**Thika Nursing Homes Limited v Rao & 2 others (Insolvency Cause E092 & E093 of 2021 (Consolidated)) [2021] KEHC 417 (KLR) (Commercial and Tax) (29 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 417 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**INSOLVENCY CAUSE E092 & E093 OF 2021 (CONSOLIDATED)**

**A MABEYA, J**

**DECEMBER 29, 2021**

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

**AND**

**IN THE MATTER OF INSOLVENCY REGULATIONS 2016**

**AND**

**IN THE MATTER OF APPOINTMENT OF ADMINISTRATORS**

**BETWEEN**

**THIKA NURSING HOMES LIMITED ..... APPLICANT**

**AND**

**PONANGIPALLI VENKATA RAMANA RAO ..... 1ST RESPONDENT**

**SWAROOP RAO PONANGIPALLI ..... 2ND RESPONDENT**

**BANK OF BARODA KENYA LIMITED ..... 3RD RESPONDENT**

**RULING**

1. On 22/11/2021, the Bank of Baroda Kenya Ltd ("the 3rd respondent") placed Thika School of Medical and Health Sciences Ltd and Thika Nursing Homes Ltd ("the applicants") under administration.

2. On 25/11/2021, the applicants, who have been described as Sister Companies, lodged applications in Insolvency Cause Nos E 092 of 2021 and E093 of 2021, respectively whereby they challenged their placement under administration as aforesaid.

3. The identical Motions were brought under Articles 22 and 23 of the *Constitution of Kenya*, Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules,* Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure*

*Act*. Two principal orders were sought in the said Motions; firstly, an order to restrain the respondents from interfering with the affairs of the applicants and secondly, an order terminating or revoking the appointment of the 1st and 2nd respondents as joint administrators of the applicants.

4. Both applications were argued under Insolvency Cause No. E 092 of 2021. Not only that the facts are the same, but the transactions leading to the proceedings are interrelated. Both the applicants are sister companies, they procured financial facilities from the 3rd respondent in 2014, 2015 and 2018, respectively amounting to over Kshs 800 million.

5. Both companies were placed under administration on 22/11/2021 when the 3rd respondent appointed the 1st and 2nd respondent as joint administrators.

6. It is for the foregoing reasons and for the overriding objective of the law, for efficiency and expedited dispensation of justice that both matters were heard together. In this regard, this ruling is in respect of both applications in Insolvency Cause Nos E 092 of 2021 and E093 of 2021.

7. Both applications were supported by the affidavits of Dr. Barham Dev. Vasishit sworn on unknown dates. It was the applicants' case that; they operate a medical training institution and the Thika Nursing Home. The training institution operates in Thika, Kisumu, Kitui and Mombasa with about 3500 students.

8. The applicants contended that they had obtained financial facilities from the 3rd respondent and had been servicing them regularly before the Covid-19 pandemic hit in March, 2020. That the 3rd respondent maliciously downgraded their accounts making it difficult for them to obtain any alternative financier to take over the facilities held by the 3rd respondent.

9. A suit in the Kiambu Chief Magistrate's Court had not borne any fruits as it was dismissed for want of jurisdiction. There was pending a suit in the Kiambu High Court No. E 200 of 2021 seeking protection from negative CRB listing by the 3rd respondent.

10. It was contended that the 3rd respondent was not a holder of a qualifying floating charge over the applicants' assets. That the debentures dated 19/3/2014, 9/7/2015 and 14/9/2018, respectively did not qualify as floating charges under section 534 of the *Insolvency Act*. That the appointment of the 1st and 2nd respondent had not complied with Regulation 102 of the Insolvency Regulations 2016. That the applicants were capable of repaying their debts but the 3rd respondent was not acting in good faith. Finally, it was contended that the appointment of the 1st and 2nd respondent was for ulterior motive and not to realize the debts.

11. The respondents opposed the applications vide the affidavits of Andrew Lukuyani and Ponangipalli Venkata Ramana Rao sworn on 15/12/2021, respectively.

12. The 3rd respondent denied the allegations levied against it by the applicants. It denied acting in bad faith. It asserted that it had extended financial accommodation to the applicants to the tune of Kshs 800 million and it was holding various securities in respect thereof. That the applicants were unable to repay their debts and the arrears in loan repayment stood at over Kshs. 262 million as at 10/12/2021.

13. The 3rd respondent further contended that it had variously accommodated the applicants giving them time to regularize their loan repayment to no avail. That the moratorium extended to the applicants had not yielded any success and the promised financial takeover by a 3rd lender never materialized. That instead of exercising its statutory power of sale, which would have depleted the applicants, the 3rd respondent had opted to take the route of administration with a view to turning around the fortunes of the applicants.

14. It was contended that there had been default and the applicants were unable to pay their debts.

15. For the 1st and 2nd respondent, Ponangipalii Venkata Ramana Rao stated that he and the 2nd respondent were qualified Insolvency practitioners. That upon being appointed administrators, they followed the law by requiring the directors of the Companies to provide the statement of affairs of the applicants as at 23/11/2021.

