



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**MISCELLANEOUS APPLICATION NO. E 627 OF 2019**  
**IN THE MATTER OF COOPERATIVA MURATORI & CEMENTISTI – CMC**  
**DI RAVENNA**  
**AND**  
**IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015**  
**AND**  
**IN THE MATTER OF AN APPLICATION FOR THE RECOGNITION OF A**  
**FOREIGN PROCEEDING**  
**COOPERATIVA MURATORI & CEMENTISTI –**  
**CMC DI RAVENNA.....APPLICANT**

**RULING**

1. Whether or not this Court will grant recognition to certain foreign insolvency proceedings before a Court in Italy will substantially turn on whether such grant is manifestly contrary to the Public Policy of Kenya. A clarion call of all creditors who oppose the recognition argue that, the laudable objects of cross-border insolvency recognition aside, the circumstances here reveal a public policy exception.
2. COOPERATIVA MURATORI & CEMENTISTI – CMC DI RAVENNA (CMC DI RAVENNA) is a company with its registered office in Ravenna, via Trieste 76 registered under the Companies Registry as Number 00084280395. Just as it has branches in many parts of the world, so it does in Kenya as CMC DI Ravenna (Kenya Branch) (CMC DI Ravenna Kenya).
3. CMC DI Ravenna is said to be beleaguered by debt and is currently undergoing voluntary agreement in the Court of Ravenna, Italy following an application filed on 4<sup>th</sup> December 2018. The Kenya Branch has been included and is part of the voluntary arrangement process underway in Italy. This Court is told that the preventive application by the company for an arrangement with creditors for purposes of restructuring its corporation debt was allowed by the Italian Court vide a decree dated 12<sup>th</sup> June 2019.

4. The Italian Court appointed Mr. Antonio Gaiani, Mr. Luca Mandrioli and Mrs Andrea Ferri as Judicial Commissioners and overseers of the process of the voluntary administration with the following primary tasks:-

- a) *To Supervise, monitor and control the administration of the assets of the Company for the duration of the arrangement process.*
- b) *To Report on the progress of the process to the Court, and*
- c) *To Provide the Court with their opinion on the viability of the resultant rearrangement plan negotiated with creditors*

5. The company asserts that the process currently underway in the Italian Courts is a statutory process arising from provisions of Italian law akin to the procedure provided for under Part IX of the Insolvency Act No.

18 of 2015 on Voluntary Administration. This Court is asked to allow the Notice of Motion of 4<sup>th</sup> December 2019 in the following terms:-

1. *This application be certified as urgent.*
2. *The Honourable Court be pleased to recognize the foreign proceedings currently before the Court of Ravenna in Italy where the Company, **COOPERATIVA MURATORI & CEMENTISTI – CMC DI RAVENNA**, is a party.*
3. *The Honourable Court be pleased to recognize the decree of the Court of Ravenna in Italy issued on 12<sup>th</sup> July 2019 granting the application filed by the Applicant, **COOPERATIVA MURATORI & CEMENTISTI – CMC DI RAVENNA**, under Article 160 and 161 Section 6 of the Italian Royal Decree No. 267 of 16<sup>th</sup> March 1942.*
4. *The Honourable Court be pleased to accept the Applicant's undertaking to give notice within a reasonable time to be determined by the Court, through the Foreign Representative, 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 in the Court in Ravenna.*
5. *The Honourable Court be pleased to accept the Applicant's undertaking to give notice within a reasonable time, through the Foreign Representative, to all persons within the Republic of Kenya whose rights, obligations or interests may be affected by orders sought in the Application.*
6. *The Honourable Court be pleased to stay and or issue an injunction barring any and all adverse Civil actions, operation of any orders and decrees issued against **COOPERATIVA MURATORI & CEMENTISTI – CMC DI RAVENNA** and its subsidiaries and or Branches pending the hearing and determination of this Application.*
7. *The Honourable Court be pleased to stay and or issue an injunction barring any and all adverse actions, operation of any orders and decrees issued against **COOPERATIVA MURATORI & CEMENTISTI – CMC DI RAVENNA** and its subsidiaries and or Branches ("the Company") pending the hearing and determination of the foreign proceedings in the Italian Court in Ravenna.*
8. *The Honourable Court be pleased to stay and or issue an injunction barring the commencement in any of the Courts in the Republic of Kenya any Civil Proceedings of any type against **COOPERATIVA MURATORI & CEMENTISTI – CMC DI RAVENNA** and its subsidiaries and or Branches ("the Company") pending the finalization of the Voluntary Arrangement already underway in Italy under the direction of the proceedings in the Italian Court in Ravenna.*

