REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

INSOLVENCY PETITION E001 OF 2019

INSOLVENCY PETITION 19 OF 2017

IN THE MATTER OF HI-PLAST LTD

RULING

BACKGROUND

APPLICATION FOR ADMINISTRATION ORDER BY HI PLAST COMPANY IN INSOLVENCY PETITION E001 OF 2019

The Petitioner; Hi Plast Company Limited; hereinafter called the ‘’Company’’ approached the court through an application for an administration order dated 18th of January 2019 for the orders that;

a. The court issues an administration order in respect to Hi-Plast Ltd.

b. The Official Receiver is appointed as an administrator of Hi- Plast Ltd.

c. A mandatory order compelling the Respondent to render a true and proper account of the Applicant’s charge account;

d. The secured creditor be restrained from continuing to charge any kind of interests on the charge account until the hearing and determination of the petition;

e. The court to issue any other orders it may deem fit and just.

The Petition was supported by an affidavit by the Director of the Petitioner Company.

The Petitioner is a company that was engaged in the business of manufacturing plastic bags for household usage and commercial packaging until when the Government declared a ban via Gazette Notice No. 2356 of 2017 on the use, manufacture and importation of all plastic bags which consequently made the Petitioner experience hardships in settling its liabilities.

SECURED CREDITORS REPLYING AFFIDAVIT

The Secured Creditor; I & M Bank filed Replying Affidavit to the Application for administration order under Protest as Counsel for the Bank informed the Court they were not party to any arrangement by the Company to settle its indebtedness. The Secured Creditor would file pleadings and submissions to the instant petition on orders of the Court.

In response to the Petitioner’s application for an administration order, the Secured creditor filed a replying affidavit dated 20th May 2019. The Secured creditor averred that in the liquidation petition filed by the various creditors in **Insolvency Cause No. 19 of 2017, In the Matter of Hi-Plast Ltd**, the debtor company, had not opposed the application which sought the appointment of a provisional liquidator.

The Secured creditor further averred that on 26th March 2019, after the court heard the party’s in the said application, it directed that the company and secured creditor, exchange accounts and the latter was permitted to proceed and sell the secured securities. In the same order that was made by the court on that day, the Court ordered the pending of the unsecured creditors petition until after the sale of the secured property by the Secured creditor.

The Secured creditor urged the court to stay the proceedings of **Insolvency Petition No. E001 of 2019** further claiming that every step it undertook was based on the contracts of lending and securities which were registered with the express requests from the Company and its

Directors. The Secured creditor averred that it had complied with the statutory notices and hence carried out the due processes as required by law. Moreover, the Secured creditor averred that the debtor Company was indebted to it in the amount of **Kshs 355,020,522.96**, as at 30th March 2019.

The Secured creditor stated that it was not prepared to surrender its security and that the party should then be removed from the proceedings.

APPLICATION FOR LIQUIDATION BY SAVICHEM INTERNATIONAL LIMITED UNSECURED CREDITOR IN INSOLVENCY PETITION NO 19 OF 2017

Savichem Limited filed petition for liquidation of Hi Plast Co Ltd on account of failure to meet its obligation to pay USD 278,687 owed to the Petitioner. On 28th June 2018, the Secured Creditor joined the proceedings.

LIQUIDATION

The Petitioner is also subject to the liquidation process filed by Savichem Africa Ltd in **Insolvency Cause No. 19 of 2017**dated 14th November 2017. The Petitioner is indebted to Savichem Africa Ltd and other creditors as follows;

a) Savichem Africa Ltd for an amount of USD 278,687.00

b) Aprirose Trading Ltd for an amount of USD 385, 300.00

c) Sarrchem International Ltd an amount of USD 567,193.34 & Kshs 9,904,950

d) Somachem Ltd an amount of USD 778,410

APPLICATION BY UNSECURED CREDITOR

The Unsecured creditor applied to the court through an application dated 12th April 2018 for the court to grant orders that the court do issue an interim order restraining the Respondent from disposing off its properties pending the hearing and determination of the liquidation petition.

AFFIDAVIT IN OPPOSITION TO THE LIQUIDATION PETITION

Sarrchem International Ltd (interested party/creditor) opposed the Petition for liquidation through an affidavit dated 27th of June 2018 by stating that the debtor company, confirmed its indebtness to them on 13th February 2018 as evidenced in exhibits "**RDS2-A**" and "**RDS2-B**". The creditor stated that their interests must be protected in securing the amount of USD 567,193.34 & Kshs 9,904,950.