16. That on 25/11/2021, they published in the Daily Nation a Notice to the effect that the applicants had been placed under administration but they intended to continue with the normal operations of the two institutions. That they had the option of either adopting or not adopting the contracts of employment of the employees of the applicants. In this regard, they had invited all employees to apply for re-employment by 30/11/2021. That by the time the Court restrained them from continuing with the administration on 25/11/2021, not a single employee had been sacked.

17. He further deposed that on 1/12/2021, following the order of this Court of 25/11/2021, they published a Notice in the Daily Nation to the effect that the operations of the applicants had reverted back to its directors. He confirmed that his intention and that of the 2nd respondent was to professionally administer the applicants in terms of the objectives of the *Insolvency Act*.

18. The parties filed submissions which were ably highlighted by Learned Counsel and which the Court has considered. This is an injunction application. The applicable principles were set out in the celebrated case of *Giella vs Cassman Brown 1973 EA*. These are that; an applicant must establish a prima facie case with a probability of success, secondly, he must show that if the injunction sought is not granted he will suffer loss that cannot be compensated by an award of damages and finally, if the court is in doubt, it will determine the matter on a balance of convenience.

19. Before delving into the matter, there was an issue that was raised by the applicants about the irregularity of the replying affidavits sworn on behalf of the respondents. That they were fraudulent and forgeries as the purported Commissioner for Oaths, Mr. Orego disowned the same.

20. In the spirit of Article 159 (2) (d), of the Constitution, the Court permitted the respondents to withdraw the same and replace them with those sworn on 15/12/2021. The Court however, penalized the respondents by ordering them to pay to the applicants a total sum of Ksh. 40,000/- within 7 days in default execution to issue for the said misbehavior. Therefore, nothing turns on them.

21. I now turn to the main issue in contention. The applicants challenge the appointment of the 1st and 2nd respondent as administrators for three reasons; that the 3rd respondent lacked the power to place the applicants under administration, that the appointment negated the objects under section 522 of the *Insolvency Act* and that the appointment was actuated by malice.

22. On malice, it was contended that the 3rd respondent had refused to restructure the applicant's facilities. That it kept on putting pressure upon the applicants resulting in the filing of two suits in Kiambu Courts. That it intended to place the applicants under administration with a view of taking them over.

23. The conduct of the 3rd respondent as pleaded does not disclose malice on its part. There is evidence that it had restructured the applicants' facilities since 2018 but the applicants kept on shifting goal posts and were not able to service the debt.

24. They kept on asking for more time. They had consumed monies belonging to the 3rd respondent's depositors but failed to repay the same. The 3rd respondent was entitled to use all legal means to recover the same. The listing on CRB, in my view, was not illegal as the loans had become non-performing.

The reference to that bureau cannot be said to be evidence of malice when he loan had become non performing.

25. Further, there was no material that was presented to show that the placement of the applicants under administration was a precursor for the 3rd respondent to take them over or sell them to its cohorts.

26. In this regard, and for the latitude given to the applicants since 2018 to regularize the servicing of the facilities, I reject the contention that the 3rd respondent was actuated by malice.

27. Indeed, the route that it took was more accommodating than the other two options available to it. These were exercising its statutory power of sale which would mean the selling of the charged properties whereon the applicants businesses operate from. The other one was to appoint a receiver/manager who would only be interested in dismantling the assets of the applicants with a view to recover the debt. To the contrary, administration would mean the applicants would continue trading as going concern.

28. The next contention was that the appointment of the administrators negated the objects of administration. That the applicants are not an ordinary factory. They are educational and medical institutions respectively. That the 1st and 2nd respondent do not have any training in medicine to run the medical school as well as the medical facility. That they disrupted the students' examination before the Court restrained them. The respondents contended otherwise.

29. The objects of administration are set out in section 522 of the Act. These are: -

> "(a) to maintain the company as a going concern.
>
> (b) to achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);
>
> (c) to realize the property of the company in order to make a distribution to one or more secured or preferential creditors".

30. It is clear from the foregoing that, the objective of administration under the Act is to maintain a distressed Company as a going concern. To get the best outcome for the creditors by most probably turning it around instead of cannibalizing it.

31. In the present case, the applicants contend that the 1st and 2nd respondent do not have the qualifications to run the two medical facilities (the school and hospital). The respondents have retorted that it is their intention to continue running the applicants as a going concern. That they did not want to resort to other means of realizing their securities as that would have resulted in the collapse and closure of the applicants' operations.

32. The view which the Court takes is that, the mere fact that the 1st and 2nd respondent are not medically trained does not in itself defeat the object of administration. The actions taken by the 1st and 2nd respondent upon their appointment suggests that their intention was to have the applicants continue running.

33. They issued public notices that they were the new administrators and that the applicants would continue operating. They issued letters to the applicant's staff asking them to re-apply for employment under administration. That meant that the current staff who have hitherto been running the institutions would, on re-applying, continue to be in-charge of the various positions that they have been.

