



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY NOTICE NO. E013 OF 2018

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

ALLIED EAST AFRICA LIMITED FORMERLY HILLPORT LIMITED

BETWEEN

I & M BANK LIMITED..... APPLICANT

AND

ABC BANK LIMITED .....1<sup>ST</sup> RESPONDENT

FIRST COMMUNITY BANK LIMITED.....2<sup>ND</sup> RESPONDENT

RULING NO. 2

### **Introduction and Background**

1. This decision concerns the appointment of a competing slate of administrators under the *Insolvency Act, 2015* (“the *Insolvency Act*”) by creditors; I & M Bank Limited (“I&M”) and African Banking Corporation Bank Limited (“ABC”) over the business undertaking of **ALLIED E.A LIMITED** formerly **HILLPORT LIMITED** (“the Company”). The Company is engaged in the business of production, re-validation, testing and inspection of LPG cylinders.

2. I&M granted the Company facilities of up to an aggregate principal amount of KES. 1,200,000,000.00 which were secured by the following securities issued by the Company in favour of I&M: A debenture dated 10<sup>th</sup> December 2014 securing an aggregate maximum principal amount of KES. 750,000,000.00 together with a charge of the same date over the Company’s property Title No. Kajiado/Kisaju/2450 securing the same amount, a further debenture dated 9<sup>th</sup> March 2017 securing an aggregate maximum principal amount of KES. 70,000,000.00, a second further debenture dated 12<sup>th</sup> September 2017 securing an aggregate maximum principal amount of KES. 380,000,000.00 accompanied by a further charge of the same date created by the Company over its property known as Title No. Kajiado/Kisaju/2450 securing the same amount.

3. ABC advanced the Company KES 60,000,000.00 secured by a fixed and floating debenture dated 1<sup>st</sup> July 2014 created by the Company in favour of ABC.

4. First Community Bank Limited (“FCB”) advanced the Company USD 1,180,000.00 secured by an all assets debenture dated 13<sup>th</sup> April 2015.

5. These proceedings were triggered by the Company defaulting in repayment of the aforesaid facilities and despite demand, it was unable to settle its debts. By a letter dated 15<sup>th</sup> November 2018, I&M, pursuant to **section 535(1)** of the *Insolvency Act*, notified ABC of its intention to appoint an Administrator in respect of the Company property.

6. On 19<sup>th</sup> November 2018, ABC filed a Notice of Appointment of Administrator together with a Statutory Declaration indicating that it had

appointed Julius Mumo Ngonga and Anthony Makenzi Muthusi of Ernst & Young LLP to act as Administrators over the whole of the Company's property.

7. On 27<sup>th</sup> November 2018, I&M moved the court by the Notice of Motion dated 27<sup>th</sup> November 2018 under **section 612** of the *Insolvency Act* seeking orders, inter alia, restraining the Administrators appointed by ABC from carrying on their administration duties in respect of the Company. It also sought an order that the Administrators appointed by ABC be replaced by P. V. R. Rao as Administrator. The application was supported by Musa Dumbuya, its Debt Recovery Manager, sworn on 27<sup>th</sup> November 2018.

8. On 28<sup>th</sup> November 2018, the court granted an injunction restraining the ABC-appointed Administrators from carrying out or continuing with the administration of the Company. On 4<sup>th</sup> December 2018, the Court appointed P.V. Rao and/or Mark Mark Gakuru, the Official Receiver to act as Interim Administrator pending the hearing and determination of the application dated 27<sup>th</sup> November 2018. In response thereto, ABC relied on the affidavit of its Senior Legal Manager, Agatha Kiattu, sworn on 5<sup>th</sup> December 2018.