9. *The above orders to continue in effect until they are lifted, varied or discharged by a further order of this Court.*

6. IOTA Engineers and Construction Limited (**IOTA**), Siginon Group Limited, Rift Valley Water Works Development Agency (**RVWWDA**), C. K. Patel Limited, Oilfield Movers Limited, E-Quarry Limited, and ABSA Bank Kenya PLC who are creditors to CMC DI Ravenna Kenya resist the application. Some of their reasons for opposing the recognition overlap.

7. As a prefatory they take the view that the Motion is incompetent for want of compliance with the Insolvency Act. RVWWDA, for instance, argues that the Applicant has not proved that Italy is its centre of main interest (**COMI**) so as to make the Italian Court the seat of the main proceeding. Further, that, contrary to the provisions of the fifth schedule to the Act, the instant application is brought in the name of the company qua Company and not in the name of the foreign representative for and on behalf of the Company. Lastly, on this preliminary matter, that the application is not accompanied by the documents set out in Paragraph 17(2) of the fifth schedule.

8. The creditors contend that grant of the orders is detrimental to the interests of the Kenyan creditors and its sole intention is to avoid settling its obligations to pay and/or settle liabilities in Kenya. The Court is told that the Application has not demonstrated that the interests of the Kenyan creditors, and in particular the unsecured creditors have been or will be protected as espoused in Rule 24 of the schedule. These, the Court is urged, are public policy considerations.

9. Another public policy consideration that this Court is asked to take into account is that of the costs of access to justice. It is urged that Kenyan creditors will be put into substantial and unnecessary expenses upon submitting to the Italian Courts. The Court is told that this is contrary to the dictates of our Constitution.

10. Unique to RVWWDA, but still a proposition on public policy exception, is that its relationship with CMC DI Ravenna Kenya is founded on contract which is funded by both the Kenya Government and donors. That the Government has made significant payments to the Applicant even for works which are yet to be complete for which the Kenya Public has had to shoulder. The Court is also told that there are criminal proceedings in Kenya related to two projects undertaken by CMC DI Ravenna Kenya and that this Court should not interfere with the criminal process by granting the recognition.

11. The voice of a secured creditor is raised by Absa Bank. It makes the point that its lending to CMC DI Ravenna Kenya is secured and as a secured creditor it cannot be restrained from enforcing its securities.

12. As for Benisa, it holds a decree for Kshs.30,085,106.28 in HCCC E 121 of 2019 (**Benisa Limited – vs- CMC DI Ravenna Kenya Limited**). It is apprehensive that should the recognition be granted and stay orders issued then its effect is to stifle, curtail and or scuttle the normal adjunctive process of domestic Courts. Further, that being a creditor, it has a legitimate and identifiable stake which requires to be promptly satisfied.