REPLYING AFFIDAVIT TO THE LIQUIDATION PETITION

The debtor Company replied to the Liquidation petition through an affidavit dated 29th June 2018 stating that the total amount of liability claimed against it by the creditors was in the amount of USD 2,009,590.34 and Ksh 9,904,950.00.

The Petitioner also recognized that it was indebted to I & M Bank Ltd(secured creditor)for a disputed outstanding loan of Kshs 373,506,975.75 anchored upon a charge instrument dated 23rd June 2015 and registered in the favour of the secured creditor for Kshs 300,000,000. The Petitioner also pleaded that the secured creditor had been overcharging interest on the charge account with an aim of clogging the Petitioners Equity of Redemption.

The Petitioner averred that the property LR No. 209/8611/2 situated along Runyejes road, Industrial Area is able to settle its liabilities if disposed at the current market value, as opposed to the will of the secured creditor to dispose it at a price far below the property's market value.

AFFIDAVIT IN SUPPORT OF THE PETITION

Simba Enterprises (creditor) responded to the liquidation petition through an affidavit dated 25th March 2019 stating the creditor delivered goods to the debtor company and that the invoices raised by the remain unpaid by the debtor, amounting to the sum of USD 409,963.87.

AFFIDAVIT IN SUPPORT OF THE PETITION

Aprirose Trading Ltd (creditor) responded to the liquidation petition through an affidavit dated 25th March 2019 stating the creditor supplied goods to the debtor company and that the invoices raised by the remain unpaid by the debtor, amounting to the sum of USD 419,506.78.

The following Applications have been made in the Liquidation proceeidings.

Sarrchem International Limited sought to be joined in the Liquidation Petition via an Application dated 12th March 2018.

By an Application dated 25th June 2018, the Respondent Company prayed for orders:-

1. A temporary order of injunction be issued restraining the secured creditor and its agents, servants and employees from disposing off any part of all those pieces of land known as L.R no. 1870/X/115 and L.R. No. 209/8611/2 pending the hearing and determination of the application herein.

2. A temporary order of injunction be issued restraining the secured creditor and its agents, servants and employees from disposing off any part of all those pieces of land known as L.R no. 1870/X/115 and L.R. No. 209/8611/2 pending the hearing and determination of the liquidation proceedings herein.

The secured creditor opposed the Company's Notice of Motion dated 25th June 2018 by filing Grounds of Opposition dated 2nd July 2018. Status quo orders were issued in relation to the said Application and were later vacated conditionally vide an order dated 26th March 2019.

Furthermore, the Respondent Company filed a Notice of Motion dated 18th July 2018

The Respondent Company filed Applications dated 26th July 2018 and another dated 8th August 2018

The two applications of 25th June 2018 and 26th July 2018 were compromised by an order dated 26th March 2019.

The Respondent company filed Application dated 20th May 2019.

PETITIONER'S WRITTEN SUBMISSIONS

The Petitioner addressed the issues for determination by the court as follows;

a. Whether the company should be placed under administration

The Petitioner relied on the objectives of an administration order under Section 522 of the Insolvency Act. The company submitted that the value of its assets exceeded the amount claimed by the creditor's but the secured creditor, however, had not presented to the court the exact amount pursuant to which it wants to exercise its statutory power of sale.

The Petitioner further submitted that the liquidation order could not be made as the affairs of the company still required further investigation into the statement of accounts, as had been ordered by the court.

b. Whether the liquidation and administration proceedings of the same company could run concurrently

The Petitioner submitted that an order for administration will ensure the company will be a going concern unlike where a liquidation order which will render the company completely non-existent.

c. Whether a secured creditor is part of an administration process

The Petitioner submitted that an order for administration does not exclude any class of creditors as administration aims to realize the property of the company in order to make a distribution to one or more secured or preferential creditors.

SECURED CREDITOR'S SUBMISSIONS

The Secured creditor's filed written submissions to the application for an administration order dated 16th July 2019.

The issues addressed in the written submissions by the creditors were as follows;

a. Company's default had crystallized the rights of the Secured creditor

The right of the secured creditor to exercise its statutory power of sale under the charge; **LR No. 209/8611/2** situated along Runyejes road, Industrial Area had crystallized upon default by the Company. It relied on **clauses 7,8,9 and 10** of the charge document.

