



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. APPLICATION NO. E725 OF 2019

IN THE MATTER OF THE

HP GAUFF INGENIURE GMBH & CO. KG –JBG

AND

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

AND IN THE MATTER OF

AN APPLICATION OF RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS

RULING NO. 2

Introduction

1. The issue before the court is whether this court should recognize foreign insolvency proceedings. The application for that purpose is the Chamber Summons dated 20th May 2020 and filed on behalf of **HP GAUFF INGENIEURE GMBH & CO. KG – JBG** (“the Company”). It is filed pursuant to the provisions of **section 720** and the **Fifth Schedule** of the *Insolvency Act, 2015* seeking the following prayers;

1. **THAT** this Application be certified as urgent and service be dispensed with in the first instance.
2. **THAT** The Honourable Court be pleased to stay the commencement and/or continuation of any and all adverse civil action, barring any and all adverse Civil actions, operations of any orders and decrees issued against the Applicant pending the hearing and determination of this Application.
3. **THAT** The Honourable Court be pleased to recognize the foreign provisional proceedings currently before the Nuremberg Local Court, in Germany where the Applicant is a party.
4. **THAT** The Honourable Court be pleased to recognize the decree of the Nuremberg Local Court issued on the 23rd of April, 2020 granting the application by the Applicant, HP Gauff Ingenieure GmbH & Co. KG – JBG, protecting the Applicant’s assets against adverse changes pursuant to Section 21 (1) of the German Insolvency Statute and ordering provisional debtor-in-possession management in the form of a protective shield proceeding commencing on 23 April 2020 at 2:30 pm.
5. **THAT** the Honourable Court be pleased to accept the Applicant’s undertaking to give notice within a reasonable time, through the Foreign Representatives, to all persons within the Republic of Kenya whose rights, obligations or interests may be affected by the proceedings, decrees, directions consequential orders or determination by the Nuremberg Local Court.
6. **THAT** The Honourable Court be pleased to accept the Applicant’s undertaking to give notice within a reasonable time to all persons within the Republic of Kenya whose rights, obligations or interests may be affected by orders sought in this Application.
7. **THAT** The Honourable Court be pleased to stay the commencement and/or continuation of any and all adverse civil action, barring any and all adverse Civil actions, operations of any orders and decrees issued against the Applicant pending the finalization of the provisional insolvency proceedings in Germany under the direction of the proceedings in the Nuremberg Local Court, in Germany.

8. ***THAT*** the stay against the commencement and/or continuation of any and all adverse civil action, barring any and all adverse Civil actions, operations of any orders and decrees issued against the Applicant to continue until they are lifted, varied or discharged by a further order of this Court.

9. ***THAT*** the Honourable Court be pleased to stay execution against the Applicant's assets in Kenya.

10. ***THAT*** the stay of execution orders above to continue in effect until they are lifted, varied or discharged by further orders of this Court.

11. ***THAT*** Honourable Court grants any relief the Court may deem fit to grant that may be available to the Applicant.

12. ***THAT*** the costs of this application be provided for.

2. The application is supported by two affidavits sworn by the Provisional Insolvency Monitor, Joachim Exner and the Company's Managing Director, Dr. Georg Bernsau.

3. Following the filing of the application, I issued the following directions on 2nd June 2020;

(a) Notice of filing of this application shall be advertised in any newspaper of national circulation.

(b) Pending the hearing of the application an order of stay be and is hereby issued staying commencement and continuation of any proceedings before the Company and execution of any orders or decrees against the Company pending the hearing and determination of this application.

(c) This matter shall be mentioned for further orders/directions on 25th July 2020.

(d) Any party has liberty to apply for further and other orders.

4. The Company complied with these directions by publishing a notice to the creditors and the order of the Nuremburg Local Court in the Daily Nation. The notices triggered the filing of the following four applications seeking various orders; an application by Kenya Revenue Authority ("KRA") dated 13th August 2020, two applications by the Company's employees ("the Employees") dated 21st August 2020 and 23rd November 2020 and one by Zamconsult Consulting Engineers Limited ("Zamconsult") dated 19th November 2020. The Company's application is also opposed by its employees through a replying affidavit sworn by Danson Mbaru on 23rd November 2020 on behalf of 38 other employees.

5. The Insolvency Monitor and foreign representative held a meeting with creditors who were given an opportunity to lodge their claims. When the matter came up for directions, I ordered counsel to resolve any uncontested issue particularly regarding the issue of the employees. Although some issues were resolved, I directed that the application for recognition of the foreign insolvency proceedings be argued together with the other applications which would be deemed to be in response to the main application.