9. Aggrieved by the ex-parte order, ABC filed the Notice of Motion dated 6<sup>th</sup> December 2018 seeking to stay and set aside the orders issued on 30<sup>th</sup> November 2018 restraining its appointed Administrators from carrying on administration of the Company. In the alternative, ABC seeks that the order granted on the 30<sup>th</sup> November 2018 be varied, by allowing Julius Mumo Ngonga and Anthony Makezi Muthusi to continue with the administration of the Debtor. ABC amended the Notice of Motion on 28<sup>th</sup> January 2019 by including a prayer seeking removal of P.V.R. Rao as the interim administrator of the Company. The application is supported by the affidavit of Agatha Kiattu sworn on 28<sup>th</sup> January 2019. ABC also filed a preliminary objection dated 4<sup>th</sup> February 2019 challenging the competency of I&M's application.

10. ABC Bank also filed a Notice of Motion dated 6<sup>th</sup> May 2020 seeking an order that the Administration of the Company by P V R Rao be vacated and or terminated forthwith. The application was supported by the affidavit of its Legal Manager, Kajuju Marete, sworn on 6<sup>th</sup> May 2020. It was opposed by I&M through the replying affidavit of its Manager in the Debt Recovery Unit, Janet Gatwiri Marete sworn on 8<sup>th</sup> June 2020.

11. FCB supports the position taken by ABC through the Replying Affidavit of its Legal Officer, Claris Ogombo, sworn on 30<sup>th</sup> April 2020.

12. The issues arising from the said applications were canvassed by written and oral submissions together with oral testimony from Beatrice Osicho, State Counsel, deployed to the Office of the Registrar of Security Rights under the *Moveable Property Security Rights Act, Act No. 13 of 2017* ("the *MPSRA*") who, as directed by the court on 13<sup>th</sup> November 2019, swore an affidavit on 6<sup>th</sup> March 2020.

13. In their respective submissions, I&M and ABC framed the following issues for determination:

(a) Whether ABC's Debenture of 1<sup>st</sup> July 2014 meets the statutory threshold of **section 534** of the *Insolvency Act*.

(b) Whether I&M's charges and debentures satisfy the requirements of **section 534** of the *Insolvency Act* and whether they qualify as having priority under **Section 535 (2)** of the *Insolvency Act* and the *MPSRA*.

(c) Whether I&M is entitled to replacement of ABC's Administrators under **section 612** of the *Insolvency Act*

(d) Whether a stay should be issued in respect of the orders issued on 30<sup>th</sup> November 2018

(e) Whether there was any material non-disclosure by I&M

14. It is not disputed that ABC holds a debenture over the Company dated 1<sup>st</sup> July 2014 and registered on 8<sup>th</sup> July 2014 while the I&M's debentures are dated 9<sup>th</sup> March 2017 and 12<sup>th</sup> September 2017. It is thus clear that the debenture held by ABC pre-dates the *Insolvency Act* which was enacted in 2015 and came into force in various stages in 2015 and 2016 while the debentures held by I&M were created after the *Insolvency Act* came into force. In my view and in order to decide the issues framed effectually, I propose to condense the issues for resolution as follows:

(a) Whether the application filed by I&M is competent.

(b) Whether the ABC is entitled to appoint administrators under the *Insolvency Act*.

(c) If so, which creditor has priority.

### **Competence of I & M's application**

5. Before I proceed to deal with the substance of the application, let me dispose of some technical issues raised by ABC in its Notice of Preliminary Objection dated 4<sup>th</sup> February 2019.

16. Counsel for ABC impugns the competence of these proceedings. He contends that they were commenced by ABC filing a notice as required under the *Insolvency Act* merely to inform the court that ABC had appointed administrators. He pointed out that even the identity of the registry of the classification as insolvency notice shows that this is not a proceeding and the matter was spent once the court was duly notified. He added that if I&M wished to pursue its cause, it had to file substantive proceedings in which it would seek interim relief pending

substantive determination of the dispute. He pointed out that in the absence of substantive claim, the court could not issue interim relief or proceed to determine the issues raised which are substantial, complex and required taking of oral testimony. In Counsel's view, in the absence of a substantive suit to support the case, the application is incompetent.