The Secured creditor submitted that the court had no jurisdiction to issue an order for injunction restraining the secured creditor from enforcement of its right, neither did it require leave of the court to proceed with the proposed sale of the charged property.

The Secured creditor further submitted that its rights could not be suspended by the appointment of a liquidator or an administrator as relied on Section 889 of the Companies Act. It also relied on the case of ***Emirates National Oil Company(Singapore) Private Ltd vs Triton Petroleum Ltd [2009] KLR***, where the court held that;

> ***"The interim liquidator's duties shall not extend to administering the assets and property secured by the debentures upon which the receivers and managers herein were appointed. So that there may be no conflict between the receivers and managers and the interim liquidator, the two sets of officials are directed to convene a meeting as soon as possible for purposes of***

ascertaining the assets and properties of the company that are subject to the debentures. The receivers and managers are directed to cooperate with the interim liquidator in this regard. For avoidance of doubt, the interim liquidator shall not have power to manage or inquire into the assets of the company that is established to be subject of the debentures. Nor will he have any powers to deal with the properties or assets of the company that have been taken possession of by the receivers and managers."

SUBMISSIONS OF THE UNSECURED CREDITOR

The Unsecured creditor filed written submissions dated 15th July 2019 in response to the application for an administration order. It submitted that on the 5th of December 2017, it filed a petition seeking to windup the debtor Company for failure to pay its liabilities to the unsecured creditor an amount of USD 278,687.00.

The Unsecured creditor submitted that the secured creditor could not at one hand seek to realize securities and on the other hand participate in the administration proceedings yet the assets sought to be sold from the valuations provided by the secured creditor were less than the amount owed by the debtor company. The secured creditor relied on **Sections 560 and 561 Insolvency Act** as they put a moratorium that bars the enforcement of security only with the sanction of the court.

The secured creditor relied on the case of ***Re Arvind Engineering Ltd [2019]eKLR*** where Tuiyott J held that;

"….This Court takes the view that once an application for an administration order is pending and which the Debenture Holder is aware, and has chosen to participate, then the Debenture Holder ought to remain in those proceedings and make arguments for or against grant of the order. Further it may argue that it should be the one and not the applying party who should appoint the Administrator. The solution is not to scuttle the pending proceedings by making a quick appointment as done by the Bank here. The presence of bad faith is particularly telling in this matter because not only was the Bank aware of the proceedings but had in fact submitted to them..."

DETERMINATION

The issues for determination before this court are:-

1. In light of the petition for liquidation of the Company by the Unsecured Creditor or the Petitioner/Company petition for administration which of the petitions should be granted and enforced.

2. What are the rights and/or obligations of secured Creditor in liquidation, administration or exercise of statutory power of sale?

3. Whether the Secured Creditor should be granted orders to to exercise its statutory power of sale.

4. In light of the petition for liquidation of the Company by the Unsecured Creditor or the Petitioner/Company petition for administration which of the petitions should be granted and enforced.

5. Whether in light of the statutory power of sale, an order for administration would be most preferred to one of liquidation

The legal regime that regulates liquidation and administration is as follows;

Section 393(1) of Insolvency Act provides for the circumstances in which a company may be liquidated voluntarily:

(a) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution providing for its voluntary liquidation; or

(b) if the company resolves by special resolution that it be liquidated voluntarily.

A company may be voluntarily liquidated either by the members (Section 399 (1)) or the creditors (Section 405 (1)) of the Insolvency Act.

The Court may also liquidate a company. Section 423 (1) of the Act grants the High Court jurisdiction to supervise the liquidation of companies registered in Kenya.

Liquidation- the circumstances under which a company is said to be unable to pay its debts are stipulated under **Section 384 of the Insolvency Act.** It provides:

(1) For the purposes of this Part, a company is unable to pay its debts—

a. if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to

the reasonable satisfaction of the creditor;

b. if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).

(3) The insolvency regulations may increase or reduce the amount specified in subsection (1) (a).

Administration is defined under **Section 521 of the Insolvency Act** as;

"For the purposes of this Act-

a. A company is "under administration" while the appointment of an administrator of the company continues to have effect;

b. A company "enters administration" when the appointment of an administrator takes effect."