Background

6. The Company is incorporated in Germany and has its registered office at Beuthener Straße 41-43, 90471 Nuremberg, Germany and operates in Kenya through its branch HP Gauff Ingenieure GmbH & Co. It is an engineering consulting company offering services in Germany, Kenya and Tanzania. Its main client base consists of public sector institutions with financing provided by the World Bank, KfW (a German government-owned development bank) and private companies. It currently has 250 permanent employees in Kenya.

7. Dr. Georg Bernsau depones that he was appointed Company Managing Director on 22nd April 2020 together with Dr. Volker Hamm pursuant to the fulfilment of the condition precedent of the granting of the order for provisional insolvency proceedings and provisional debtor-in-possession management under the German Insolvency Statute. In his deposition, he has given a background to these proceedings.

8. Since 2014, the Company faced a steady decline in performance due to a high increase in the cost-of-sales ratio due to growth in expenses for commissioning subcontractors in project locations. It also engaged in uncontrolled expansion that led to complex structures and unproductive internal processes. The Company also suffered high turnover among experienced employees leading to delays in project completion. As a result, the Company accumulated unfinished projects, experienced reduced inflow of liquidity from its clientele leading to high level of receivables from individual projects.

9. Upon the recommendation of its financiers and a restructuring expert, Bachert Unternehmensberatung GmbH & Co. KG, the Company successfully implemented restructuring measures. As a result, the financiers confirmed continued financing until 30th June 2020. However, due to the temporary confirmation of continued financing, impending tax burdens and the withdrawal of a potential investor, the Company was threatened with imminent illiquidity causing it to make an application for debtor-in-possession in Germany with a view of seeking interim protection to allow for restructuring and management of the liquidity problem while continuing its business operations.

10. The Managing Director made an application to Court in Germany, the Nuremberg Local Court on 22nd April 2020 on behalf of the Company requesting for the initiation of preparations for restructuring pursuant to the provisions of sections 270, 270 (b) of the German Insolvency Statute. The application was filed in Nuremberg where the Company's headquarters and seat of management are located and which is also the centre of its main interests.

11. On 23rd April 2020, the Nuremberg Local Court issued a decree in order to protect the Company's assets against adverse changes pursuant to section 21 (1) of the German Insolvency Statute. The Nuremberg Local Court further ordered a moratorium that the Company secure and preserve its assets and provisionally stayed enforcement measures against the Company in accordance with the German Insolvency Statute. The Nuremberg Local Court also appointed Joachim Exner, as the Insolvency Monitor ("Monitor") with the powers to supervise the business affairs of the Company and to investigate and report to the court on the Company's financial affairs and the conduct of the insolvency proceedings.

12. The Monitor explained that as part of its filings in the Nuremberg Local Court, the Company submitted an updated list of all its creditors in Germany and other countries around the world including Kenya. Under Section 22 of the German Insolvency Statute, the Company proposed and the court did approve the creation of a provisional three person creditors committee intended to represent the interest of all creditors

13. The Monitor states that under his supervision, a caretaker board comprising a specialist insolvency lawyer and a provisional creditors' committee have been appointed. He has also submitted a list of creditors including Kenya creditors to the Nuremberg Local Court. He therefore contends that the interests the Creditors based in Kenya are well represented and accounted for in the ongoing proceedings. The Monitor further depones that at the time of filing the present application, the Company was working to comply with the orders of the Nuremberg Local Court regarding reporting on matters relating to its provisional self-management administration including providing an expert opinion on whether the Company's assets will cover the costs of the proceedings, whether there is justification for opening the full insolvency proceedings, the prospects for the continuation of the Company's business, measures taken within the framework of provisional debtor in-possession management and on the development of the Company's financial situation and an insolvency plan starting 23rd April 2020.

14. In making this application, the Company seeks the cooperation of the High Court of Kenya to have the decree of the Nuremberg Local Court recognized in Kenya and for a stay to be granted preventing the commencement and continuation of actions, proceedings or executions against the Company and orders to enable the preservation of its assets pending the conclusion of the insolvency proceedings in the Nuremberg Local Courts in the terms prayed for in this application.

The Employees' Response

15. The Employees through Danson Mbaru assert that despite the Company seeking recognition of the German insolvency proceedings in Kenya, it has not paid its employees' salaries for the months of May, June, July and August, 2020. He deponed that he was aware that the Company's branch managers in Kenya have incorporated a new company; Gauff Consultants Africa Limited ("Gauff Consultants") in which they are now directors.

16. The Employees complained that the Company's directors have been writing to its debtors directing them to make all payments for work already done by the Company to Gauff Consultants. Further, some of the Company's assets are being illegally and unlawfully being transferred to Gauff Consultants. They further complain that the Gauff Consultants has been set up to unlawfully acquire the Company's assets, take up the Company's existing consultancy contracts and to unlawfully collect money owed to the Company in order to defeat any claims by the local creditors.