17. Counsel for I&M submits that it could only file the present application under the same file that ABC had filed because if it filed a different and separate application they would have been accused of abuse of court process for filing multiple proceedings. Counsel submits that in the absence of rules governing how its application is to be filed, the application was properly filed. Counsel maintains that this matter is not complex as the only question before the court is the issue of priorities under **section 38** of the **MPSRA**. Counsel further submits that the court has inherent jurisdiction to determine the manner in which the matter should be determined in the absence of specific regulations for that purpose.

18. Without belabouring this aspect of the case, I am not inclined to strike out the matter because the court is enjoined by **Article 159(2)(d)** of the Constitution to eschew technical objections in favour of substantive justice. This principle finds expression in **section 696** of the **Insolvency Act** as follows:

*696 (1) A proceeding under this Act may not be invalidated or set aside for a defect in a step that is required to be taken as part of, or in connection with, the proceeding, unless a person is detrimentally affected by the defect.*

*(2) The Court may order the defect to be corrected, and may order the proceeding to continue, on such terms as it considers appropriate in the interests of everyone who has an interest in the proceeding.*

*(3) In this section, "defect" includes a misdescription, misnomer or omission.*

19. I am persuaded to exercise discretion in favour of I&M for several reasons. This matter was commenced in 2018 when the court issued ex-parte interim orders. It has remained unresolved for the last two and a half years and given that the status of the Company remains in flux, it would be in the interests of the Company and its creditors that the dispute is resolved with alacrity in order to settle the parties' respective rights.

20. The parties have had the opportunity to present their case to the fullest extent by filing their respective depositions. They also had the chance to cross-examine Beatrice Osicho, State Counsel, deployed to the Office of the Registrar of Security Rights under the **MSPRA**. None of the parties applied to file further affidavits or call any additional witnesses. Finally, counsel made oral and written submissions on the issues put forward for determination.

21. I hold that dismissing the matter at this point would leave the key issues in dispute festering, causing either party to file further proceedings hence it is in the interests of justice to resolve them once and for all to avoid waste of the court's precious time and resources and increase in costs incurred by the parties. It is also apparent that the issues for resolution are rather narrow and do not require further or other proceedings. I reject ABC Bank's preliminary objection.

#### **Whether the ABC was entitled to Appoint an Administrator**

22. One of the hallmarks of the **Insolvency Act** is the introduction of the device of Administration to replace the receiver(s)/managers(s) under the **Companies Act (Repealed)** in order to meet the overall objective of ensuring that distressed companies are given "breathing space" so that they remain going concerns. In order to benefit from these provisions, the person appointing the Administrator, without recourse to the court, must be the holder of a qualifying floating charge under **section 534(1)** of the **Insolvency Act** which provides as follows:

#### **534. Holder of floating charge may appoint administrator**

*(1) The holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the company.*

*(2) For the purposes of subsection (1), a floating charge is a qualifying floating charge if it is created by a document that—*

*(a) states that this section applies to the floating charge; or*

*(b) purports to empower the holder of the floating charge to appoint an administrator of the company.*

*(3) For the purposes of subsection (1), a person is the holder of a qualifying floating charge in respect of a company's property if the person holds one or more debentures of the company secured—*

*(a) by a qualifying floating charge that relates to the whole or substantially the whole of the company's property;*

*(b) by a number of qualifying floating charges that together relate to the whole or substantially the whole of the company's property; or*

*(c) by charges and other forms of security that together relate to the whole or substantially the whole of the company's property and at least one of which is a qualifying floating charge. (Emphasis mine)*

23. I&M submits the ABC is not entitled to appoint administrators as its debenture pre-dates the **Insolvency Act**. Referring to **section 534(2)** aforesaid, I&M contends that ABC is not a holder of a qualifying charge because its debenture dated 1<sup>st</sup> July 2014 does not meet the

statutory requirements. It adds that since it was drawn up before prior to enactment of the *Insolvency Act*, it does not indicate that **section 534(1)** thereof is applicable.