Consequently, **Section 522 of the Insolvency Act** provides for the objectives of administration as:-

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

Section 531 of Insolvency Act goes ahead to list the conditions for making an administration order as:

"The Court may make an administration order in relation to a company only if satisfied—

(a) That the company is or is likely to become unable to pay its debts; and

(b) That the administration order is reasonably likely to achieve an objective of administration."

Therefore, for the court to grant the order for administration, **the court must be satisfied that the company is or is likely to become unable to pay its debts and that the order if made, the Company is reasonably likely to achieve an objective (s)of administration**.

Liquidation entails the process whereby, a Company that is insolvent by proof of indebtedness despite statutory demands by Creditor(s) and claims are not settled, the Company is put to bed, the Company is dissolved and the Company's assets through a liquidator are disposed off to settle the existing claims. This is a drastic and final blow to a Company that leaves no chance of survival, through reinventing, restructuring or realigning itself to engage in commercial enterprise and becomes and remains a thriving business enterprise.

Conversely, administration process entails the process where, once a Company is insolvent; is not able to settle debts due and owing despite statutory demands; consideration of its asset portfolio given time and opportunity would upon valuation settle the indebtedness and resuscitate the Company to continue as a thriving commercial enterprise.

Liquidation leaves no room for nor gives a Company opportunity to survive after settling indebtedness but dissolves the Company whereas administration insulates the Company that while going through a dry financial spell it may/will survive after settling Creditors claims as a going concern,

In ***Re Nakumatt Holdings Limited [2017] eKLR*** the Court observed;

"What information then is the Court supposed to receive? [for administration to apply]

A speculative suggestion is not enough…It is the Applicant who seeks to and must satisfy the Court of the prospect…

He must by way of affidavit in support of the motion establish the reasonable grounds, including an indication of how long the turnaround is expected to take. The Applicant for administration order must provide a substantial measure of detail about the proposed plans to maintain the Company as a going concern and/or to settle with creditors in a better mode than a liquidator if one were appointed would.

From the pleadings and submissions filed by parties through Counsel; the Company's indebtedness is summarized as follows;

Petitioner has the following assets and liabilities;

Assets	**Liabilities**
LR No.1870/X11159(I.R.No.57684) worth **Ksh 80,000,000**	Sarichem Africa **– USD 278,687**
LR No. 209/8611/2 worth **Kshs 600,000,000**	Aprirose Trading **– USD 385,300**
Machinery on LR No. 209/8611/2 valued at **Kshs 132,323,460**	Sarichem International **– USD 567,193.34 &Kshs 9, 904,950**
Cocorio owes Petitioner **Kshs 77,218,321**	Somachem Ltd **– USD 778,410**
LR No. 209/8611/2	I & M Bank (secured creditor)- **Kshs 373,506,975.75**

The Petitioner (Hi Plast) herein prays for an administration order according to **Section 531 (b) and Section 522 (1) of the Insolvency Act**. It supports its Petition by reference to a Valuation Report of **L.R No. 209/8611/2** conducted by the Petitioner Company pursuant to the Court order and whose current market value as per 15th April 2019 is Kshs 510million and Forced sale value of 430 million.

It is the Petitioner's claim that the suit property which is held as security by I&M Bank, upon sale the current market value; the proceeds can offset all its liabilities. However, the Petitioner Company claims I&M Bank is exercising its statutory power of sale and selling the suit property as per its Valuation Report of 2018 which valued the suit property at Ksh 375m and Ksh 282m forced sale value.

The Secured Creditor filed audited bank statements by Audit Focus Advisory vide letter of 14th January 2019 and statements of account filed and the outstanding amount is **Ksh 660,076,780/-**

The Petitioner/Company filed Supplementary Affidavit of 25th April 2019 and annexed the Hi-Plast Account Transaction Summary which amounts to the outstanding claim against the Secured Creditor at **Ksh 689,288,194.30/=** removing contested interest at **Ksh 52,994,044.27/-**

The financial statements of the Petitioner Company disclose a viable business enterprise until the plastic ban was enforced. The essential factors to be considered before granting an order for administration. Other factors were laid out in ***Re Nakumatt Holdings Limited [2017] eKLR*** where the court held:-

> ***"Other factors include; the effect of an order under s.533 would have on society generally, the rights of the creditors as balanced with that of the company to continue to survive, the conduct of the parties through the litigation period and especially the period after the filing of the application for liquidation, the insolvency level of the company both commercially and under the balance sheet and, last but not least, the proposal if any made by the company and its proposed administrator. I do not however deem this list as exhaustive but the most essential factors which must be shown are those found under s.531 of the Act."***