17. The Employees state that the Company is owed Kshs. 117,144,000.00 as outstanding fees for work done as follows; Kenya National Highways Authority (KeNHA) Kshs 73,800,000.00, Konza Technologies Development Authority Kshs. 13,824,000.00, Government of Kenya (Ministry of Finance) Kshs. 4,920,000.00, Local Administrative Entities Development Agency (LODA) – Rwanda Kshs. 24,600,000.00. They believe that the money outstanding from the Company's debtors should be utilized to pay them outstanding salaries and dues to them as they are preferential creditors before being utilized to settle debts in Germany.

18. After the Employees filed their application seeking orders against the directors of Gauff Consultants, they held a meeting with the Branch Managers, Guillaume Claude Patricot and Michel Andre Fest, who communicated to them that they had formed Gauff Consultants to take over the operations of Company in Kenya. They were further informed that apart from employees who were being taken over by Gauff Consultants, the Monitor had authorized the Gauff Consultants to take over all the liabilities of the Company employees including payment of all salary arrears and terminal benefits due to them. Finally, that the pending invoices for the already work done for the Company would be paid directly to Gauff Consultants in order to facilitate payment of all salaries arrears and terminal dues.

19. Despite the communication, the Company issued letters declaring each employee redundant. The Employees were informed that everyone would be paid their salary arrears from May to August, one-month salary in lieu of notice and all the terminal benefits as provided under the employment laws in Kenya and in accordance with their contracts of employment.

20. Mr Mbaru also depones that he is aware that Kenya National Highways Authority paid all the pending invoices for the work already done on or about early October, 2020 directly to Gauff Consultants. He complains that instead of the money being utilized to pay all the terminal benefits to the Employees, it was diverted and utilized by Gauff Consultants to run its operations.

21. The Employees complain that some of them have worked for the Company for over 40 years yet they are being forced, blackmailed and or threatened by the Branch Managers to accept only a quarter of their actual terminal benefits and yet there is sufficient money to pay all the employees their terminal benefits. The Employees pray that unless this Court intervenes and ensures that all the money received by Gauff Consultants on behalf of the Company has been accounted for, there is a danger that the Branch Managers shall mislead the Monitor that the Employees have been paid in full and that they will not be able to make their claims to the Monitor in Germany.

22. The Employees submit that if the application for recognition is allowed, they will be left without any recourse. They pray that it is in the interests of justice that this Court directs the Company to pay all their terminal benefits in full before the recognition of the insolvency proceedings in the Nuremberg Local Court in Germany.

23. Based on the same grounds that they have outlined in their response to the Company's application, the employees filed another application dated 23rd November 2020 seeking an order, "*compelling the Company's Branch Managers and who are also the directors of Gauff Consultants Africa Limited (Guillaume Claude Patricot and Michel Andre Fest) to disclose, account to this Honourable Court all the money they have received from the Company's debtors, namely The Kenya National Highways Authority, Water Services Trust Fund, Thika Water & Sewage Company Ltd, Konza Technologies Development Authority, Local Administrative Entities Development Agency (LODA) Rwanda, The Ministry of water and Irrigation and The Ministry of Transport, infrastructure, Housing, Urban Development & Public Works and any other debtor.*"

Application by Kenya Revenue Authority

24. The application by KRA is premised on **section 43 (3)** of the **Tax Procedures Act**, **section 52** of the **Insolvency Act** seeking the following orders:

1. Spent

2. THAT this Honourable Court do issue orders preserving funds and prohibiting the transfer, withdrawal or disposal of or other dealing involving the funds in the following bank accounts and those held on behalf of the Respondent by the entities listed herein:

Name	Bank/Entity
HP GAUFF INGENIURE GMBH & CO	NCBA GROUP PLC BANK
HP GAUFF INGENIURE GMBH & CO	KENYA COMMERCIAL BANK
HP GAUFF INGENIURE GMBH & CO	KONZA TECHNOPOLIS DEVELOPMENT AUTHORITY
HP GAUFF INGENIURE GMBH & CO	KENYA NATIONAL HIGHWAYS AUTHORITY
HP GAUFF INGENIURE GMBH & CO	SINOHYDRO CORPORATION LIMITED
HP GAUFF INGENIURE GMBH & CO	TETRA TECH INTERNATIONAL INC
HP GAUFF INGENIURE GMBH & CO	RIFT VALLEY WATER SERVICES BOARD

3. THAT the amounts in the said bank accounts and/or those held on behalf of the Respondent by the entities listed be preserved pending holding of a creditors meeting, advice from Insolvency Monitor on Applicants claim lodged on 28th July 2020 or until further orders of the Court.

4. THAT in the alternative and without prejudice to the foregoing this Honourable Court be pleased to impose such terms as to giving security for the taxes that were found due and owing to the Applicant.