24. I&M further submits that the debenture does not expressly empower ABC to appoint an administrator under the *Insolvency Act* and adds that the debenture provides for the appointment of a receiver and manager and that this should not be construed as providing for appointment of an administrator. It cites the Court of Appeal decision in *Parminder Singh Sagoo & another v Neville Anthony Dourado & another NRB CA Civil Appeal No. 24 of 1982 [1983] eKLR* to support the position that a statute must be construed strictly according to its words and that consequently and in light of the statutory provisions, ABC's appointment of administrators is a nullity. It reiterates that since ABC's debenture was registered under the *Companies Act (Repealed)* and by virtue of **sections 690(4) and 734(2)** of the *Insolvency Act*, ABC's rights are restricted to the appointment of a receiver and not an administrator as was held in *KSC International Ltd and Others v Bank of Africa and Others ML HCCC 446 of 2015 [2018] eKLR*.

25. I&M concludes that its own debentures meet the requirements of **section 534** of the *Insolvency Act* as they both indicate that they are floating charges to which the provisions of the *Act* apply and they empower it to appoint an administrator.

26. The gravamen of ABC's case is that I&M failed to disclose material facts when it moved the court and obtained an ex-parte injunction by misleading the court to believe that it has a first rank floating charge over ABC. ABC asserts that its debenture is a first qualifying floating charge as it meets the statutory requirements of **section 534(2)** of the *Insolvency Act*.

27. ABC further contends that in its application dated 27<sup>th</sup> November 2018, I&M misled the Court that it holds a prior floating charge in respect of the Company when it was within its knowledge that ABC is a holder of a prior first floating charge and that is why it served a three-day notice upon ABC pursuant to **section 535(1)** of the *Insolvency Act* and which notice is only served to persons with a prior floating charge. It also points out that prior to I&M's registration of its further debenture dated 9<sup>th</sup> March 2017, it did in fact seek consent from ABC as the prior ranking debenture holder.

28. ABC submits that its debenture remained valid and enforceable despite coming into operation of the *Insolvency Act* all the accrued rights were expressly preserved under **section 734(2)** thereof which excludes that application of the *Insolvency Act* and preserves the provisions of the **Parts VI to IX** of the *Companies Act (Repealed)* in relation to debentures that were created prior to its repeal.

29. ABC submits that although its debenture refers to the appointment of receiver(s) and manager(s), their powers are similar or equivalent to those exercisable by administrators set out in the **fourth schedule** of the *Insolvency Act*. It thus submits that there is no difference between the roles to be played by a receiver/manager or an administrator hence its appointment of an administrator and not receiver is inconsequential and arguments to that effect should not be permitted to prejudice and or deny it the exercise accrued rights.

30. I am in agreement with ABC that the coming into force of the *Insolvency Act* did not invalidate or render unenforceable debentures that predated the *Act*. It preserved the provisions of the *Companies Act (Repealed)* which entitle that the holder of a debenture to appoint receivers/managers in the event of default. While it is clear that ABC's debenture could not incorporate provisions of the *Insolvency Act* which was not in force at the time when it was drawn, I hold that this mere fact does not preclude the debenture holder from appointing an Administrator in line with **Part VIII Division 3** of the *Insolvency Act*. It provides for who can appoint an Administrator as follows:

### **523. Who can appoint an administrator?**

*A person may be appointed as administrator of a company-*

*(a) by administration order of the Court in accordance with Division 3;*

*(b) by the holder of a floating charge under section 534; or*

*(c) by the company or its directors under section 541.*

31. The effect of the aforesaid provision is that only creditors holding a qualifying floating charge under **section 534** may appoint an Administrator without recourse to the court. Thus if the creditor is not the holder of a qualifying floating charge, it has to apply to the court for appointment of an Administrator in line with **Part VIII, Division 3, sections 530 to 533** of the *Insolvency Act*. In order to appoint an Administrator without making an application to the court, the floating charge must meet either of the conditions set out in **section 534**, that is it must state that section applies to it or empowers the holder to appoint an administrator.