13. Let me first reflect on whether the Motion is faulty for non-compliance of the provisions of the Act. The law in the fifth schedule is that the Court can recognize either a main or non-main foreign proceedings. In terms of interpretation, Paragraph 4 of the schedule a 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”.**

14. That definition provision distinguishes a foreign main proceeding and a foreign non-main proceeding as follows:-

**“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;**

**“foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a foreign State if the debtor has a business establishment in that State”.**

15. A relief that may be granted by Court on recognition of a foreign proceedings, whether main or non-main is set out in Paragraph 23. Paragraph 22 on the other hand gives the effects of recognition of a foreign main proceeding. Without going into any detail on the provisions of those two paragraphs, it does seem clear to this Court that the effects of recognition of a foreign main proceedings may be more drastic than that of a non-main proceeding. Just to demonstrate this difference, under paragraph 22 and save for the power of the Court to make certain exemptions, there is automatic stay of commencement or continuation of proceedings against the debtor’s assets, rights, obligations, or liabilities, and execution against the debtor’s assets and suspension of transfer, encumbrance or disposal of any assets of the debtor.

16. From the body of the Motion and which is fortified by the submissions in support, the Applicant seeks recognition of foreign main proceedings. That is, that the proceedings of the Italian Court at Ravenna are main proceedings.

17. Remembering that foreign main proceedings means foreign proceedings in a state where the debtor has its centre of main interests (COMI), then to a limited extent counsel for RVWVDA’s argument that as no definition of the meaning of COMI is given in our statute one has to look elsewhere for assistance. What I do not accept is the suggestion that the place to find it is in the European Council regulations. This is because the Model law in Article 16 Paragraph 3 provides for the presumption to be made concerning the COMI of the debtor;

**“In the absence of proof to the contrary, the debtor’s registered, or habitual residence in the case of an individual is presumed to be the centre of the debtor’s main interests.”**

18. The Applicant is a company with its registered office in Ravenna Italy. In the absence of proof to the contrary, Italy is presumed to be the centre of the debtor’s main interests. The onus is on the party seeking to displace this presumption to provide proof to the contrary. The mere assertion that the company has 30 branches and offices worldwide and that it has operations in Kenya, without more, can hardly be enough to rebut the presumption that the debtor’s centre of main interest is at Italy where it has a registered office. The argument fails.

19. A second argument made regarding non-compliance is that an action for recognition must be brought in the name of the foreign representative for and on behalf of the company and not in the name of the company qua company. Clarified, that a foreign representative must be clearly designated as a party to the proceedings. The creditor asserts that the application is faulty as it is brought in the name of the company in which the foreign representatives are not direct parties. So what is the law?

20. Paragraph 19 (1) provides that a court shall recognize a foreign proceedings if, inter alia, the foreign representative applying for recognition is a person or a body within the meaning of Paragraph 4. Paragraph 4 defines a foreign representative as follows:-

**“.... a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or financial affairs or to act as a representative in the foreign proceeding;**

21. While it is true that, ideally, it is the foreign representative bringing the action on behalf of the company who ought to be named as the applicant, I nevertheless observe that in this instance, though filed in the name of the company, the action is brought at the instigation of the foreign representatives. In so far as it is the foreign representatives and not the company who moved the Court for recognition, the Court chooses not to make too much on the lapse in initiating the proceedings. It is the foreign representatives

who own and control the proceedings.

22. I turn to the third challenge. Paragraph 17(2) reads:-

**“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.”**

23. Without elaborating, RVWVDA states that the application has not complied with these requirements. This Court does not agree because the application is accompanied by a certified copy of the preventive application dated 4<sup>th</sup> December 2018 commencing the foreign proceedings and a certified copy of a Decree dated 12<sup>th</sup> June 2019 appointing the foreign representatives. The Court is satisfied, on the basis of these documents, of the existence of the foreign proceedings and of the appointment of the foreign representatives. The entire rationale of the rule is that the Court must be sufficiently assured that there exists foreign proceedings and of the appointment of the foreign representatives who present the recognition application.

24. The Court now turns to the substance of the Application. As alluded to at the beginning of the decision, the substantial issue is whether the recognition application gets past the public exception doctrine. But before I do so, the Court resolves a matter that is much less controversial.