25. The application is supported by an affidavit sworn by Sheryl Nakami Sanya, an officer involved in the enforcement measures relating to recovery of taxes from the Company. She depones that KRA made a final finding that the Company's tax liability is Kshs. 1,955,787,204.00 and in view of the proceedings in Germany, it seeks preservation of funds as it is unlikely to recover the full amount.

26. KRA states that on 3rd and 4th August 2020, it issued notices for the Preservation of Funds to the Company's bankers and other entities holding funds on behalf of the Company in accordance with **section 43** of the **Tax Procedures Act**. Since the notices have expired, it prays for orders extending the notices in order to safeguard revenue. It contends that the Company may dissipate the funds if the orders for preservation are not granted by withdrawing the money, transferring or putting it out of the reach of KRA. It further states that the Company has continued to receive income for which no taxes have been paid.

Application by Zamconsult

27. Zamconsult Consulting Engineers Limited ("Zamconsult") has made an application premised on **sections, 498, 499, 500, 501, 502, 503, 504, 505 & 720** and the **Fifth Schedule** of the **Insolvency Act, 2015** and **Regulation 10(4)** of the **Insolvency Regulations, 2016** seeking the following prayers;

1. This Honourable court do stay these proceedings (**HCC. Misc. No. E725 of 2020**) pending the hearing and determination of the present Application.

2. An order be and is hereby issued compelling the directors of **Gauff Consultants Africa Limited** to disclose, account and surrender to this Honourable Court all the money they have received from the Company's debtors, namely **The Kenya National Highways Authority, Water Services Trust Fund, Thika Water & Sewage Company Ltd, Konza Technologies Development Authority, Local Administrative Entities Development Agency (LODA) Rwanda, The Ministry of water and Irrigation and The Ministry of Transport, infrastructure, Housing, Urban Development & Public Works** and any other debtor since filling of the

recognition application.

3. An order be issued that motor vehicles registration numbers **KCE463L, KAZ106B, KCF239Z, KCF434C, KBZ930C, KCD513Z, KCB652M, KBY438F, KCD 450L, KAW151G, KBG892K, KAX 117U and KBY438F** belonging to the Company and already transferred to **Gauff Consultants Africa Limited** be transferred back and/or be vested to the **HP GAUFF INGENIURE GMBH & CO. KG- JBG**.

4. An order be issued that all office equipment including furniture, computers, printers etc be surrendered by **Gauff Consultants Africa Limited** to the custody of this court.

5. This Honourable Court directs and orders the Company **HP GAUFF INGENIURE GMBH & CO. KG- JBG** to pay the cumulative sum of **Kshs 16,100,102.64** outstanding payments owed to **Zamconsult Consulting Engineers Limited** for works done prior to the hearing and/or recognition of the foreign insolvency proceedings in the Nuremberg Local Court in Germany.

6. In the alternative, the company **Gauff Consultants Africa Limited** having received **HP GAUFF INGENIURE GMBH & CO. KG- JBG** payments from debtors be and is hereby directed and ordered to provide sufficient security in the form of a bank guarantee obtaining and valid in Kenya for the payment of **Kshs 16,100,102.64** outstanding payments owed to **Zamconsult Consulting Engineers Limited** for works done prior to the hearing and/or recognition of the foreign insolvency proceedings in the Nuremberg Local Court in Germany.

7. The court orders the prosecution of the managers of **HP GAUFF INGENIURE GMBH & CO. KG- JBG**, who are the current directors of **Gauff Consultants Africa Limited**; **Mr Michael Fest** and **Mr. Guillaume Patricot** for interfering with the natural course of insolvency as per Division 10 of the Insolvency Act.

8. The costs of this application be provided for.

28. The application is supported by the affidavit of its Managing Director, Eng. Dr. Zablon Isaboke Oonge. He depones that when Zamconsult became aware of the insolvency proceedings, it instructed its advocate to engage the Company on the outstanding amount of Kshs. 16,100,102.64 owed to it on account of the work completed as a sub-contractor the following projects; Kiambaa Dam, Itare Dam and Bunjunyu Dam. He stated that despite the instructing clients in all the above Dam projects having paid all the money, the Company has failed to pay Zamconsult.

29. Zamconsult supports the Employees claim that the Branch Managers formed Gauff Consultants and have been irregularly transferring the Company's assets including its motor vehicles. It also complains that Gauff Consultants has unlawfully taken over the Company's premises and converted the Company's office equipment for its use with the intention of depriving the Company's creditors any assets from which they may recover their debts.