32. ABC has argued that whatever name used, the duties of the receiver/manager under its debenture are co-extensive with those of an administrator appointed under the *Insolvency Act* hence for all intents and purposes, just as it is entitled to appoint a receiver, it is also entitled to appoint an administrator. I disagree with this position because **section 520** of the *Insolvency Act* ascribes a specific meaning to the term "administrator" and it relates to the manner of appointment rather than to the functions. It states, "'administrator', in relation to a company, means a person appointed under this Part to manage the company's affairs and property, and, if the context requires, includes a former administrator." (Emphasis mine)

33. It follows that although the functions of a receiver/manager may be conterminous with those of an administrator under the *Insolvency Act*, they are cannot be equated nor can the power to appoint a receiver or receiver manager under a debenture predating the *Insolvency Act* be equated to the power to appoint an administrator under **section 534**. This difference is not merely textual; it is substantive. Under **section 524**, an administrator is required to, "perform the administrator's functions as quickly and efficiently as is reasonably practicable" bearing in mind the objectives of administration set out in **section 522** of the *Insolvency Act* which include maintaining the company as going concern, achieving a better outcome for the company's creditor's as a whole than would likely to be the case if the company were to be liquidated and to realise the property of the company in order to make a distribution to one or more secured or preferential creditors. This

position of an administrator is fortified by **section 525** which provides that, “An administrator is an officer of the Court, whether or appointed by the Court or not.”

34. On the other hand, a receiver/manager appointed under a debenture is not an officer of the court although the court may intervene in certain instances in performance of its duties. It does not have the responsibilities and obligations to the general body of creditors, whether secured and unsecured and cannot be called upon to account as such but is an agent of the company or the debenture holder (see **Surya Holdings Limited and Others v CFC Stanbic Bank Limited ML HCCC No. 78 of 2014 [2015] eKLR** and **Lochab Brothers v Kenya Furfural Company Limited & Others [1983] KLR 257**). Further unlike the process of receivership, administration offers specific benefits including a moratorium on legal processes under **section 560** of the **Insolvency Act**.

35. In deciding whether or not the administrator and receiver/manager are one the same, the court is called upon to give meaning to the words of the statute and I agree with the Court of Appeal in **Parminder Singh Sagoo & another v Neville Anthony Dourado & another (Supra)** citing with approval several decisions including **Alien v Thorn Electrical Industries Limited [1967] 2 All ER 1137** held that the court must give words their natural and ordinary meaning in the context in which they appear. As I have shown, the **Insolvency Act** is clear on the meaning of the term administrator, the manner of appointment and the incidents of a company under administration. The terms “receiver/manager” have a long history in English common law and doctrines equity and nothing would have been easier for the legislator to adopt them in the new statute. The purpose of the **Insolvency Act** was to break away from the old law and give way to the current practice that places a premium on rescuing or restructuring the company as a going concern rather than winding it up. I therefore hold that a receiver/manager appointed under the debenture or security document is different from an administrator appointed under the provisions of the **Insolvency Act**.

36. The issue whether ABC is entitled to appoint an administrator under its debenture, the turns to whether it holds a qualifying floating charge under **section 534(2)** of the **Insolvency Act**. I think it is not in dispute that the instrument could not make reference to the provision the **Insolvency Act** since it was not in existence at the time. As to whether it purports to the empower ABC to appoint an administrator, I think not in light of the meaning ascribed to receiver/manager and administrator I have set out above.

37. The finding I have made does not mean that ABC is not entitled to appoint a receiver/manager under the debenture as this power is specifically preserved under **section 734(2)** of the **Insolvency Act** which states:

*734(2) Despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after commencement.*

38. **Parts VI to IX** of the **Companies Act (Repealed)** deal, inter alia, with the powers of a debenture holder to appoint a receiver and manager over the assets of a company. Under **section 734(1)(i)** of the **Insolvency Act**, “the appointment of a receiver of in respect of the company by holders of the company’s debentures,” is a past event and therefore excluded from the legal incidents of **Part VIII** of the **Insolvency Act**. The manner of appointment and activities of receivers and managers under debentures pre-dating the **Insolvency Act** continue to be regulated by the provisions of the **Companies Act (Repealed)** (see also **KSC International Limited (Under Receivership) and Others v Bank of Africa (K)Limited and Others (Supra)**).

