lease rent among the lenders, and not because they are secured creditors. He further submitted that the allegations that the respondent has ceded his statutory power to the 1st interested party and that it is the said party that is de facto making decisions relating to the administration of the company are far-fetched and are not supported by any evidence.
 26. Mr. Oluga contended that the 1st interested party has never appointed an Advocate for the respondent and that in HCCC No. 3 of 2016, the respondent was represented by the law firm of COOTOW & Associates. He stated that it was only practical that the control of the milling plant is exercised by the same entity that has control of or owns the land hence it was inevitable for the respondent to liaise with the 1st interested party in order for it to manage the debt recovery process and the realization of the charged assets. He submitted that the respondent has been filing returns/statement of accounts with the Official Receiver thus the same are available and accessible to the applicants and the general public.



27. The respondent's Counsel asserted that the respondent prepared the statement of proposals and shared the same with the relevant persons such as creditors and in addition, one of the directors of the company Mohamed Tahir Sheikh Said was present at the meeting of creditors where the statement of proposals was shared. He contended that there is no law mandating the respondent to share the statement of proposals with the applicants who are disentitled by virtue of their failure to supply the respondent with the statement of affairs.
28. Mr. Munyao, learned Counsel for the 1st interested party submitted that the order seeking the setting aside of the agreement for sale dated 27th December, 2019 was couched in the form of a mandatory injunction and once the Court hears and determines the application dated 3rd November, 2020, there will be nothing else left to determine as there is no underlying substantive suit. In submitting that the applicants had not demonstrated any special circumstances, and that the application dated 3rd November, 2020 was not one of the clearest of cases to warrant the grant of the orders sought therein, he relied on the case of Kenya Breweries Limited & another v Washington O. Okeyo Civil Appeal No. 332 of 2000 where the Court of Appeal sitting in Nairobi cited the case of Locabail International Finance Ltd v Agro export and others [1986] 1ALL ER 901 at page 901, and the case of Nation Media Group & 2 others v John Harun Mwau [2014] eKLR.
29. Mr. Munyao contended that the agreement dated 27th December, 2019 had already been executed by the parties and the assets of the borrower had already been sold and as such, the borrower could only redeem the said assets if it repaid the entire debt. On whether this Court should grant the applicants a restraining injunction, he relied on the case of Giella v Cassman Brown [1973] E.A 358, where the Court of Appeal for East Africa laid down the three conditions required for injunctive orders to issue. He also relied on the case of Mrao v First American Bank of Kenya Limited & 2 others [2003] KLR 125, where the Court defined what constitutes a prima facie case.
30. Mr. Munyao submitted that it was not possible for the applicants to establish a prima facie case against the 1st interested party since there were no orders sought against it. He further submitted that the applicants and the interested parties were not proper parties in the Insolvency Cause since the applicants did not seek leave of the Court to for joinder and to join the 1st interested party in the Insolvency Cause. He submitted that only parties to a suit may benefit from orders of the Court and/or may be bound by orders of the Court. To bolster his submissions, Mr. Munyao relied on the case of Serve in Love Africa Trust (SILA TRUST) v The County Government of Uasin Gishu & Others, Eldoret HCC Petition No. 3 of 2015.
31. Mr. Munyao stated that the 1st applicant deposed that she is a shareholder and a director of the company whereas the 2nd applicant is a director of the company. He submitted that under the law, the directors of a company have no capacity to institute proceedings for the benefit or on behalf of the company while in Administration. He further stated that Section 591 of the *Insolvency Act*, 2015 does not give them the legal capacity to institute proceedings. He also cited Section 581 of the *Insolvency Act*, 2015 and stated that the filing of Court proceedings is an exercise and performance of a management function by the directors of a company and in light of the fact that the applicants in their capacity as directors had not sought the consent of the Administrator or leave of the Court to institute the current proceedings, the proceedings herein are a nullity and the Court ought to dismiss the same.
32. He asserted that the 1st applicant was entitled to litigate on behalf of and for the benefit of the company in certain instances but she can only do so in her capacity as a member in line with the provisions of Section 591(1) of the *Insolvency Act*, 2015. Mr. Munyao relied on the case of Amin Akberali Manji & 2 others v Altaf Abdulrasul Dadani & another [2015] eKLR and submitted that an action brought to Court by a member of a company on behalf of the company against the directors of the company



amounts to a derivative action therefore, since an Administrator is by law an agent of the company and he takes over the duties and functions of the directors of the company, Section 238 and 239 of the Companies Act, 2015 apply.