30. He informs the court that the Company is owed the sum of Kshs. 100,453,367.60 and EUR 181.624.95 by various entities here in Kenya as outstanding certificates for work done as follows; Kenya National Highways Authority (KeNHA) Kshs. 79,369,567.62 Kshs. 79,369,567.62, Konza Technologies Development Authority Kshs. 13,824,000.00, The Ministry of water and Irrigation Eur. 181,624.95, Ministry of Transport, infrastructure, Housing, Urban Development & Public Works Kshs, 4,800,000, Local Administrative Entities Development Agency (LODA) – Rwanda - Kshs. 24,600,000.

31. Like the Employees, Zamconsult contends that the money owed to the Company and which forms part of its assets, should be used to satisfy the debts owed to its creditors in Kenya as opposed to being transferred to a new entity, thus defeating the purpose of insolvency and the ends of justice. It submits that the Monitor had directed all creditors to register their claims with him in Germany before 29th July 2020 but this process has been a difficult and challenging process for Zamconsult given the language barrier, different legal systems and logistical challenges. It contends that given the same challenges including geographical distance and monetary expenses, it will be difficult for Zamconsult to participate in the proceedings in Germany and there is a possibility that Zamconsult may not get its day in court or have its concerns addressed at a fair hearing.

32. Zamconsult further contends that despite the massive reserve of money out of the debts owed to it by its local creditors and which money the Company have received, the Monitor has made false declarations of solvency to the Company's creditors by stating that the Company has no money to pay the salaries.

Response by the Company

33. The Company, through the deposition of Dr. Georg Bernsau, denies the accusations by Zamconsult. He depones that the Company is registered in Kenya as a branch of a foreign company and that under the Kenyan law it is considered a foreign company with a registered place of business in Kenya. That the Company is therefore subject to the foreign laws applicable in its place of original registration and that is why it has submitted to the jurisdiction of the Nuremberg Local Court for the conduct of the insolvency proceedings under the provisions of the German Insolvency Statute.

34. The Company contends that the insolvency is being carried out in compliance with the German Insolvency Statute and it is under oversight of the German Court to ensure that this is conducted with the highest degree of fidelity to the same to ensure the best possible outcome for creditors of the Insolvent Company which includes the sale of parts of the business to willing investors for value.

Analysis and determination

35. Cross-border or foreign insolvency proceedings are governed by **section 720** of **Part XIII** of the *Insolvency Act* which provides as follows;

720. Cross border insolvency

The United Nations Commission on International Trade Law (Model Law on Cross-Border Insolvency) has the force of law in Kenya in the form set out in the Fifth Schedule.

36. **Paragraph 3** of the **Fifth Schedule** of the *Insolvency Act* sets out the scope of application as follows;

3. Scope of application of this Schedule

(1) Except as provided in subparagraph (2), this Schedule applies—

(a) assistance is sought in Kenya by a foreign court or a foreign representative in connection with a foreign proceeding;

(b) assistance is sought in a foreign State in connection with a proceeding under this Act and any other written law relating to insolvency in Kenya;

(c) a foreign proceeding and a proceeding under this Act and any other written law relating to Insolvency in Kenya in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under this Act or any other written law relating to insolvency in Kenya.

(2) This Schedule does not apply to a company that holds a licence granted under section 5 of the Banking Act if—

(a) the Central Bank of Kenya has intervened in the management of the company in accordance with section 34 of that Act and that intervention has not ceased; or

(b) the licence of the company is suspended as a result of the operation of section 47 of that Act.

37. **Paragraph 12** restricts the Court's jurisdiction on cross border insolvencies as follows:

12. Limited jurisdiction

The sole fact that an application under this Schedule is made to the Court by a foreign representative does not subject the foreign representative or the foreign assets and financial affairs of the debtor to the jurisdiction of the Court for any purpose other than the application.

38. **Paragraph 13** provides that a foreign representative may commence insolvency proceedings in Kenya. A foreign representative is defined under **Paragraph 4** as follows;

"foreign representative" means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the re-organisation or the liquidation of the debtor's assets or financial affairs or to act as a representative in the foreign proceeding;

39. In this respect, the application having been filed by the Provisional Insolvency Monitor, Joachim Exner and the Company's managing director, Dr. Georg Bernsau is properly before the Court. The Monitor, qualifies as a foreign representative having been appointed on 23rd April 2020 by the Nuremberg Local Court in Germany.

40. The procedural conditions that an applicant must meet before foreign insolvency proceedings are recognised are set out in **Paragraph 17** as follows;

17. Application for recognition of a foreign proceeding

(1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition may be rejected if it is not accompanied by—

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in sub-paragraphs (a) and (b) —any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition may also be rejected if it not accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The Court may require a translation of documents supplied in support of the application for recognition into English as the official language of Kenya.