34. There was no evidence of any sacking of any of the staff. The re-employment of the staff would make them preferred creditors and therefore to would be to their advantage. All the administrators need is to retain qualified personnel to run both institutions under their supervision. I reject the contention that the administration negates the objects set out in Section 522 of the Act.

35. The 3rd ground was that the 3rd respondent did not have power to appoint administrators. That it was not a holder of a floating charge in terms of section 534 of the Act. That its debentures did not comply with the *Insolvency Act* and did not give the 3rd respondent the power to appoint an administrator. The case of *I & M Bank Ltd vs ABC Bank Ltd & Anor [2021] eKLR* was cited for the proposition that a holder of a debenture that was executed prior to the coming into operation of the *Insolvency Act* cannot appoint an administrator.

36. Two of the debentures held by the 3rd respondent predates the *Insolvency Act*. They were created in 2014 and 2015 before the coming into force of the *Insolvency Act*. Obviously those two could not have contemplated and/or incorporated section 534 of the Act. Further, the Court has looked at the debenture of 2018. Likewise, the same did not make reference or incorporate the said section. In this regard, none of the security documents empowered the 3rd respondent to appoint administrators over the applicants.

37. Having so found, is the mere fact that the three debentures did not incorporate the provisions of the *Insolvency Act* preclude the 3rd respondent as a debtor vide a debenture from appointing an administrator in line with Port VIII Division 3 of the Act?

38. No doubt the three debentures were a floating charge in the sense that, from the way they were drawn, they were only to crystalize upon the happening of the incidents enumerated therein, including default.

39. They had clauses that empowered the 3rd respondent to appoint a receiver manager. Of course a receiver manager is different from an administrator, in that, whilst the latter is an officer of the court, the former is not. Further, the functions of the latter are Company friendly and therefore friendly to the whole body of creditors while the former is not. The doctrine and/or notion of receiver manager as known in the former legal system was egocentric, draconian and a kiss of death to any company in distress.

40. The objects of administration as set out in section 522 of the Act are meant to maintain a company in distress as a going concern; achieving a better outcome for the whole body of creditors and to realize the property of the company in order to make a distribution to one or more secured creditors. That was never the intention of receivership in the former law.

41. Having in mind the holding in the I&M Bank Ltd vs ABC Bank Case (supra), which is persuasive and the objectives set out above, what would have been just in the circumstances? Would it have been just for the 3rd respondent to exercise its statutory power of sale or appoint a receiver manager?

42. The 3rd respondent stated in its replying affidavit that had it exercised its statutory power of sale, which had arisen as there was clearly default, it would have had to dispose off the properties whereon the businesses of the applicants is undertaken. Further, that had it appointed a receiver manager as set out in the three debentures, that would have disrupted the operations of the applicants to the extreme detriment of all concerned.

43. Public interest called upon the 3rd respondent to take a route that was less disruptive and with minimum inconvenience. Administration meant that the applicants would continue with operations with a view to recover monies for repayment of the whopping debt that is in excess of Kshs 900 million. The public who depend on the applicant's medical services would continue to enjoy the same and

more importantly, the over 3500 students who are enrolled in the medical school would continue to receive their training.

44. In view of the foregoing and applying the overriding objective of the law, the Court holds that whilst the debentures did not give power to the 3rd respondent to appoint the 1st and 2nd respondent as administrators, it was not precluded from doing so.

45. The Court is alive to the dictates of Section 523 of the Act as to who can appoint an administrator. These include an administration order of the Court in accordance with Division 3, a holder of a floating charge under section 534 of the Act and the company or its directors under section 541.

46. A reading of sections 531 and 532 of the Act shows that the Court may make an administration order on an application of a creditor if the court is satisfied that the company is or is likely to become unable to pay its debts and an administration is likely to achieve the objectives set out in section 522 of the Act.

47. In the present case, the applicants are saddled with a huge debt of over Kshs 900 million. They have been unable to repay the same. They had been given leeway from 2018 to-date. In the period September-November, 2021, they were only able to pay Kshs 15 million out of arrears of Kshs 262 million outstanding. Clearly, circumstances existed for the making of an administration order on application.

48. In the I&M Bank case (supra), the bank appointing the administrator was acting to the prejudice of the other debenture holders who challenged the same. In the present case, there is no prejudice will be suffered if the administration is upheld. Requiring the 3rd respondent to make a fresh application under section 523, 531 and 532 of the Act will not achieve anything save for increased costs and delay. It will only be postponing the day of reckoning.

49. Accordingly, I hold that the applicant has not established any prima facie case with any probability of success.

50. As regards the loss to be suffered, there will be no irreparable loss that has been demonstrated that would be suffered if the order is not granted. He 3rd respondent is only exercising one of its remedies as a creditor.

51. On the balance of convenience, the same tilts in favour of the 3rd respondent. The respondents would run the institutions profitably and recoup some of the 3rd respondent's outlay as well as hose of the other creditors'.

52. All in all, I find that the applications are without merit and I dismiss the same with costs. The orders inforce are forthwith discharged.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY FROM MOMBASA THIS 29TH DAY OF DECEMBER, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**