39. But what did ABC do in this case? ABC elected to appoint administrators by specifically invoking the provisions of the **Insolvency Act**. This is evident in the Notice of Appointment of Administrator dated 16<sup>th</sup> November 2018 filed in this court and which states that ABC has appointed the, “Administrators over the whole property of ALLIED EAST AFRICA LIMITED ..... with effect from the 16<sup>th</sup> November 2018 and or in accordance with the provisions of the Part VII of the Insolvency Act.” It is also reiterated in the accompanying Statutory Declaration sworn on the same date by Agatha Kiattu in which she states in part as follows:

*[3] THAT the Applicant is a holder of a qualifying floating charge in respect of the property of ALLIED EAST AFRICA LIMITED formerly HILLPORT LIMITED (“the Company”).*

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*[11] THAT I wish to confirm that the appointment of the administrators herein is in accordance with Part VIII Division 4 of the Insolvency Act, 2015, Laws of Kenya.*

40. Based on the material and arguments before me and for the reasons I have set out, I find that the debenture issued by the Company in favour of ABC is not a qualifying floating charge within the meaning of **section 534(2)** of the **Insolvency Act**. Consequently, ABC could not appoint an administrator without making an application to the court as a creditor under **section 532(1)**. It follows therefore that its action of purporting to appoint administrators under its debenture is null and void and of no effect.

#### **Whether I&M’s debentures rank first in priority over ABC’s debenture**

41. Having concluded that the actions by ABC are null and void, the inquiry must conclude there but for the sake of completeness, let me deal with the issue of priority which is provided for in **section 535** of the **Insolvency Act** which, prior to amendment, provided as follows:

#### **535. Restrictions on the power of holder of floating charge to appoint administrator**

*(1) A person may not appoint an administrator under section 534 unless the person has given at least three days’ notice to the holder of any prior floating charge that satisfies subsection (2) of that section.*

(2) For purposes of subsection (1), a floating charge has priority over another if –

(a) it was created first; or

(b) it is to be treated as having priority in accordance with an agreement which the holder of each floating charge was party.

Following enactment of the **MPSRA**, **section 535(2)** now provides as follows:

*535 (2) For the purposes of subsection (1), the priority of a floating charge shall be determined in accordance with the Movable Property Security Rights Act.*

42. The same position regarding priority is fortified by **section 612** of the **Insolvency Act** dealing with the court's power to replace administrators in the event of competing claims by holders of qualifying floating charges and which provides, in part, that:

*612(4) The Movable Property Security Rights Act determines whether one floating charge is prior to another for the purposes of this section.*

43. The aforesaid position applies when both parties have appointed administrators and the question of priority arises. In this case, ABC is not a person entitled to appoint an administrator under **section 534** hence the issue of priority does not arise thereunder. The parties though, addressed the court on the application of the **MPSRA**.

44. It is I&M's position that under **section 535(2)** of **Insolvency Act**, the priority of a floating charge is determined in accordance with the **MPSRA** which, at **section 38**, provides that priority amongst competing security rights created by the same borrower in respect of the same collateral is determined according to the time of registration. In this regard, I&M states it complied with the provisions of the **MPSRA** and from the evidence, its debenture has priority over that of ABC.

45. In response, ABC submits that determination of priority is a complex issue which requires the court to take evidence not only from the Registrar but also from experts. In any case, ABC contends that the **Companies' Act (Repealed)** applies to its debenture and that the **MPSRA** only came into force after the repeal of the **Companies Act** and after the establishment of ABC's debenture, thus ABC's priority was established under the law once its debenture was registered.

46. ABC states that at the time of registration under the **MPSRA**, the Company had not validated its registration information on the *e-citizen* platform hence it was not feasible to undertake a company search for the Company as a corporate entity on e-citizen. ABC followed up this matter and was advised by the Companies Registry Business Registration Services that the Company was linked to both Hillport Limited CPR/2010/202519 and Hillport Limited CPR/2010/281292. Thereafter, ABC proceeded to undertake the registration of its floating debenture dated 1<sup>st</sup> July 2014 and registered on 8<sup>th</sup> July 2014 under both Hillport Limited CPR/2010/202519 and Hillport Limited CPR/2010/281292. ABC therefore contends that it duly registered its debenture under Hillport Limited which changed its name to Allied East Africa Limited.

