THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

INSOLVENCY CAUSE NO. 16 OF 2018

ATHI RIVER STEEL PLANT LTD.....APPLICANT

VERSUS

1. PONANGIPALI VENKATA RAMANA RAO

2. COMMERCIAL BANK OF AFRICA LTD.

3. KCB BANK OF KENYA LIMITED

4. BANK OF AFRICA LIMITED

5. I & M BANK LIMITED.....RESPONDENTS

RULING

1. The parties' pleadings in this case were the certificate of urgency, notice of motion and supporting affidavit drawn on 20th and filed on 23rd July, 2018, the supplementary affidavit filed on 31.8.2018 and the 2nd supplementary affidavit filed on 11.12.2018 for the applicant; the 5th Respondent's Replying affidavit filed on 30.7.2018, the 1st and 5th Respondents replying affidavit filed on 31.7.2018, the 1st Respondents Replying affidavit filed on 12.10.2018, the 4th Respondent's further affidavit filed on 11.10.2018, the 2nd Respondent's further affidavit deponed on 9th October, 2018, the 3rd Respondent's undated further affidavit filed on 31st October, 2018, the 4th Respondents Replying affidavit filed on 30.7.2018, what is indicated as the 2nd Respondents supporting affidavit filed on 30.7.2018, the respondents' joint list and bundle of documents filed on 31st July, 2018.

2. The Applicant; Athi River Steel Plant Ltd, filed this application against the Respondents; Ponangipali Venkata Ranana Rao, Commercial Bank of Africa Ltd, KCB Bank of Kenya Limited, Bank of Africa Limited, and I and M Bank Limited individually and/ or jointly and/or severally seeking the following interim orders that:-

- ***The Respondents be restrained by themselves, their agents or servants from selling disposing of, offering for sale or alienating in any manner whatsoever any of the applicant's land, properties, machinery, equipment, assets or stock or any part thereof ;***

- ***The 1st Respondent be restrained by himself, his agents or servants from acting and/ or purporting to act as the receiver and/ or manager and/ or administrator of the applicant and from interfering in any manner with the applicant's quiet possession and enjoyment of all the applicant's land, properties, machinery, equipment and assets;***

- ***The appointment of the 1st Respondent by the 2nd to 5th Respondents as the receiver and manager or administrator of the Applicant company be suspended;***

- ***The 1st Respondent and his agents or servants be ejected and removed from the applicant's premises and the applicant's possession of all its premises and properties be reinstated.***

3. The applicant also seeks the following final orders:-

i. A declaration that the appointment of the 1st Respondent by the 2nd to 5th Respondents as the receiver and manager or administrator of the Applicant company was unlawful and the same is null and void and of no legal effect;

ii. An injunction restraining the 1st Respondent by himself, his agents or servants from acting and/ or purporting to act as the receiver and/ or manager and/ or administrator of the applicant and from interfering in any manner with the applicant's quiet

possession and enjoyment of all the applicant's land, properties, machinery, equipment and assets.

iii. An injunction restraining the Respondents by themselves from selling, disposing of, offering for sale or alienating in any manner whatsoever any of the applicant's land, properties, machinery, equipment, assets or stock or any part thereof .

iv. A declaration that any agreements entered into by the 1st Respondent for the sale of any of the applicant company's assets are unlawful, null and void and of no legal effect.

v. The applicant company's Board of Directors be at liberty to propose a voluntary arrangement with the applicant's creditor's and to appoint a supervisor to oversee the process as provided for in the Insolvency Act, 2015.

vi. ***Costs of the application be borne by the Respondents***.