33. Mr. Munyao stated that there has been previous litigation among the parties to the application dated 3rd November, 2020 such as Mombasa HCCC No. 3 of 2016-TSS Investments Limited and TSS Millers Limited v Kenya Commercial Bank Limited which has since been withdrawn by the 1st plaintiff, Mombasa ELC No. 18 of 2018-TSS Investments Limited v Administrator TSS Grain Millers Limited, Bakhressa Grain Millers Limited and KCB Bank Kenya Limited where Justice Anne Omollo struck out the plaint. He submitted that Mombasa Block 1/316 which was the suit property in the aforementioned suits was sold to Bakhressa Grain Millers Kenya Limited and thereafter to Ustawi Grain Millers Limited which is the current registered owner of the said property. Mr. Munyao further submitted that the grain milling plant, associated machinery and the equipment that stands on Mombasa Block 1/316 was also sold by the Administrator to Ustawi Grain Milling Limited by way of an agreement dated 27th December, 2019.
34. He submitted that the equity of redemption in respect of the property known as Mombasa Block 1/316 stood extinguished after the said sale and therefore, the sale of the assets of TSS Grain Millers Limited could only be set aside if the applicants or the borrower redeem the assets by repaying the entire outstanding debt. To support his argument, Mr. Munyao relied on the case of Jose Estates Limited v Muthumu Farm Limited & 2 others [2019] eKLR.
35. He contended that since the appointment of the Administrator, the bank had not interfered with or sought to control the discharge of his duties. He submitted that since the directors and members of the borrower had secretly created other debentures over the assets of TSS Grain Millers Limited in favour of NIC Bank and National Bank of Kenya Limited; the 1st interested party, NIC Bank and National Bank of Kenya Limited entered into an interlenders' agreement dated 3rd October, 2017 which allowed the Administrator to lease out the grain milling plant and associated equipment of the borrower. He further submitted that since the grain milling plant herein is situated on the property known as Mombasa Block 1/316, it was only prudent that its control be exercised by the same entity that has control over the land. Mr. Munyao cited the provisions of Section 582 as read with Section 471 of the Insolvency Act and submitted that the Administrator in applying the proceeds of sale is bound by the law and is not under the control or direction of the directors of the company.
36. The Counsel for the 1st Interested party cited Section 587(1) of the Insolvency Act, 2015 and submitted that an Administrator of a company has the power to sell the property of a defaulting borrower. He stated that the terms of the debentures created by the company in favour of the 1st interested party expressly grant the 1st interested party the power to appoint an Administrator, who in turn is granted power to sell the property of the company in order to realize money to pay the debts of the company.
37. He submitted that the applicants had not demonstrated that they or the borrower would suffer irreparable loss that cannot be compensated by an award of damages and in any event, the assets that were sold belong to the company and not the applicants. He also stated that since the applicants are not part of the Insolvency Cause, they cannot suffer loss. Mr. Munyao contended that the applicants had annexed an agreement for sale of the assets of the borrower whereas the Administrator had annexed a valuation of the assets of the borrower, therefore, the monetary value of the assets was determinable at any time, and as such, there can be no loss suffered by the applicants that cannot be compensated by an award of damages.
38. Mr. Munyao referred to the case of Matex Commercial Supplies Limited & another v Euro Bank Limited (In Liquidation) [2007] eKLR and submitted that in view of the fact that the borrower and



the applicants herein were well aware of the consequences of creating a debenture in favour of the bank, the applicants appreciated that the assets of the company would be sold in the event of failure to repay the loans borrowed.

39. On the third condition of balance of convenience, he relied on the case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others* [2006] eKLR and the case of *Stek Cosmetics Limited v Family Bank Limited & another* [2020] eKLR and submitted that the balance of convenience tilts in favour of allowing the recovery of a debt as early as possible since the loan amounts are still outstanding and continue to grow. In addition, there is a real risk that the debt will grow to a level that the value of the security offered to the bank will be outstripped therefore, the 1st interested party remains entitled to take all legal measures to recover the debt owed to it by the company. He also submitted that where a lender has chosen to exercise its rights by way of appointing an Administrator as in this matter, the defaulting company and its members should not be allowed to dictate the functions of an Administrator, as a Court should only interfere with the Administrator's duties and functions only in the clearest of circumstances.
40. The 1st respondent's Counsel submitted that the authorities relied upon by the applicants are distinguishable for various reasons. He pointed out that in the case of *Kimeto & Associates Advocates (supra)*, the petition was filed by unsecured creditors of Mumias Sugar Company Limited, a public company registered in the Nairobi Stock Exchange, seeking to liquidate the company for failing to settle their debts. He stated that since the applicants therein did not have a coherent plan to keep the company afloat, the Judge refused to heed their prayer to nullify the leasing process.
41. Mr. Munyao contended that the applicants herein have not offered to pay off the debt owed to the bank by the company and have not demonstrated that they are willing to finance the operations of the insolvent company. He further submitted that in the case of *Kimeto & Associates Advocates (supra)*, the Judge first of all made an order joining the respondents in the proceedings in order to bring them within the jurisdiction of the Court unlike in the case herein.
42. Mr. Munyao also submitted that the case of *Lehman Brothers Australia Ltd (in liquidation) (supra)* is also distinguishable alongside *Ex parte James (1873-74) LR 9Ch App 609* since those cases were brought to Court by creditors of the companies and not by shareholder and directors of the companies. He contended that in *Ex parte James (supra)*, the underlying dispute was that the Trustee in Bankruptcy had been voluntarily paid monies under a mistake of law and he declined to refund the said money, whereas in *Lehman Brothers Australia Ltd (in liquidation) (supra)*, the underlying dispute involved a mistake in calculating the agreed claim amount of LBA and the Court intervened to correct a common mistake of a purely clerical nature.
43. Mr. Mugambi, learned Counsel for the 2nd interested party submitted that TSS Millers Limited and the 1st interested party have a banker –customer relationship. He explained that TSS Millers Limited constructed and ran a maize and wheat milling plant on a piece of land known as Mombasa/Block I/316 which belonged to TSS Investments Limited but the said land is now owned by the 2nd interested party which acquired it from Bakhresa Grain Milling Kenya Limited, which had in turn acquired it from the 1st respondent through a statutory power of sale. He also submitted that the sale of the land is subject to parallel proceedings in Mombasa High Court Civil Case No. E13 of 2020, TSS Investments Limited, KCB Bank Kenya Limited and Jamii Flour Millers Limited.
44. He contended that TSS Millers Limited had over the years taken various financial facilities from the bank and issued debentures in favour of the bank over its entire assets both present and future as security for the sums advanced. However, in early 2016, the company defaulted in its repayment obligations to the bank and this led the 1st interested party to seek to realize its securities over the