Reiterating the essential factors set out in Section 531 of the Insolvency Act, the court in ***Re Colt Telecom Group PLC [2002] EWHC 2815*** explained the first factor with regard to the inability to pay debts. The court held that the words *"is or is likely"* to be unable to pay its debts meant that it is more probable than not that the company will be unable to pay its debts. Similarly, the court in ***Re Nakumatt Holdings Limited [2017] eKLR*** held that:-

> ***"A company is unable to pay its debts if it is commercially insolvent and commercial insolvency will be established once it is shown that demand has been made and not heeded or that persistent requests and consistent promises to pay have not been honoured. Once there is evidence of financial distress, then the first precondition for an administration order under s.531 of the Insolvency Act would be deemed to have been met."***

In this case, the Petitioner in **Insolvency Cause No. 19 of 2017** avers in **paragraphs 6 and 7** that demand letters requiring the company to pay its liabilities had been served upon it but they neglected to pay and were thus deemed to be unable to pay its debts as per **section 384** of **the Insolvency Act**. Moreover, in the Company's Petition for administration orders, the company admits in paragraph 4 that it is indebted to an amount of **USD 2,009,509.34** and Kshs. 9,904,950 as claimed against it by the creditors. It is thus clear that there is evidence of financial distress and as such, the first precondition for an administration order under **Section 531 of the Insolvency Act** has been met.

Now, to the second precondition; In ***Re Nakumatt Holdings Limited [2017] eKLR*** the court opined that;

> ***"My view is that the use of the word 'Iikely' connotes probability and the degree of the probability is then founded in the qualifying word or the general context of the statute. The qualifying word is 'reasonably' which in my view does not result in an actual or existent probability. The statute could thus not have meant that the prospect of achieving any of the objectives or all of the objectives under s.522 of the Act must be real. In my view, the use of the phrase "reasonably likely" indicates that something less is required. It is not and should not be that achieving the objectives is a real prospect or real probability. If the facts indicate a reasonable possibility of the company being maintained and rescued as a going concern, then the court must be deemed to have been satisfied under s.531(b) of the Act and it may then exercise its discretion in favour of granting the order."***

What then this court should determine is whether the company has shown a reasonable possibility of it being maintained and rescued as a going concern. The threshold is very low because one of the reasons as to why the Insolvency Act was enacted is to provide insolvent bodies an alternative to liquidation procedures; administration, for the benefit of their creditors as envisaged in the title.

To demonstrate the reasonable possibility, the company in its Petition listed its assets as:-

a. L.R No. 1870/X11159 (I.R. No. 57684) worth Kshs. 80,000,000

b. L.R No. 209/8611/2 worth Kshs. 600,000,000

c. Machinery on L.R No. 209/8611/2 valued at 132,323,460

d. Debtor in the name Cocorio Investment who owes the Petitioner Kshs. 77,218,321

It was thus the Petitioner's averment that the property **L.R No. 209/8611/2** is able to settle all its liabilities if disposed off at the current market value. In support of this, the Petitioner filed on 25th April 2019 a valuation report of the property which was Kshs. 510,000,000 market value and Kshs. 430,000,000 forced value; the secured creditor did not adduce a current valuation report to the contrary.

However, the said property is charged by the Secured Creditor who wants to exercise its statutory power of sale in accordance to a Valuation Report dated 21st June 2018 valuing the property at Kshs. 375,000,000 market value and Kshs. 282,000,000 forced sale value.

As at 30th April 2019, the Statement of Account details the company's indebtness at Kshs. 355,020,522.96. Prima facie, comparing the debt in the Statement of Account vis' a vis the current valuation report, the company will be able to offset its liabilities with the secured creditor and still remain with Kshs.154,979,477.04 if the latter disposes off **L.R No. 209/8611/2** at the current market value. This court gave orders on 28th March 2019, that both parties furnish it with current valuation reports. However, the Secured Creditor has not complied with such orders and as such is estopped from relying on an outdated valuation report having in mind that a current one is in the court file.