41. In order to comply with the aforesaid requirements, Dr Georg Bernsau in his Further Supporting Affidavit sworn on 23rd July 2020 produced a copy of the decree issued by the Nuremberg Local Court dated the 1st July, 2020 and a certified translation thereto. On that basis, I am satisfied that the applicant has satisfied that conditions for recognition of the insolvency proceedings in Germany. Moreover, none of the creditors contested the validity of foreign proceedings or pointed out any deficiency in the application.

42. **Paragraph 19** sets out the parameters for the court’s consideration when determining an application for recognition. It provides;

19. Decision to recognise a foreign proceeding

(1) Subject to paragraph 8, the Court shall recognise a foreign proceeding if—

(a) the foreign proceeding is a proceeding within the meaning of paragraph 4;

(b) the foreign representative applying for recognition is a person or body within the meaning of that paragraph;

(c) the application meets the requirements of paragraph 17(2); and

(d) the application has been submitted to the Court.

(2) The Court shall recognise the foreign proceeding—

(a) as a foreign main proceeding if it is taking place in the State if the debtor has the centre of its main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of paragraph 4(f) in the foreign State.

(3) The Court shall hear and determine an application for recognition of a foreign proceeding at the earliest possible time.

(4) As soon as practicable after the Court has recognised the foreign proceeding under subparagraph (1), the foreign representative shall notify the debtor that the application has been recognised.

(5) This paragraph and paragraphs 17, 18 and 20 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. [Emphasis mine]

43. **Paragraph 4** defines “foreign proceedings” and “foreign main proceedings” as follows;

“foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under to a law relating to insolvency in which proceeding the assets and financial affairs of the debtor are subject to control or supervision by a foreign court, either for the purpose of reorganisation or liquidation;

“foreign main proceeding” means a foreign proceeding taking place in a foreign State if the debtor has the centre of its main interests in that State;

44. The proceedings in the Local Court in Nuremberg, Germany fall squarely within the meaning of foreign proceedings and foreign main proceedings as the Company has its center of main interests (COMI) in Germany where the insolvency proceedings were commenced. It is not in dispute that the Company is registered under the laws of Germany with its registered address in Nuremberg where it has its headquarters. I therefore hold that the application complies with the provisions of **Paragraph 19**.

45. The duty of the court to recognize foreign proceedings under **Paragraph 19** is couched in mandatory terms once an applicant has complied with the procedural requirements of **Paragraph 17**. I find and hold that based on the substance of application, the applicant has complied with all the preconditions for recognition in **Paragraphs 17** and **19**. The remaining questions for consideration are whether the grounds furnished by the creditors are sufficient to deny the application for recognition and whether the court should grant the reliefs sought in the application.

46. Under **Paragraph 19**, the decision to recognise foreign proceedings is subject to **Paragraph 8** which provides as follows:

8. Public policy exception

(1) Nothing in this Schedule prevents the Court from refusing to take an action governed by this Schedule if the action is manifestly contrary to public policy of Kenya.

(2) Before refusing to take action under subparagraph (1), the Court shall consider whether it is necessary of the Attorney-General to appear and be heard on the question of the public policy of Kenya.

47. The creditors did not contend that there were any public policy reasons to deny recognition of the foreign proceedings. In **Re Cooperativa Muratori and Cementisti – CMC Di Ravenna (Insolvency) HC Misc. App. No. E627 of 2019 [2020] eKLR**, Tuiyott J. considered the scope of the public policy exception and held that for the public policy exception to defeat an application for recognition it must be demonstrated that the grant of recognition would be so clearly or plainly contrary to the public policy of Kenya and that by inclusion of the word ‘manifest’ the public exception clause was intended to be invoked in exceptional and limited circumstances. The learned Judge concluded that:

37. It does seem to this Court that once a recognition application satisfies the procedural requirements of the fifth schedule and demonstrates that it is aligned to the objectives of cross-border insolvency as set out in Paragraph 2 of the schedule, then the Court in Kenya should lean towards granting recognition unless the action clearly falls within the public policy exception.

48. The thrust of the Creditors complaint is that they are owed substantial amounts of money which can be paid from the amount due from the Company’s debtors. They also complain that the Company’s Branch Managers have siphoned off money due to the Company to Gauff Consultants with the intention of evading their obligations to the creditors. Who should be paid and under what circumstances are matters that are normally dealt with by the Insolvency Court and do not fall within the public policy exception. Likewise, the manner of dealing with the assets of the Company are within the power and authority of the Insolvency Court in this case the Local Court in Nuremburg, Germany. However, the issues raised by the Creditors may be taken into account in granting relief either to the applicant and the Creditors under the provisions of the **Fifth Schedule**.

49. Upon recognition of the foreign proceedings, **Paragraph 22** provides for the effect of recognition as follows:

22. Effects of recognition of a foreign main proceeding

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations, or liabilities is stayed;

(b) execution against the debtor’s assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(2) Subparagraph (1) does not prevent the Court, on the application of any creditor or interested person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.