- sums owed. It was submitted by Mr. Mugambi that before the bank could realize its securities, the 1st interested party and TSS Millers Limited mutually agreed to place the company under administration which led to the 1st interested party to appoint the respondent, Mr. P.V R. Rao, as the company's Administrator on 30th May 2016, which appointment subsists to date having been extended from time to time by orders of this Court.
45. Mr. Mugambi asserted that the respondent took over the running of the affairs of the company including the plant, equipment and machinery of the maize and wheat milling plant, he ran the mill for years until sometime in 2019 when the 2nd interested party approached him with an offer to buy the mill. He stated that the parties then engaged in negotiations and thereafter, the Administrator accepted the 2nd interested party's offer to buy the mill at Kshs. 300,000,000/=. He stated that this culminated into the signing of the sale agreement dated 27th December, 2019. He submitted that the conclusion of the sale of the mill took a little longer but since the 2nd interested party wanted early access to the mill, it agreed with the Administrator to lease the assets of the mill at the rate of Kshs 300,000/= per month with the option that the amount to be paid pursuant to the lease agreement, would be eventually deducted from the purchase price. He further submitted that the completion of the sale of the mill is on hold because of orders of this Court.
46. The 2nd respondent's Counsel submitted that the applicants and the interested parties have never been parties to these proceedings. He referred to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and submitted that in Court proceedings, a person or entity not originally named in the pleadings and who for some reason wishes to participate in the hearing of a suit can only do so with leave of the Court. To this end, he relied on a number of authorities such as *Serve in Love Africa Trust (Sila Trust) v County Government of Uasin Gishu* (supra), *Sammy M. Makove, Commissioner of Insurance & Another v Kiragu Holdings Limited* [2013] eKLR, and *Zephir Holdings Limited V Mimosa Plantations Limited & 2 others* [2014] eKLR.
47. Mr. Mugambi contended that the applicants ought to have applied to the Court for leave to be added as parties to the suit herein and to join as interested parties before attempting to participate in these proceedings and they could therefore not properly agitate any cause of action against the interested parties before this Court. He submitted that the case law relied on by the applicants to show that there is no requirement for a member or creditor to apply for leave to join proceedings are distinguishable.
48. He cited Section 592(1)(a) & (2) of the *Insolvency Act*, 2015 and submitted that the 1st applicant described herself as a shareholder and a director of the company and described the 2nd applicant as a director of the company, therefore they do not fall in any category of the persons listed under Section 592(2) of the *Insolvency Act*, 2015, consequently, they lack the requisite locus standi to ask the Court to examine the conduct of the Administrator in selling the mill. He further cited Section 591 of the *Insolvency Act* and stated that it provides that an Administrator's conduct of administration can be challenged on the application of a creditor or member of a company under administration.
49. In addition, he submitted that Section 2 of the Act defines a creditor to include a person entitled to enforce a final judgment or final order whereas a member in relation to a company includes a person who is not a member of a company but to whom shares in the company have been transferred, or transmitted by operation of law. Mr. Munyao asserted that as a director of the company, the 1st applicant is a member of the company while the 2nd applicant is a director of the company who holds nil shares as can be seen from the official search of the company's shareholding exhibited by the 1st applicant. Mr. Mugambi stated that in this instance, no shares in the company have been transferred, or transmitted by operation of the law to the applicants hence they do not qualify to be termed as



either creditors or members of the company. He stated that as a result thereof, Section 591 of the Act denies them sanctuary.

50. Mr. Mugambi relied on the definition of a bonafide purchaser in Black's Law Dictionary 8th Edition and submitted that the 2nd interested party's case is that it is a bona fide purchaser of the mill without notice of any defect and as such, its claim over the mill cannot be impeached by the applicants. He also relied on the Court of Appeal decision in *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR, where the learned Judges cited with approval the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173 and submitted that the 2nd interested party has proved all the elements in the Katende case (supra), and it has an absolute unqualified and answerable defence against all claims by the applicants.
51. Mr. Mugambi cited the case of *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* (supra) and submitted that the 2nd interested party was running the mill on a lease from the Administrator. He further submitted that the Court should consider that in entering into the sale agreement with the Administrator, the 2nd interested party was an innocent party and the Administrator had statutory powers to enter into the sale. The 2nd respondent's Counsel urged this Court to allow the Administrator and the 2nd interested party to conclude the sale of the mill.

ANALYSIS AND DETERMINATION.

52. I have considered the application filed herein, the affidavits filed in support thereof, the replying affidavits by the respondent and the interested parties, the Notice of Preliminary Objection by the 2nd interested party, as well as the written submissions by Counsel for the parties. The issues that arise for determination are-
- i. Whether the applicants have the requisite locus standi to file and prosecute the application herein;
 - ii. If the application herein is merited; and
 - iii. Who should bear the costs of the applications dated 3rd November, 2020 and 22nd January, 2021.
53. The applicants in support of the application dated 3rd November, 2020 deposed that the 1st applicant is a shareholder and director of TSS Grain Millers Limited while the 2nd applicant is a director of TSS Grain Millers Limited (under Administration). She further deposed that the Administrator has acted and is further proposing to act in a way that detrimentally affects their interests since he is not carrying out the administration as quickly or as efficiently as is reasonably practicable.
54. They stated that TSS Investments Limited who are the registered owners of all that parcel of land known as Mombasa/Block I/316 authorized TSS Grain Millers Limited to construct and run a maize and wheat milling plant on the said property, and offer the suit property to the 1st interested party to secure loan facilities advanced to TSS Grain Millers Limited, however, in early 2016, the 1st interested party threatened to sell the suit property in exercise of its statutory power of sale. Thereafter, the 1st interested party and TSS Grain Millers Limited agreed to appoint an Administrator over TSS Grain Millers Limited, who would then profitably manage the said company and pay off the loan due to the 1st interested party. The applicants further stated that the appointment of an Administrator was challenged in Court by NIC Bank Limited via Mombasa HCCC No. 9 of 2016 and National Bank of Kenya Limited via Mombasa HCCC No. 10 of 2016 but later, the said banks and the 1st