Having evaluated the essential elements that a court should consider before granting an order of administration as laid out under **Section 531** of the **Insolvency Act,** it is my view that the company has clearly demonstrated that it is unable to pay its debts and that an administration order is reasonably likely to achieve an objective of administration and as such administration orders should be granted as provided under **Section 533 (1) (a) of the Insolvency Act.**

The Court is vested with discretion to determine whether to grant administration order after reviewing the necessary material facts. Consequently, having considered at length the material filed by the Petitioner Company of its financial status and the totality of evidence presented; I am satisfied that given the circumstances it is fit and proper to place the Petitioner/Company under administration which best meets the ends of justice and protects all parties rights. These include unsecured creditors, employees, shareholders etc

This is based on the fact that the company was unable to pay off its debts due to the recent plastic ban by the Government of Kenya. Therefore, with proposals of use of environmentally friendly raw materials during production, the company has a chance to survive as a going concern. The company has a reasonable possibility of being rescued and maintained as a going concern.

I am thus convinced and satisfied that an order for administration if made as requested is reasonably likely to achieve an objective of administration and as such grants the administration order as provided by **Section 533 (1) (a)** of **the Insolvency Act** and I consequently, appoint the Official Receiver as the administrator of the Petitioner /Company.

2. What are the rights and/or obligations of secured Creditor in liquidation, administration or exercise of statutory power of sale?

3. Whether the Secured Creditor should be granted orders to to exercise its statutory power of sale.Whether the Secured Creditor should be allowed to exercise its statutory power of sale

A charge between the Secured Creditor I& M Bank Limited on the one hand and the Petitioner/Company Hi- Plast on the other hand was drawn on 23rd June 2015. Pursuant to **Sections 878 & 889 of Companies Act 2015**; the Charge was registered in the Registry of Companies on 16th July 2015 and with the Land Titles Registry on 9th July 2015 over suit property **Land Reference 209/8611/2** Nairobi for a facility advanced to the Company of Ksh 300m secured by the suit property.

Where the chargor fails to discharge the debt, the bank is forced to look to its security for repayment of the advance. The rights of the secured creditor are derived from the registered charge whose validity was/has not been contested. In the absence of the chargor servicing the debt or exercising the right of redemption on completion of the loan repayment and there is discharge of charge; the secured creditor ranks in priority to realize its claim over the security/collateral beyond all other Creditors, be they 2nd Chargee/Mortgagee, Trade Creditors, Floating Charge holders Preferential Creditors and Unsecured Creditors etc.

The Secured Creditor may exercise self help remedies to recover the facility. These remedies include an action against the Chargor for the amount of debt, statutory power of sale of the charged property, appointment of administrator or liquidator; foreclosure and/or taking possession of the charged suit property.

In liquidation whose purpose is realization of debtor's assets to settle liabilities and dissolution of the Company, the Secured Creditor is protected as the said Creditor will rank in priority and exercise first the lien over the charged property before other Creditors.

Similarly in the process of Administration, the Administrator ought to prioritize the interest of the secured creditor(s) with regard to the charged property to realize the facility granted to the debtor.

Therefore, the secured Creditor whether involved in administration and/or liquidation shall rank in priority over charged property. No …..party may exercise rights over the …..suit property before the secured Creditor's claim is settled. Since no reasons or evidence is placed before Court to justify denying the Chargee the rights accruing from and under the registered charge there will be no prejudice to the unsecured & ……company if the Secured Creditor is left to exercise the statutory power of sale of the charged property under the registered charge.

It is thus proper to say that secured creditors are preferential creditors and they have a first priority claim under **Paragraph 2 (c)** of the Second Schedule, Insolvency Act. The rationale behind a secured creditor being much better off than an unsecured creditor during bankruptcy is the fact that the lien entitles the secured creditor to the proceeds from any property serving as collateral up to the claim amount.

Section 226 (2) of the Insolvency Act provides secured creditors with 3 options in relation to property that is subject to a charge. They are:-

> ***"(a) Option 1: to realise the property by having it sold (but only if the creditor is entitled to do so under the terms of the charge); or***
>
> ***(b) Option 2: to have the property valued and prove in the bankruptcy as an unsecured creditor for the balance due (if any) after deducting the amount of the valuation;***
>
> ***(c) Option 3: to surrender the charge to the bankruptcy trustee for the general benefit of the creditors and prove in the bankruptcy as an unsecured creditor for the whole debt."***

In this case, the Secured Creditor opted for option 1 to exercise their right of statutory power of sale against **L.R No. 209/8611/2** and **L.R No. 1870/X11159 (I.R. No. 57684)** which have registered charges against them in favour of the Secured Creditor.