(3) Subparagraph (1) (a) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) Subparagraph (1) does not affect the right to request the commencement of a proceeding under this Act or any other written law relating to insolvency or the right to make claims in such a proceeding.

50. **Paragraph 23** provides for the types of relief the court may grant upon recognition of the foreign proceedings;

23. Relief that may be granted on recognition of a foreign proceeding

(1) On recognition by the Court of a foreign proceeding, whether main or non-main, if necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including—

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations, or liabilities, to the extent they have not been stayed in accordance with paragraph 22(1)(a);

(b) staying execution against the debtor’s assets to the extent it has not been stayed in accordance with paragraph 22(1) (b);

(c) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended in accordance with paragraph 22(1)(c);

(d) providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor’s assets, financial affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor’s assets located in Kenya to the foreign representative or another person designated by the Court; and

(f) extending relief granted under paragraph 21(1).

(2) On recognition by the court of a foreign proceeding, whether main or non-main, the Court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Kenya to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in Kenya are adequately protected.

(3) In granting relief under this paragraph to a representative of a foreign non-main proceeding, the Court shall satisfy itself that the relief relates to assets that, under the law of Kenya, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

51. The general effect of a recognition order is to place a moratorium on any actions against the company and its assets as reflected in **Paragraphs 22 and 23**. In this respect, I have already granted an order staying any proceedings against the Company pending resolution of this application in line with **Paragraphs 21**. The same orders of stay would ordinarily be granted once the foreign proceedings are recognised. On the other hand, and in order to meet the objectives of the **Insolvency Act** set out in **section 3** which include ensuring that the Company is able to operate as a going concern in order to meet its financial obligations to the creditors in full or achieve a better outcome for the creditors as a whole if it is liquidated, **Paragraphs 24 and 25** provide that in recognizing cross border insolvencies, a Company's creditors must be protected as follows;

24. Protection of creditors and other interested persons

(1) In granting or denying relief under paragraph 21 or 23, or in modifying or terminating relief under subparagraph (3), the Court shall ensure that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) In granting relief under paragraph 21 or 23, the Court may impose such conditions as it considers appropriate.

(3) The Court may—

(a) at the request of the foreign representative;

(b) a person affected by relief granted under paragraph 21 or 23; or

(c) on its own initiative, modify or terminate the relief.

(4) The Court shall, on application of the statutory manager (if any) or the Official Receiver, terminate the relief granted under paragraph 21 or 23 if—

(a) an application for recognition has been made in respect of a debtor that is a bank;

(b) the Court has granted that application or the Court has granted relief under paragraph 21; and

(c) an insolvency event occurs in relation to the debtor after that application or relief has been granted.

(5) The following are insolvency events for the purposes of subparagraph (4):

(a) if the debtor is a natural person—the making of a bankruptcy order in respect of the person; or

(b) if the debtor is a company or other body corporate—the making of a liquidation order in respect of the company or the passing of a voluntary resolution for the liquidation of the company.

25. Actions to avoid acts detrimental to creditors

(1) On recognition by the Court of a foreign proceeding, the foreign representative has standing to initiate any action that an insolvency administrator may take in respect of a proceeding under this Act that relates to a transaction (including any gifts or improvement of property or otherwise), security, or charge that is voidable or may be set aside or altered.

(2) When the foreign proceeding is a foreign non-main proceeding, the Court shall ensure that the action relates to assets that, under the law of Kenya, should be administered in the foreign non-main proceeding.

(3) Nothing in subparagraph (1) affects the doctrine of “relation back” as it is applied in Kenya.

52. The Employees, Zamconsult and Kenya Revenue Authority contend that they will not be paid if the insolvency proceedings in Germany are recognised. Since the Company is incorporated in Germany and the Kenya Branch is registered in Kenya in 1986 as a foreign company, it does not have an independent legal existence in Kenya apart from its parent German entity. As I have found, the Local Court in Nuremberg, Germany has jurisdiction to proceed with the insolvency in accordance with German Law. Counsel for the Company submitted that according to German law, all the assets of the insolvent Company will be collected and put in one pool for distribution to the creditors.

53. The application by KRA was made after these proceedings were commenced and the order staying any further proceedings issued by this court on 2nd June 2020. Allowing the orders would in effect paralyse the insolvency proceedings in Kenya contrary to the provisions of the **Fifth Schedule**. Further, if the orders sought by the Employees, Zamconsult and KRA are granted, all the other creditors will be disadvantaged. Granting those orders, would mean that the creditors in Kenya would be given priority or preference over all the other creditors of the Company elsewhere. This would undermine the basic principle underlying insolvency, that is, all creditors of the same class must be treated fairly and equally. It would also amount to this court taking over the insolvency proceedings contrary to the **Fifth Schedule**.