- interested party herein entered into an interlenders' agreement through which the Administrator would proportionately repay the loans owed to the three banks.
55. The applicants averred that they made efforts to ensure that the Administrator was assisted as far as possible in discharging his statutory role but the Administrator was unprepared to hold any discussions with them. They further averred that when the 1st interested party sold Mombasa/Block I/316 to Bakhresa Grain Milling Kenya Limited, TSS Investments Limited challenged the said sale vide Mombasa ELC No. 18 of 2018. The applicants stated that the 1st defendant and Bakhresa Grain Milling Kenya Limited entered into a deed of settlement through which the sale of the suit property was reversed.
 56. The applicants contended that the Administrator had through an agreement of sale dated 27th December, 2019 offered to sell the milling plant and all machinery owned by TSS Grain Millers Limited to the 2nd interested party for a sum of Kshs. 350,000,000/= despite the fact that Bakhresa Grain Milling Kenya Limited vide a letter dated 27th July, 2017, offered to buy the milling plant for Kshs. 810,000,000/=, which offer the Administrator did not accept. They averred that since the sale of the subject property is meant to repay the 1st interested party's loan which is what resulted in the administration, the Administrator is duty bound to inquire into and see that the sale of the subject property facilitates the objects of administration and if that is not the case, the 1st interested party will still demand payment of the balance from TSS Grain Millers Limited.
 57. It was stated by the applicants that the agreement for sale dated 27th December, 2019 between the Administrator and the 2nd interested party only acquired the assets of TSS Grain Millers Limited but all the liabilities including employees' wages and amounts owed to third party banks had been excluded which meant that they would be borne by TSS Grain Millers Limited. The applicants averred that the milling plant and machinery was all that TSS Grain Millers Limited had in terms of property, thus it would be impossible for the company to meet its other liabilities after hiving off the only assets it could use to meet those other obligations.
 58. The applicants deposed that vide a letter dated 10th July, 2018, the Administrator was informed of serious allegations of illegality and fraud in the manner in which NIC Bank Limited and National Bank of Kenya Limited acquired their status as secured creditors but he still went ahead to pay NIC Bank Limited and National Bank of Kenya Limited from proceeds of leasing the milling plant. The applicants stated that the Administrator purported to give consent to NIC Bank Limited to sell all that property known as Mombasa/Block 1/373 owned by TSS Grain Millers Limited that was generating income which led to the institution of Mombasa HCCC No. 13 of 2018 to stop the said sale.
 59. The applicants cited Section 586 of the [Insolvency Act](#), 2015 and stated that although the Administrator herein is an agent of TSS Grain Millers Limited he has ceded his statutory power to the 1st interested party which is de facto making decisions relating to the administration of TSS Grain Millers Limited. They further stated that the Administrator had continued to act in secrecy and in collusion with the 1st interested party and had made other creditors believe that the milling plant was not operational yet the silos owned by the company were still leased out and generating income, which had never been accounted for.
 60. It was stated by the applicants that the milling plant was leased for a sum of Kshs. 300,000.00 per month but the Administrator has never provided a statement of accounts showing how much has since been recovered from the administration, how it has been applied and how much is outstanding. The applicants stated that they have no idea whether a statement of proposal was ever prepared in line with the provisions of Section 566 of the [Insolvency Act](#), 2015 and if so, whether it was being implemented.



61. The respondent in his replying affidavit deposed that the application herein is fatally defective as the 2nd applicant is not a member of TSS Grain Millers Limited since this is an insolvency cause commenced against the company and none of the parties named in the application as applicants, respondent or interested parties were a party to the Insolvency Cause. It was contended that the 2nd respondent did not have capacity to make the application herein. The respondent further deposed that the orders sought herein are substantive and the same cannot be granted in an Insolvency Cause.
62. The respondent averred that on 3rd June, 2016, he put up a notice in the Daily Nation Newspapers informing the public that the company had been placed under administration. Subsequently, he prepared the initial report of the administration as well as a statement of proposals but the applicants declined to furnish him with a statement of affairs of the company as provided for under Section 564 of the *Insolvency Act* despite many reminders. He deposed that he was completely paralyzed and could not discharge his duties effectively. Additionally, he stated that the applicants had on several instances piled unnecessary pressure on him and attempted to influence and interfere with his duties and independence as an Administrator of the company.
63. It was stated by the respondent that it was not true that he refused to meet the applicants and that he had held meetings with other members of the company. He indicated that there was no requirement for him to meet all the members of the company. He stated that following his appointment, he met the majority shareholder and another director but he was not under any obligation to meet the applicants separately and individually. He further stated that he has always been willing to meet them but his attempts to do so were hampered by the applicants' failure to furnish him with the company's statement of affairs. He indicated that a meeting was scheduled for 8th February, 2018 between him and the applicants but upon discovery that there was a Court case, namely, ELC No. 18 of 2018 -TSS Investments Limited v the Administrator and 3 others, where the agenda items for the meeting of 8th February, 2018 had been raised, he informed the 1st applicant that they could no longer discuss the issues as they had become the subject of litigation.
64. The respondent asserted that he was appointed in the interest of all the company's creditors to achieve the objects of administration as outlined in Section 522 of the *Insolvency Act*. He deposed that in any event, the creditors had not complained that he was conducting the administration process in a manner that was not likely to achieve the objects of administration under the law.
65. He averred that the 1st interested party exercised its statutory power of sale over all that property known as Mombasa Block 1/316 and sold it Bakhresa Grain Milling Kenya Limited, which sale remained valid until the property was transferred to Ustawi Grain Millers Limited. The respondent further averred that he sanctioned the sale of the grain milling plant to Ustawi Grain Millers Limited since it is erected on the property known as Mombasa Block 1/316, thus it was only prudent and legal that the control of the grain milling plant be exercised by the same entity that had control over the property on which the plant is erected.
66. He stated that it was no longer tenable or reasonably practicable to keep the company as a going concern by running the milling plant since there were no funds to run the day to day operations as neither the members/directors of the company nor the 1st interested party availed funds to run the business. He elaborated on the foregoing by stating that the weigh bridge was no longer operational, the plant had no power, and the construction of the silo had not been completed. He averred that since the debt due to the 1st interested party was continuing to accrue interest at exponential rates, it became prudent for him to exercise his powers under Section 522(1C) & (4) as read with Section 587 of the *Insolvency Act* and sell the plant; and thereafter apply the proceeds towards the loan owed to the 1st interested party.