25. A portion, perhaps the more substantial, of the debt owed by the company to Absa Bank is a secured credit. Absa Bank argues that it would be contra-statute domestic law and therefore inimical to public policy if the recognition proceedings were to defeat or frustrate its enforcement rights under the credit arrangement. This is not contentious because the Applicant’s counsel conceded that Absa’s secured debt is not part of the process. That really is the position and would hold true for all secured debts. None can be subject to any orders that this Court may, in the end, be minded to issue.

26. This Court has understood the creditor’s arguments on public policy to be grounded on two provisions of the statute. First, that one purpose of cross-border insolvency is to promote the objectives of attaining;

**“Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor. (Paragraph 2(c)).**

Second, that Paragraph 8(1) reads:-

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

27. Although counsel referred Court to several decisions both local and from other jurisdictions that define and discuss the concept of public policy, this Court is content to rely on detailed discussions emanating from our Courts. This is because questions of public policy are national in nature. Concepts defer from one state to the other. This is apparent even from the definition of the word in Black’s Law Dictionary which defines it as;

**“The collective ruled, principles, or approaches to problems that affect the commonwealth or(esp) promote the general good; specif; principles and standards regarded by the legislature or by the Courts as being of fundamental concern to the state and the whole**

**society < against public policy.”**

28. As would be obvious, and explicit from the provisions of Paragraph 8(1), what matters is the public policy of Kenya. In **C R (Suing Through**

**Father and Next Friend) & 130 Others V Kenya National Examinations Council [2017] EKLR**  
Mativo J had this to say on public policy:-

**“27. A was observed by the Supreme Court of India, the public policy of the country and the larger public interests, would be more appropriate guides than the considerations of equity to decide the questions in the absence of any statutory prescription applicable to the controversy on hand than the consideration of equity.[21]**

28. Discussing public policy, the following passage from the decision of the Supreme Court of India in **Central Inland Water Transport Corporation Limited & Another v. Brojo Nath Ganguly & Another,[22]** in which the court explained the concept of public policy and its role in the judicial decision making process in the following words is highly beneficial:-

**“92. .... From the very nature of things, the expressions “public policy”, “opposed to public policy”, or “contrary to public policy” are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought— “the narrow view” school and “the broad view” school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. .... Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd.* [(1902) AC 484, 500] : “Public policy is always an unsafe and treacherous ground for legal decision”. That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson v. Mellish* [(1824) 2 Bing 229, 252 : 130 ER 294, 303 and (1824-34) All ER 258, 266] described public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you”. The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Assn. Ltd.* [(1971) Ch 591, 606] : “With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.” Had the timorous always held the field, not only the doctrine of public policy but even the common law or the principles of Equity would never have evolved. Sir William Holdsworth in his *History of English Law Vol. III*, p. 55, has said:-**

**“In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.”**

**It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public**

conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.”

29. It is my considered opinion that public policy and public interest must be construed strictly to uphold the sanctity and integrity of national examinations. Lord Shaw of Dunfermline in *Local Government Board vs Airlidge*,<sup>[23]</sup> summed up the position when he held that authorities:-

“... must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means”

29. Of course, *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366 Ringera J famously observed:-

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2)

(b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

30. Adding his voice Onguto J. in *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] eKLR said:-

“58. Dubbed the ‘unruly horse’, much ink has been spilled over the foundation and the content of public policy. Locally, the notion was aptly captured by Ringera J (as he then was) in the case of *Christ For all Nationals v. Apollo Insurance Co. Ltd* [2002] 2 EA 366 when he stated as follows:

“although public policy is a most broad concept incapable of precise definition... an award could be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was

a) Inconsistent with the Constitution or other laws of Kenya, whether written or unwritten or

b) Inimical to the national interest of Kenya or

c) Contrary to justice and morality”.