47. ABC discounts the fact that I&M registered its debentures as its documents show that the Company is an unincorporated body which means that I&M did not, in fact, register its debenture within the prescribed period. It submits that since the Company is a body corporate and the purported registration cannot be found when conducting a digital search as demonstrated by the search it conducted on 4<sup>th</sup> December 2018. It maintains that it holds a prior first floating charge based on the documentation including the search conducted on 22<sup>nd</sup> November 2018 from the Registrar of Companies.

48. The **MPSRA**, which came into force on 16<sup>th</sup> May 2017, is a statute of general application and provides for the creation of security rights over movable assets: tangible and intangible unless specifically excluded by the **Act** or other legislation. Tangible assets include goods like motor vehicles, crops, machineries and livestock while intangible assets include receivables, choses in action, deposit accounts, electronic securities and intellectual property rights. Further, the **MPSRA** applies to security rights in movable assets in all transactions without regard to its form or the person who owns the collateral, and includes a chattels mortgage, credit purchase transaction, credit sale agreement, floating and fixed charge, pledge, trust indenture, trust receipt, financial lease, and any other transaction that secures payment or performance of an obligation, including an outright transfer of a receivable. It is not disputed that the subject debentures issued by the Company in favour of ABC, FCB and I&M constitute collateral as defined in **section 2** of the **Act**, that is, "*a moveable asset that is subject to security right or outright transfer.*"

49. In order to ensure uniformity and universality of its application and effectiveness, **section 92** of the **MPSRA** provides a sunset for securities existing under prior law, that is the law existing prior to the coming into force of the **Act**. In particular, **section 92(1)** thereof provides as follows:

### **92. Third-party effectiveness of a prior security right**

*(1) A prior security right that was effective against third parties under prior law continues to be effective against third parties under this Act until the earlier of—*

*(a) the time it would have ceased to be effective against third parties under the prior law; and*

*(b) the expiration of nine months after the coming into force of this Act.*

50. **Section 92** aforesaid means that those holding securities under the prior law, for example the **Companies Act (Repealed)** or the **Chattels Transfer Act (Repealed)**, were required to register their securities at the Collateral Registry by 15<sup>th</sup> February 2018 even if the securities were registered under prior law. Thus ABC was required to register its debenture under the **MPSRA** notwithstanding that it already registered under the **Companies Act (Repealed)**. I therefore reject ABC's argument that priority in respect of its securities is governed by the **Companies Act (Repealed)**.

51. Under **section 15** of the **MPSRA**, "a security right in a moveable asset is effective against third parties if a notice with respect to the security right is registered with the Registrar." **PART IV** of the **MPSRA** provides for the procedure for registration of notices relating to security rights by establishing a registry for that purpose while **section 26** of thereof provides that the procedure for registration is found in the **Movable Property Security Rights (General) Regulations, 2017** ("the **Regulations**").

52. **Section 27** provides for the information required in an initial notice as follows:

**27. Information required in an initial notice**

(1) An initial notice shall contain the following information in the relevant designated fields, as further prescribed in the Regulations

(a) the identifier and address of the grantor;

(b) the identifier and address of the secured creditor or its representative;

(c) a description of the collateral in accordance with section 8 or by a serial number for the serial-numbered collateral only that is not held as inventory;

(d) the period of effectiveness of the registration; and

(e) any other information for statistical purposes only.

(2)..... [Emphasis mine]

53. Under **Regulation 9(3)** of the **Regulations**, "Where the grantor is incorporated in Kenya, the grantor identifier is the registration number in the certificate of incorporation." **Section 34(3)** of the **MPSRA** provides that "a search certificate issued by the Registrar is proof of its contents".