67. The respondent stated that before the plant was sold, a professional valuation was undertaken so as to ascertain the best price thereof. He also stated that the offer to buy the milling plant at Kshs. 810,000,000/= by Bakhresa Grain Milling Kenya Limited was withdrawn by the said company. The respondent averred that the purchaser of the plant cannot inherit liabilities of the company, as the said liabilities are to be settled in accordance with the law. He cited the provisions of Section 582(3) of the [Insolvency Act](#) and stated that he was not aware of any Court order permitting payment of wages owed to employees or debt owed to third party banks.
68. The respondent averred that he paid NIC Bank Limited and National Bank limited pursuant to an interlenders' agreement dated 3rd October, 2017 and not because they were secured creditors. He further averred that he had not ceded his statutory power to the 1st interested party as he was firmly in charge of the administration process. He indicated that he had filed his returns/statement of accounts with the Official Receiver and the said documents are accessible to the applicants and to the public.
69. The 1st interested party in its replying affidavit deposed that the applicants and the interested parties were not original parties in the cause herein thus in the absence of an application to be joined to these proceedings as interested parties or at all, they are not properly before this Court and any proceedings against the 1st interested party are null and void ab initio. The 1st interested party averred that there is no prayer in the application by the applicants against the 1st interested party.
70. It was stated by the 1st interested party that TSS Grain Millers Limited issued several debentures in its favour, over its entire assets both present and future as securities for various loan facilities. The 1st interested party deposed that upon obtaining the said facilities, TSS Grain Millers Limited defaulted in meeting its financial obligations and as a result, it commenced the recovery process for purposes of realizing its securities. It was deposed that subsequently, an Administrator for TSS Grain Millers Limited was appointed by the 1st interested party on 30th May, 2016. The 1st interested party averred that the said Administrator has been discharging his duties in accordance with the law and in the best interest of the creditors of TSS Grain Millers Limited.
71. The 1st interested party deposed that land parcel No. Mombasa/ Block 1/316 had initially been charged to the 1st interested party by TSS Investments Limited as security for loans advanced to TSS Grain Millers Limited but upon default, the the 1st interested party commenced the process of realizing its security and ultimately sold it by way of private treaty to Bakhresa Grain Millers Kenya Limited, which later sold and transferred the suit property to Ustawi Grain Millers Limited the current registered owner. The 1st interested party asserted that the sale of Mombasa Block 1/316 has never been reversed.
72. The 1st interested party averred that in response to the letter by the company dated 22nd January, 2018 addressed to its Head of Credit Support, once a company has been placed under administration, the law requires that every letterhead of the company must reflect the fact of administration by clearly indicating the same on the face of the letter head, and that the directors/shareholders of the company under administration do not have authority to author letters for the company. He stated that by the time the letter was written to the 1st interested party, the parties were engaged in active litigation over the debt recovery efforts it had initiated.
73. The 1st interested party asserted that the Administrator was entitled to legal representation whenever litigation against him arises, and it does not appoint Counsel for the Administrator. It contended that the applicants have come to a Court of equity seeking equitable reliefs yet they have not done equity on their part. It deposed that the debt due and owing to it has not been settled and the applicants have not made any efforts to settle the said loan facilities. In addition, the 1st interested party stated that both



equity and the law demand that the applicants should not seek to frustrate the 1st interested party's effort in recovering the debt by realizing the security offered to secure the debt.