59. The issue before me no doubt has nothing to do with setting aside an award under Section 35(2)(b)(ii) of the Act but it is to be noted that the recognition or enforcement of an award will also be refused if the court finds that such recognition or enforcement would be contrary to the public policy of Kenya. Ringera J’s words are thus perfect guidance as to what public policy entails.

60. I may perhaps add that public policy, in my view, generally refers to the set of socio-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure therefrom can be entertained. Public policy acts as a shield for safeguarding the public good, upholding justice and morality and preserving the deep rooted interest of a given society.

**61. It would also be apt to note that due to a risk of local manipulation to avoid international awards, it is essential that, when raised to resist recognition or enforcement, public policy is interpreted in a restrictive manner. It cannot be generalized but rather a party seeking to rely on it must show a well-settled and clear public policy so that a losing party is not seen to be merely engaged in a retaliatory exercise.”**

31. Read together, the decisions give a comprehensive picture of the notion of Kenya’s public policy that it is needless for this Court to say any more in that regard. The Court bears those discussions in deciding the matter.

32. The words of paragraph 8(1) provides an internal guide on how the public policy exception is to be applied in respect to cross-border insolvency recognition proceedings. I again reproduce the provisions:-

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

33. The inclusion of the word manifest is not without significance. In legal parlance, manifest is defined as:-

**“Clear, obvious, unquestionable.”**

***(Black’s law Dictionary Tenth Edition)***

For the public policy exception to defeat a recognition then it must be that to grant recognition would be so clearly or plainly contrary to the public policy of Kenya. By inclusion of the word ‘manifest’ the public exception clause was intended to be invoked in exceptional and limited circumstances.

34. The words in our paragraph 8(1) are drawn from similar words of Article 6 of the Model Law which reads:-

**“Nothing in this law prevent the Court from refusing to take an action governed by the law if the action would be manifestly contrary to the public policy of this state”.**

35. The guide issued by the United Nations Commission on International Trade Law to the Enactment and Interpretation of the model law counsels as follows in respect to the extraordinary application of the public policy exception:-

**“30. Article 6 allows recognition to be refused where it would be “manifestly contrary to the public policy” of the State in which recognition is sought. This may be a preliminary question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances (see paras. 101-104). Differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.**

.....

.....

**101. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6.**

**102. In some States the expression “public policy” may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in**

particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.

103. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if “public policy” were to be understood in an extensive manner.

104. The purpose of the expression “manifestly”, used also in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.”

36. The American decision of Re Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) cited to this Court by counsel Wathuta for Iota gives instances where a relief for recognition can be said to be manifestly against public policy, in that instance of the United States.

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.

38. This Court has held that the Application before Court meets the criteria set out in Paragraph 17 of the schedule. In terms of whether it is in line with the objectives of Paragraph 2, the Court is told that the company has 30 branches and offices worldwide. It is submitted that the insolvency of the company may have a domino effect on the branches and subsidiaries affiliated to it. The Court is told of the possibility of transnational insolvency suits being instituted against the Applicant.

39. It is asserted that to fail to have an uniformed approach in dealing with the cross-border nature of the company business would lead to diverse and uncoordinated legal proceedings in various countries with the possibility of locking out creditors who lack financial muscle to participate in multiple proceedings in different jurisdictions. These sound laud and seem to be in tandem the object of fairly administrating cross-border insolvencies in a manner that protects the interests of all creditors. And not to be ignored is information contained in the affidavit of Valerio Giuliani which reverts that on 25<sup>th</sup> March 2020 70% of creditors, including Kenya creditors, approved a restructuring proposal that is already under consideration. The Court’s inclination is therefore to accede to the recognition request unless of course the public policy argument holds sway.