54. **Section 38** of the **MPSRA** deals with the issue of priority as follows:

**38. Competing security rights created by the same grantor**

*Subject to the other provisions of this Part, priority among competing security rights created by the same grantor in the same collateral is determined according to the time of registration*

55. According to the deposition and testimony of Ms. Osicho, I&M is the only creditor registered under the Collateral Registry in respect of the Company, Allied East Africa Limited. She stated that ABC and FCB have not registered their debentures. According to the search produced by her, the identifier number for Allied East Africa Limited is C.1417806. She pointed out that the Hill Port Limited registration shows a different identifier number which does not relate to the certificate of registration of Allied East Africa Limited therefore, ABC's registration is invalid.

56. I also agree with the submission by counsel for I&M that the filing of ABC's debenture under Hillport Limited was contrary to the provisions of **section 27(1)(a)** of the **MPSRA** as the debenture was the Company, as Allied East Africa Limited and not Hillport Limited. By the time the debenture in favour of ABC was created, Hillport had already changed its name in 2012 and under **section 66** of the **Companies Act, 2015**, a change of a company's name has effect from the date on which the Certificate of Change of Name is issued. Accordingly, the registration of ABC's security as against Hillport Ltd is a nullity as the correct legal entity is Allied East Africa Limited.

57. Further and based on the evidence, the certificate of search issued by the Registrar is conclusive and it shows that I&M's collateral is the only one registered. The identifier number in terms of **Regulation 9(3)** of the **Regulations** is the registration number in the company's certificate of registration. In this case, the registration produced by ABC does not reflect the identifier in relation to the Company.

58. ABC argued that I&M was aware of its security as it had in fact sought its consent to create its security and notified it when it proposed to appoint its administrators. **Section 40** of the **MPSRA** discounts knowledge of existence of a security right in favour of another person in determining priority on the following terms:

**40. Irrelevance of knowledge of the existence of a security right**

*Knowledge of the existence of a security right in favour of another person on the part of a secured creditor does not affect its priority under this Act.*

59. In conclusion I hold that the debenture issued by Company to ABC is not registered under the **MPSRA** while the debentures issued by the Company to I&M are duly registered and rank first in priority under **section 38** of the **MPSRA**.

### **Conclusion and Relief**

60. In summary and for the reasons I have set out above, I have found as follows:

(a) The debenture issued by the Company in favour of ABC is not a qualifying floating charge within the meaning of **section 534(2)** of the **Insolvency Act**.

(b) While it is entitled to appoint a receiver, ABC cannot appoint an administrator without making an application to the court as a creditor under **section 532(1)** thereof.

(c) Since the debenture issued by the Company in favour of ABC is not registered under the **MPSRA**, the debentures in favour of I&M, having been registered, rank first in priority to those of ABC.

61. I have also held that the action by ABC to appoint administrators is null and void. Consequently, the issue whether the court should replace Administrators appointed by ABC does not arise. For the avoidance of doubt, the administrator appointed by I&M Bank, P. V. R. Rao, shall remain in office subject to the provisions of the **Insolvency Act**.

### **Disposition**

62. I dismiss the preliminary objection filed by ABC, the Notice of Motion dated 6<sup>th</sup> December 2018 as amended on 28<sup>th</sup> January 2019 and the Notice of Motion dated 6<sup>th</sup> May 2020. I allow I&M's Notice of Motion dated 27<sup>th</sup> November 2018 on the following terms:

**(a) A permanent injunction be and is hereby issued restraining Julius Mumo Ngonga and Anthony Makenzi Muthusi from commencing, carrying out or continuing with the administration in any manner whatsoever of Allied East Africa Limited.**

**(b) The 1<sup>st</sup> Respondent shall bear the cost of these proceedings.**

**SIGNED AT NAIROBI BY**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of MAY 2021.**

**J. M. MATIVO**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Ms E. Kinyenje-Opiyo instructed by Kaplan and Stratton Advocates for I & M Bank Limited.

Mr Nyaanga instructed by Nyaanga and Mugisha Advocates for the ABC Bank Limited.

Mr Issa instructed by Issa and Company Advocates for the First Community Bank Limited.