74. The 2nd interested party in its replying affidavit deposed that sometime in February, 2018, Engaano Miller, a sister company to Ustawi Grain Millers Limited learnt from the 1st interested party that one of its customers by the name Bakhressa Grain Milling Kenya Ltd was intending to dispose of a property in Kenya known as Mombasa /Block 1/316, the suit property herein, for purposes of settling a loan that had been advanced to Bakhressa Grain Milling Kenya Ltd by the 1st interested party and it was attracted by the offer because it was informed that there is a grain processing mill that is erected on the said property, and it considered acquiring both the land and the mill. It stated that it instructed Hamilton Harrison & Mathews Advocates to carry out due diligence on the land and the mill, and in turn, the said law firm carried out a search on the suit property and established that the nature of the title was a leasehold registered to Bakhressa Grain Milling Kenya Ltd on 21st August, 2017 and a certificate of lease had been issued in its name on the same date. The 2nd respondent also established that the property was charged to the 1st defendant to secure the sum of Kshs. 600,000,000/=.
75. The 2nd interested party averred that a further historical search revealed that the suit property was sold to Bakhressa Grain Milling Kenya Ltd in the year 2017 by the 1st interested party in exercise of its statutory power of sale. It further averred that Hamilton Harrison & Mathews Advocates also established that the 1st interested party and Bakhressa Grain Milling Kenya Ltd later on entered into a deed of settlement which entitled the 1st interested party to dispose of the suit property to any third party for purposes of settling the loan advanced to it by the 1st interested party. It was stated by the 2nd interested party that it was satisfied with the due diligence carried out and agreed to make a bid for the purchase of the land. It was stated that since Engaano Millers Limited is not incorporated in Kenya, it decided to use its sister company, the 2nd interested party herein, to follow up on the purchase of the property.
76. It was stated by the 2nd interested party that after negotiations with the 1st interested party, it accepted their offer of Kshs. 300,000,000/= which culminated into the signing of the sale agreement dated 27th December, 2019, but since the 2nd interested party had changed its name during the pendency of the transaction, it nominated Ustawi Grain Millers Limited to be the transferee of the leasehold interest in land parcel No. Mombasa /Block 1/316. The 2nd interested party averred that the suit property was registered in favour of Ustawi Grain Millers Limited and a Certificate of lease was issued on 12th October, 2020.
77. The 2nd interested party deposed that contemporaneous with its efforts to acquire the suit property, it also carried out due diligence on the mill. Thereafter, it approached the Administrator with an offer to buy the mill and after negotiations, the Administrator accepted the 2nd interested party's offer of Kshs. 350,000,000/=, which culminated into the signing of the sale agreement dated 27th December, 2019. It averred that the conclusion of the sale of the mill took a little longer than it had anticipated and since it wanted early access to the land and the mill, it agreed with the Administrator, to lease the assets of the mill at the rate of Kshs. 300,000/= per month with the option that the amount paid pursuant to the lease agreement would eventually be deducted from the final purchase price. The 2nd interested party asserted that at all times, it was a bonafide purchaser for value without notice of any legal impediment.
78. In response to the replying affidavits filed by the respondent and the interested parties, the applicants filed a further affidavit where they deposed that the 2nd applicant had not brought the proceedings herein as a member of the company but in his capacity as a director who is owed by the company thus qualifying him as a creditor who can present the application herein, and in the event the Court is of the view that he does not qualify, then the 1st applicant qualifies to do so. They further deposed that



insolvency proceedings differ from other ordinary civil proceedings hence they are bound to bring the complaints within the existing cause and not by commencing fresh proceedings.

79. It was stated by the applicants that they have never received a request from the Administrator to provide him with a statement of affairs of the company, and even assuming that the request was made to the company's directors, the Administrator's statement in the initial report and statement of proposal dated 25th July, 2016 is that the directors found it impossible to provide a statement of affairs because some employees vandalized the computer systems which would have generated the required information.
80. They contended that the interlenders' agreement dated 3rd October, 2017 recognizes NIC Bank and NBK as secured creditors. In addition, the applicants stated that the Administrator was paying the said banks in pari passu with the 1st interested party, despite the fact that on 10th July, 2018 it was notified that NIC Bank and NBK's debts were disputed on grounds of fraud. The applicants averred that the milling company has always been owned by a separate entity from the one owning the land on which the mill stands, thus there is no reason why that could not continue. They averred that the Administrator had not demonstrated that he applied for a facility to continue the operations of the company and the application was declined, and he had also not made any efforts towards recovering debts owed to the company which stand at Kshs. 209,817,552.90, which would provide the finances needed to profitably operate the mill. They further averred that if the Administrator had engaged the directors in his proposals, alternative security would have been provided from the larger TSS Group of Companies to secure any facilities that would have been necessary to run the company.
81. The applicants stated that there was no evidence of a valuation report in support of the allegations that the price of Kshs. 350,000,000/= was reached after a professional valuation. They contended that they had been denied access to the premises making it impossible to present cogent evidence of the actual value. They also stated that there was no evidence that Bakhressa Grain Milling Kenya Ltd withdrew the offer to purchase the milling plant at Kshs. 810,000,000/=.
82. The applicants contended that the order dated 8th April, 2017 shows that Mr. Omondi who was by then an Advocate at Munyao Muthama & Kashindi Advocates appeared for the Administrator in Mombasa HCCC No.3 of 2016, whereas Mr. Munyao from the same firm appeared for the 1st interested party. They stated that the law firm of Munyao Muthama & Kashindi Advocates was also the one that drew an interlenders' agreement between NIC Bank, NBK, the 1st interested party and the Administrator, and it was also the one that prepared two sale agreements for the sale of the milling plant and land parcel No. Mombasa/ Block 1/316, and as such, the Administrator was being represented with a fait accompli.
83. The applicants stated that Jamii Flour Mills Ltd are parties to a prejudicial transaction that negates the objects of the law thus they should not be allowed to claim innocence and insist that the transaction must be sanctioned by the Court. In addition, they stated that Jamii Flour Mills Ltd admitted that the transaction was not yet complete, hence they would suffer no prejudice since they can always be refunded the sums they may have paid as deposit or rent.
84. In the further affidavit by the respondent, he deposed that the applicants filed the application herein as members of the company as pleaded in the heading of the application and the 2nd applicant has been described in paragraph 2 of the supporting affidavit as a director of the company, therefore, the allegation that he is now a creditor is an afterthought as it is not backed by evidence. He further deposed that the application herein was brought jointly by the applicants as members of the company and if it is established that any of the applicants is not a member of the company, then they are incompetent



for having brought the application, which must fail, as the applicants cannot be severed, yet it is only one application brought by two applicants.