54. The Creditors have expressed concern about the right to access the court in Germany and fears that the assets of the Company may be dissipated to their detriment. **Paragraphs 27, 28 and 29** provide a means for the court to ensure that the parties receive the necessary information and participate effectively in the proceedings in Germany. They provide as follows;

27. Co-operation and direct communication between the Court and foreign courts or foreign representatives

(1) In relation to matters referred to in paragraph (3), the Court shall co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through an insolvency administrator.

(2) The Court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

28. Co-operation and direct communication between the insolvency administrator and foreign representatives

(1) In relation to matters referred to in paragraph 3(1), an insolvency administrator shall, in the performance of that administrator's functions and, subject to the supervision of the Court, co-operate to the maximum extent possible with foreign courts or foreign representatives.

(2) The insolvency administrator is entitled, in the exercise of its functions and subject to the supervision of the Court, to communicate directly with foreign courts or foreign representatives.

29. Forms of co-operation

Co-operation referred to in paragraphs 27 and 28 may be implemented by any appropriate means, including—

(a) appointment of a person or body to act at the direction of the Court;

(b) communication of information by any means considered appropriate by the Court;

(c) co-ordination of the administration and supervision of the debtor's assets and financial affairs;

(d) approval or implementation by courts of agreements concerning the co-ordination of proceedings; and

(e) co-ordination of concurrent proceedings regarding the same debtor.

55. The claims made by the Employees, Zamconsult and KRA are not exceptional. They are ordinary claims made by Creditors owed money by an insolvent Company. The Court in Germany has already appointed a Monitor who is responsible to the court for the manner in which the assets of the Company are dealt with. The provisions relating to co-operation are in my view sufficient to assuage some of the concerns by the creditors as they are able to raise with those issue with the court supervising the insolvency. It is within the power of this court to facilitate their participation by invoking the co-operation provisions.

56. Having considered the concerns raised by the creditors, their interests would be best served by an order providing for their access to the court in Germany and directing the Monitor and or foreign representative to file and serve on the creditors periodical reports of the proceedings and status of the company. Further and in order to protect the Kenyan creditors, any transfer of the Company's assets in Kenya shall be prohibited unless by leave of this court.

Disposition

57. I now grant the following orders:

(a) The applications dated 13th August 2020 by Kenya Revenue Authority, applications dated 21st August 2020 and 23rd August 2020 by employees of HP Gauff Ingenieure GmbH & Co. KG – JBG in Kenya and the application dated 23rd November 2020 by Zamconsult Consulting Engineers Ltd are hereby dismissed. Each party shall bear their own costs.

(b) The proceedings and the decree of the Nuremberg Local Court issued on the 23rd of April, 2020 granting the application by the Applicant, HP Gauff Ingenieure GmbH & Co. KG – JBG, protecting the Applicant's assets against adverse changes pursuant to Section 21 (1) of the German Insolvency Statute and ordering provisional debtor-in-possession management be and are hereby recognised by this court.

(f) An order of stay be and is hereby issued staying commencement and/or continuation of any and all adverse civil actions,

barring any and all adverse Civil actions, operations of any orders and decrees issued against the Company pending the finalization of the provisional insolvency proceedings in Germany under the direction of the proceedings in the Nuremberg Local Court, in Germany or until they are lifted, varied or discharged by a further order of this Court.

(g) An order be and is hereby issued that no assets of whatever kind belonging to the Company in Kenya shall be permitted to leave, be transferred out or encumbered or otherwise disposed of without the leave of this Court.

(h) The Local Court in Nuremberg, Germany shall adopt such process that shall give the Kenyan creditors meaningful and affordable access (including but limited to virtual access) and participation in the insolvency proceedings.

(i) The Provisional Insolvency Monitor and or foreign representative shall file in this court and serve on the Creditors and or their representatives in Kenya periodical reports of the proceedings in Germany and status of the insolvency every 90 days from the date of the first report being filed and served within 30 days from the date hereof.

(j) Any Creditor in Kenya who shall be dissatisfied with the any aspect of the process shall be at liberty to apply to this Court for modification or termination of the relief.

DATED and DELIVERED at NAIROBI this 18th day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Mr Munyaka with her Ms Mbatia instructed by Chebet & Munyaka Advocates LLP for the applicants.

Mr Mugisha instructed by Nyaanga and Mugisha Advocates for the Creditors (Employees of HP Gauff Ingenieure GMBH & Co)

Mr Osoro, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.

Mr Mbaabu instructed by Kinyua Mbaabu & Company Advocates for Creditor (Zamconsult Consulting Engineers Ltd)