In the case of ***Kenya National Capital Corporation Ltd vs Albert Mario Cordeiro & Anor [2014] eKLR*** the Court of Appeal held;

> ***"The Appellant by virtue of being a debenture holder ranked in priority to all other creditors claiming against the 2nd Respondent and this included 1st Respondent...Subsequently, and in light of the privileged position of a secured creditor, this Court cannot interfere with the suit property by upholding the decision to grant specific performance against Appellant in favor of the 1st Respondent, an unsecured Creditor in this case."***

The rights of the Secured Creditor under the charge are intact. These rights are subject to the legal regime that regulates the processes of executing these rights. The secured Creditor is held accountable in the exercise of rights under the registered charge. In order to exercise statutory power of sale, the Secured Creditor does not require the Court's intervention. In the circumstances this Court cannot grant orders to impair the exercise such rights unless the Court's jurisdiction is triggered by procedural non- compliance of mandatory statutory provisions of relevant legislation or if the validity of the registered charge that confers priority rights is challenged.

A chargee may exercise the power to sell the charged land where a chargor is in default of the obligations under a charge and remains in default at the expiry of the period provided for the rectification of that default in the notice served on the chargor under **Section 90 (1) of the Land Act. This Notice of default to pay is for 90 days**. It is followed by Notice to exercise the statutory power of sale provided for under **Section 96 (1) of the Land Act for 40 days.** A Chargee is allowed to exercise its statutory power of sale after it has served the 90 days' notice and 40 days' notice to the chargor as provided for under **Section 96 (2) of the Land Act. Notice to auction the charged suit property is served as provided under Rule 15 of Auctioneers Rules for 45 days.** It follows therefore, that if the proper procedure is followed, by the time property is auctioned or sold by private treaty the Chargor would have notice of intended sale for cumulative period of **175 days.**

The statutory notices in accordance to **Section 96 (2) of the Land Act** is not disputed. The exercise of statutory power of sale is ongoing save for contention of procurement of a current valuation report of the charged property which has since been complied with. The outstanding issue is contest of alleged interest overcharge. Pursuant to Court order of filing of reconciled accounts which each party filed statements of account; it is however, not contested that the Petitioner /Company owes the Bank a debt that is due and owing over default of repayment of the facility provided. The court cannot determined the issue of interest as it is one of the terms of the charge document. To do so would amount to ….the …..the statutory power of sale shall confirm with regard to the uncontested amount due and owing. The contested amount shall be …….of formal ….filed in court ……..

The company is in default of payment and the Secured Creditor is thus legible to exercise its statutory power of sale against it. The chargee under **Section 97 (1) of the Land Act** has a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

Section 97 (3) of the Land Act provides that:-

> ***"If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—***
>
> ***(a) There shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and***

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1)."

Section 228 (3) of the Insolvency Act; after sale of the charged property, the Secured Creditor shall account to the administrator for any surplus remaining after the amount of debt, interest payable on the debt up to the time when it is paid and any proper payments to the holder of any other charge over the property have been paid.

If there is such surplus remaining after the above named deductions have been made, the administrator shall proceed to settle the debts of the unsecured creditors.

DISPOSITION

1. The petition by petitioner/Company for grant of administration of the Company is granted.

2. The Administration Order is issued appointing The Official Receiver as Administrator of Hi-Plast Company Limited.

3. The Directors to provide the Administrator with statement of affairs of the Company before the Administrator convenes the 1St Creditors' meeting

4. The Secured Creditor shall carry out its legal rights under the valid registered charge; more particularly exercise statutory power of sale based on current valuation Report(s) at the market value of L.R No. 209/8611/2. The Secured Creditor to sell the property at the best price reasonably obtainable with regard to the current valuation report.

5. The Secured Creditor is not obliged to participate in the administration process of the Petitioner/Company – Hi-Plast Company Limited.

6. The Secured Creditor shall account to Administrator on sale proceeds, surplus and/or settlement of interest charges contested by the Petitioner/Company.

DATED, SIGNED & DELIVERED IN OPEN COURT THIS 31ST JULY 2019.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

ADVOCATE FOR PETITIONER/COMPANY

ADVOCATE FOR SECURED CREDITOR

ADVOCATE FOR UNSECURED CREDITORS

COURT ASSISTANT – ISAIAH OTIENO