85. The respondent averred that the claim that computers were vandalized was made by the directors of the company and he did not have any means of authenticating and verifying the allegation independently as the directors never provided him with passwords of the computers. He stated that the initial report and statement of proposals did not have any details of past finances of the company since such details could only be contained in the statement of affairs. He indicated that a statement of affairs is required for continuation of accounting while the returns submitted relate to the period of administration.
86. It was stated by the respondent that extension of the period of administration was needed mainly because the Court cases and several stay orders restricted his ability to perform his duties as an Administrator. He further stated that leasing of assets which is provided for under Schedule 4 of the *Insolvency Act* was the only option available to the Administrator as the sale was blocked by several stay orders. He averred that he was not a party to the interlenders' agreement between NIC Bank, NBK, and the 1st interested party as all that he did was to follow the same.
87. The respondent asserted that other than the initial meeting that he had upon his appointment with the directors, he had had several other meetings with some of the remaining directors at the bank. He stated that the fact that the land and the plant were owned by separate entities was by virtue of the fact that those two different entities were owned and controlled by the same people under TSS Group of Companies. The respondent further stated that no institution would fund the operations when there was no collateral available with the Administrator to offer as security since the machinery would not be accepted by lending institutions as the land on which it stands belonged to a different company, and it had also been charged by a debenture in favor of the 1st interested party. In addition, he stated that the directors of the company never offered different assets as security to support the company's operations.
88. It was stated by the respondent that there are no substantial debtors relating to the period of administration and in any event, he could neither prove any debt nor collect any dues from debtors of the company relating to the period prior to the administration without a statement of affairs from the members of the company. He further stated that power was reconnected to the plant and the completion of the installation of the silos and repairs to the weigh bridge was done and/or carried out by Bakhressa Grain Milling Kenya Ltd before it commenced its operations. The respondent contended that even if some meagre amount is realized on debenture assets by the Administrator, the same was not sufficient to meet his costs which included insurance, security and legal fees which take precedence over other unsecured creditors.
89. The 1st interested party on the other hand in its further affidavit deposed that the Administrator acts independently but his relationship with the 1st interested party would require him to keep the latter updated of the progress of administration. It stated that in addition, faced with the unique circumstances that the milling plant of the company is erected on land belonging to a sister company which is charged to the 1st interested party, it was necessary for the bank and the Administrator to carefully coordinate the process of realizing the securities.

Whether the applicants have the requisite locus to file and prosecute the application herein.



90. Locus standi is defined in the Black's Law Dictionary, 9th Edition at page 1026 as the right to bring an action or to be heard in a given forum. In *Alfred Njau and others v City Council of Nairobi* [1982] KAR 229, the Court while canvassing the issue of locus standi held that-
- “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
91. In *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others* [2002] eKLR, the Court stated as follows on the issue of locus standi-
- “...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.”
92. It is not disputed that at the inception of the Insolvency Cause herein, the only party was TSS Grain Millers Limited (Under Administration) and the respondent who had been appointed as its Administrator. The applicants and the interested parties were not parties to the cause herein. It is also not disputed that no application and/or prayer was made seeking leave of the Court to join and/or introduce the applicants and the interested parties to this cause in any capacity whatsoever.
93. The applicants in their affidavit in support of the application dated 3rd November, 2020 averred that the 1st applicant is a shareholder and director of TSS Grain Millers Limited (Under Administration), while the 2nd applicant is a director of the said company (Under Administration), and that the Administrator has acted and is further proposing to act in a way that detrimentally affects their interests since he is not carrying out the administration as quickly or as efficiently as is reasonably practicable. They relied on Section 591(1) of the *Insolvency Act*, 2015 and submitted that it expressly grants locus standi to members and creditors to question the conduct of an administration without necessarily seeking leave of the Court first.
94. The respondent on the other hand deposed that the application herein is fatally defective since the 2nd applicant is not a member of TSS Grain Millers Limited (Under administration), whereas the 1st interested party on the other hand contended that the applicants and the interested parties are not original parties in the cause herein therefore, in the absence of an application to be joined to these proceedings as interested parties or at all, they are not properly before this Court and any proceedings against the 1st interested party are null and void ab initio.
95. The application herein has been brought under the provisions of Section 591(1), (2) & (3) of the *Insolvency Act*, 2015 which provides as hereunder-
- “(1) A creditor or member of a company under administration may apply to the Court claiming-
- a. that the administrator is acting or has acted so as to detrimentally affect the interests of the applicant (whether alone or in common with some or all other members or creditors of the company); or
- b. that the administrator proposes to act in a way that would detrimentally affect the interests of the applicant (whether alone or in common with some or all other members or creditors).



- (2) A creditor or member of a company under administration may apply to the Court on the ground that the administrator is not performing the administrator's functions as quickly or as efficiently as is reasonably practicable.
- (3) On the hearing of an application made under subsection (1) or (2), the Court may-
 - a. make an order granting relief;
 - b. make an order dismissing the application;
 - c. adjourn the hearing conditionally or unconditionally;
 - d. make an interim order; or
 - e. make such other order as it considers appropriate.”

96. The conduct of an Administrator’s administration can be challenged in Court on application by either a creditor or a member. Section 2 of the *Insolvency Act*, 2015 defines a creditor as a person entitled to enforce a final judgment or final order and a member as in relation to a company, includes a person who is not a member of a company but to whom shares in the company have been transferred, or transmitted by operation of the law.

97. The applicants in their supplementary affidavit deposed that the 2nd applicant has not brought the proceedings herein as a member of the company but in his capacity as a director who is owed by the company thus qualifying him as a creditor, an averment which was denied by the respondent. It is trite that he who alleges must prove, as provided under Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. The applicants have not demonstrated and/ or proved any debt owed to the 2nd applicant by TSS Grain Millers Limited (Under Administration), all that they have done is to make an allegation to that effect. This Court finds that the 2nd applicant does not qualify as a creditor for failure to discharge his burden of proof.