40. It is now the time to consider the specific issues raised around the exception. As I do so, this Court had hoped to benefit from the view of the Attorney General in this matter and paying heed to the provisions of Paragraph 8(2), the Court had invited the Attorney

General’s participation in the proceedings. The provisions read:-

**“8(2) Before refusing to take an action under subparagraph (1), the Court shall consider whether it is necessary for the Attorney-General to appear and be heard on the question of the public policy of Kenya.”**

41. Sadly, and though there was evidence that he was served with copies of these proceedings and order of Court, the Attorney General did not appear nor participate. This decision is therefore made without the

input of the principal legal adviser of the Government.

42. It is submitted by at least one creditor that to accept the request is to sanction the displacement of national law in favour of foreign law which would be tantamount to robbing Kenyan creditors of equal protection of the law under domestic law. This can be combined with the assertion that the cost of participating in a foreign voluntary arrangement inhibits the creditor's access to justice.

43. That does not seem to be a dull argument, yet inherent in Kenya signing the model law and in fact domesticating it vide the fifth schedule to the Act is the expectation that Kenya would cooperate with foreign Courts and representatives on matters of cross-border insolvency. What may seem to be loss of some autonomy may be outweighed by the benefits to be gained by such cooperation (*again See Paragraph 2 of the schedule*).

44. The following observation in the guidelines to the Model does, correctly suggest, that it may be in the public interest of a country to be a responsible member of the community of nationals by cooperating at the international level where it has promised such cooperation by embracing a treaty:-

**“103. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if “public policy” were to be understood in an extensive manner.”**

45. What is critical however is that the recognition does not compromise the creditors' right to equal protection of the law or access to justice. If this were to happen then to grant recognition to foreign proceedings would be inimical to public policy of Kenya as it would be a direct affront to the rights provided by the Constitution. Fortunately, the relief to be granted upon recognition of a foreign proceeding can be fashioned in a manner that protects the interests of the local creditors. This indeed is the spirit of the flexibility offered by Paragraph 24 which reads:-

**“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.”

46. Regard is also given to the qualifications available under Paragraph 22 when a foreign main proceeding is recognized. The entire provision reads:-

**“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.”

47. The solution to the concerns of access to justice and unequal protection of the law lies in the Court subscribing and determining the reliefs to be granted and conditions to be imposed upon the recognition. It is not with readily rejecting recognition applications.

48. I turn to the cry of a creditor who has a Kenyan judgment against the Kenyan Branch. Benisa holds a money decree of Kshs.30,085,106.28. It takes the view that the stay order sought is part of the relief in recognition stifles its quest to realize its judgment. With respect this Court is unable to agree that such an order is manifestly contrary to public policy of Kenya. The truth of the matter is that such an order would have been granted even if the insolvency proceedings were commenced in Kenya (*See Section 8*). It cannot be any worse simply because it is granted pursuant to recognition of foreign proceedings.

49. Then IOTA asserts that the application is in bad faith because the foreign proceedings were commenced soon after it had obtained Judgment in **Civil Suit No. 6523 of 2018 IOTA Excavations and Rental Limited –vs- CMC DI Ravenna (Kenya Branch) Limited**. The evidence available is that the judgment for IOTA was obtained on 24<sup>th</sup> August 2018 and the foreign proceedings commenced on 4<sup>th</sup> December 2018. That would be just three months after the date of the judgment yet from the proposal on restructuring it is clear that the company is indebted to creditors in different parts of the world. I am

unable to draw a conclusion that the foreign proceedings were commenced purposely to defeat IOTA's judgment.

50. I turn to what must be a more substantial concern. This is in respect to the company's involvement in the construction of 3 dams.

Regarding Itare dam, it is said that the company and RVWDA entered into an agreement in which the company was to undertake construction for the sum of Kshs.28,000,000,000.00 and that the company has only performed less than 40% of the works. It is said that the project is funded by the Government of Kenya from donors and other development partners and that it forms part of Kenyan's loan which its people are under obligation to repay. It is asserted that the government has made significant payments to the company even for works which are yet to be completed. These are allegations for which evidence have not been provided. Yet even if true, the concern of RVWDA should be that the Court should make an order that ensures that the company's assets in Kenya do not leave the jurisdiction of the Court so as to defeat a public debt. If the Court were to grant the recognition order then it will be minded to formulate and impose such conditions that would protect public policy.

51. There are then issues surrounding the other two infamous projects Aror and Kimwarer. It raised as ground 7 of the state corporation as follows:-

...it is equally in the public domain that the applicant has been subjected to criminal proceedings before Kenya Courts in relation to other multi-billion/shilling development projects- the Aror and Kimwarer...Thus this Court should take into account the need to avoid compounding the loss of Kenyan people of further billions of shillings by not interfering with any ongoing criminal proceedings..

52. I must straightaway point out that the Court views the matter raised as so fundamentally important that it would have expected the Attorney General to place some evidence of the existing proceedings and make propositions of what that means as regards the proceedings at hand. This is because if it is demonstrated that the company or its members and officials may have been involved in criminal activities relating to the debts in Kenya and that the foreign proceedings are simply an auxiliary to that scheme then it would be against public policy to recognize the foreign proceedings. However nothing substantial has been placed before Court in evidence or arguments as to warrant drawing such a drastic conclusion.

53. As I conclude I cannot ignore one interesting argument raised by Absa, ostensibly, on behalf of RVWDA. It is argued that the Dam projects are in the nature of public private partnership and the Applicant is therefore an ineligible company and precluded from obtaining a moratorium on debt payments.

54. It is argued that the Applicant is a project company and the projects it is involved in Kenya are in the nature of Public Private Partnership (**PPP**) projects as defined under Section 641(2) of the Insolvency Act. If so, then the company falls under a category of companies which are not eligible for moratorium on debt payments when its directors propose a voluntary arrangement.

55. This aspect of the case was not fully argued. But it seems to the Court to be of some significance. It being a public interest matter, this Court will be granting liberty to any of the creditors to present evidence that the Applicant is truly a project company and is therefore not eligible for moratorium even if the Court was to grant recognition.

56. The Court has come to the conclusion that the creditors have not established that it is manifestly against the public policy of Kenya to recognize the foreign main proceedings and is minded to do so. The effect of such an order is set out in Paragraph 22 of the fifth schedule to be 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.

57. Yet because of certain concerns raised by creditors, and which are not trivial, the Court will impose and attach conditions it considers appropriate to the relief. The Court is given that latitude by the provisions of Paragraph 24 which reads:-

#### **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.**

58. In the end the Court allows the Notice of Motion of 4<sup>th</sup> December 2019 in terms of Prayers (2), (3), (7), (8) on condition that:-

58.1. The relief does not affect any debt which is secured.

58.2. No assets of whatever kind belonging to the company shall be permitted to leave, be transferred out or encumbered or otherwise disposed of without the leave of Court.

58.3. The Judicial Commissioners shall adopt such process that shall give the Kenyan creditors meaningful and affordable access (including but limited to virtual access) and participation in the process of voluntary administration.

58.4. Any creditor who shall be dissatisfied with the pace of process or any other aspect of the process shall be at liberty to apply to this Court for modification or termination of the relief.

58.5. This Court shall retain supervisory jurisdiction over the process and in the event of a dispute, any affected persons have a right to approach the Court for relief.

59. As a matter of public interest, any creditor is granted liberty to move this Court with evidence that the company is not eligible to moratorium under the provisions of Part IX Division 2 of the Insolvency Act. Such application to be filed within 30 days hereof.

60. Each party to this process to bear their own costs.

**Dated, Signed and Delivered in Court at Nairobi this 28th Day of September 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

Anami for Applicant.

Miss Ogula for Absa Bank.

Miss Ogula holding brief for Akango for RVWWDA

Kagiri for CK Patel

Miss Mwaura holding brief for Wathuta for Iota

Miss Kikanu Oil Field Movers.

Njagi for Benisa and E Quarry