98. In paragraphs 1 and 2 of the applicants’ supporting affidavit, the 1st applicant is described as a shareholder and director of TSS Grain Millers Limited (Under Administration), whereas the 2nd applicant is described as a director of TSS Grain Millers Limited (Under Administration). In light of the foregoing, it is evident that none of them qualifies to bring the application dated 3rd November, 2020 under the provisions of Section 591 of the *Insolvency Act* since they are neither creditors nor members of TSS Grain Millers Limited (Under Administration). This Court also finds that they cannot make the application herein in their capacity as shareholders and/or directors of TSS Grain Millers Limited (Under Administration), without sanction from the Administrator as provided under Section 581 of the *Insolvency Act*, 2015 which states that-

- “(1) A company under administration, or an officer of a company under administration, shall not perform or exercise a management function without the consent of the administrator.
- (2) For the purpose of subsection (1)-
 - a. "management function" means a function or power that could be performed or exercised so as to interfere with the exercise of the administrator’ s functions; and



b. consent may be general or specific.

(3)

99. It is my finding that even in the event that the applicants were actual creditors and/or members of TSS Grain Millers Limited (Under Administration); by virtue of the fact that neither the applicants nor the interested parties were originally parties to this cause, the applicants ought to have first sought leave of the Court to be joined in the proceedings for good order. I am of the considered view that the Civil Procedure Act Cap 21, Laws of Kenya and the Civil Procedure Rules, 2010 are meant to bring about order in the way civil matters and/or cases are conducted in our Courts. Order 1 Rule 10 of the Civil Procedure Rules, 2010 provides for substitution and addition of parties. Sub-rule 2 provides as follows -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

100. A suit is defined under Section 2 of the Civil Procedure Act, Cap 21 Laws of Kenya as all civil proceedings commenced in any manner prescribed. An Insolvency Cause being a civil proceeding can also be referred to as a suit. The Insolvency Act, 2015 and the Insolvency Regulations, 2016, do not repeal, amend and/or oust the provisions of the Civil Procedure Act and the Civil Procedure Rules, 2010. Therefore, just because the Insolvency Act, 2015 and the Insolvency Regulations, 2016 do not provide for leave to be joined into the proceedings before making an application questioning the conduct of an Administrator’s administration, does not mean that the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 should be completely ignored and/or do not apply.

101. In *Zephir Holdings Limited V Mimosa Plantations Limited & 2 others* [2014] eKLR, Gikonyo J held that-

“Any party, who comes in a proceeding after pleadings have been closed, will only join on application except where the court makes the joinder suo moto or the party comes as an objector to attachment of the suit property. A proceeding is not jumped into in a haphazard manner. Equally, except a proceeding in the nature of objection to attachment or any other instance provided in law, a party does not become a party until there is an order of joinder whether on application or suo moto by the court. I should state here that even amicus curiae will join on the order of the court. See the practice in constitutional petitions for example. Therefore, in ordinary circumstances, admission to a judicial proceeding especially where you are not the primary party is an important aspect in adjudication of cases which follows after the principle that “presence of proper parties before the court is sine qua non exercise jurisdiction by the court”, and that principle will be defeated if parties were to enter existing proceeding without permission of the court or anyhow.” (emphasis added).

102. Looking at the authorities relied on by the applicants in support of their contention that in an Insolvency Cause, they did not need to seek leave of the Court to join the proceedings before filing an application, I find that they are distinguishable since in the said cases, the parties who made the applications therein questioning the Administrator’s conduct in administration were already parties to the suit.



103. The Insolvency Cause herein was filed by the Administrator of the company but the applicants and the interested parties were not part of the said cause. In light of the fact that no leave of the Court was sought before the applicants filed the application dated 3rd November, 2020 joining themselves and the interested parties to the insolvency cause and seeking orders against the latter, and the fact that the applicants are neither creditors nor members of TSS Grain Millers Limited (Under Administration), this Court finds that they are not only improperly before this Court but also lacked the requisite locus standi to file the application dated 3rd November, 2020. Having so found, it follows then that the applicants herein have no valid action against any of the parties herein. The orders they seek against the respondent in prayer (iii) of their application and the costs they seek against the said respondent and 1st interested party cannot be granted.
104. It is noted that prayer (ii) of the application dated 3rd November, 2020 was drafted in a manner that was meant to give a very short reprieve to the applicants pending the hearing and determination of the application as they sought no injunctive orders to last until the hearing and determination of the Insolvency Cause. Therefore, even if the applicants had been found to be properly before this Court, there would have been no order restraining the respondent from selling, transferring, handing over, or delivering or in any way disposing of the movable and immovable assets of TSS Grain Millers (Ltd) under Administration, either in furtherance of the agreement of sale dated 27th December, 2019, between the Administrator and the 2nd interested party, or to any other party, pending the hearing and determination of the Insolvency Cause.
105. The application dated 3rd November, 2020 is devoid of merit for want of locus standi. As a consequence thereof, it is dismissed in its entirety. Costs of the said application are awarded to the respondent and the interested parties.
106. I note that parties herein did not address the issues raised in the application dated 22nd January, 2021. A perusal of the said application reveals that the issues raised therein have all been overtaken by events save for the issue of costs. In view of the fact that no responses and/or submissions were filed in relation to the application dated 22nd January, 2021, each party shall bear its own costs.
107. In regard to the Notice of Preliminary Objection filed on 21st January, 2021, it was filed by the 2nd interested party to counteract the application dated 3rd November, 2020, which I have dismissed. The said Notice of Preliminary Objection is therefore upheld. Costs of the said objection are awarded to the 2nd interested party as against the applicants. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH DAY OF NOVEMBER, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Gikandi for the applicants

Mr. Oluga for the respondent

Mr. Kariuki Henry h/b for Mr. Munyao for the 1st interested party

Mr. Mugambi for the 2nd interested party.

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