4. The Applicants case is that on 28th May, 2018 it was served with a notice of appointment of receiver and manager together with a letter dated 24th May, 2018 from the 2nd Respondent on its own behalf and on behalf of the 3rd to 5th Respondents informing them of the appointment of the 1st Respondent as the Receiver and manager of the applicant company effective from 18th May, 2018. With advice from their advocates on record, the deponent of the affidavit deponed on 20th July, 2018 averred that the impugned appointment was unlawful because it was effected under the repealed Companies Act Cap 486 and that the current applicable law does not allow the appointment of a receiver/manager over the assets of a company. The deponent averred that upon advice from his advocate on record, the 2nd to 5th Respondents failed to notify the court of the appointment as required by Section 537 of the Insolvency Act, 2015 and the said non-compliance meant that the appointment was unlawful; that further the failure to notify the court, official receiver, contributories of the company and the company's creditors was in breach of Section 539 of the Insolvency Act. That in breach of Section 522 of the Insolvency Act, the 1st Respondent is not maintaining the applicant company as a going concern and had not made a statement as per Section 566 of the Insolvency Act. That in further breach of the said Section 522 the 1st Respondent *inter alia* sent away the applicant's staff and employees and had not allowed production to be undertaken; is selling the finished products at the factory at a gross undervalue and these acts are aimed at grounding the activities of the applicant and yet a report by KPMG indicated that with the injection of sufficient working capital, the applicant can pay the outstanding loans. Further a valuation report prepared by C.P. Robertson- Dunn Valuers & Estate Agents and Axis Real Estate in March, 2016 indicated that the market value of the applicant's assets exceed the liabilities of Kshs 6,445,785,466.55 demanded by the 2nd to 5th Respondents and in this regard the applicant company proposed to enter into a voluntary arrangement with its creditors to ensure that they get paid. The deponent vide his supplementary affidavit filed on 31st August, 2018 explained the variance in the valuation reports by C.P. Robertson- Dunn Valuers & Estate Agents and Axis Real Estate. He averred that the applicant company was forced to look for alternative funding from other investors due to the refusal by the 2nd Respondent to advance facilities to them and failure to consent to facilities approved by the 3rd and 4th Respondents. Further that the applicant had obtained a loan facility in December, 2014 that was approved by Barak Fund and which the 2nd Respondent declined to consent to the transaction. Further that in March, 2018 the applicant was offered a short term facility from Barak Fund to which the respondents declined to give their consent. The deponent added that attempts to secure funding from investors was hampered by the SGR project and he reiterated the actions of the 1st Respondent that he deemed as damaging the assets of the said applicant and amounted to not running the operations of the applicant as envisaged in the law. He added that the Insolvency Act 2015 applied to the 1st Respondent and that Section 89 and 90 of the Land Act provide for the requirement for statutory notice before any acts of possession, receipt of income from charged property and the same had not been complied with. Vide the 2nd Supplementary affidavit, the deponent averred that had the 2nd Respondent consented to the loan facilities that were to be advanced by the 3rd and 4th Respondents, the applicants would have been in a position to rectify its payments and he denied refusing to cooperate with the 1st Respondent.

5. The 1st, 2nd, 3rd, 4th and 5th Respondents opposed the application. The 1st Respondent averred vide affidavit deponed on 30th July, 2018 that he is an authorized insolvency practitioner (exhibit PVR1) and that he lodged on 28th May, 2018 with the Official Receiver notices of appointment by the 2nd to 5th Respondents as official receiver over the applicant. The deponent averred that on advice from his advocates on record Section 690(4) of the Insolvency Act, 2015 empowered the holders of a floating charge to appoint an administrative receiver. The deponent averred that the appointment was served on the applicant and published in the Daily Nation and served as notice to Creditors and Debtors and that the 1st respondent requested for a statement of affairs from the directors of the applicant and the same was not forthcoming and further that upon his taking over he noted that salaries of staff were not paid as well as electricity bills, the insurance policy, rent and that Total Kenya had claims from the applicant; also KRA claimed unpaid VAT, PAYE and Corporate Tax. The deponent contends that he approached Apex Steel and Tuff Steel who offered to purchase the applicant's assets and deliveries commenced. He contended that he engaged a debt collector called Trium Collect Agencies to collect money from the applicant's debtors and has engaged in discussions with lenders about the running of the operations of the applicant at a viable and sustainable level with funds realized from sale of stock as well as lenders contributions. Vide replying affidavit filed on 12th October, 2018, the 1st Respondent contended that the applicant has not disputed its indebtedness to the banks and continue to challenge his appointment yet they say nothing about their liabilities to the banks. He admitted having received unsolicited bids from Apex Steel but denied soliciting for bids for the assets of the applicant. He admitted liquidating some assets that could be used for rehabilitation of the mill and admitted selling some items at a discount. He admitted knowledge of proposals made to Banks for working capital financing but the same was not approved and in his assessment the applicant can only be revived with Kshs 500 million capital. He added that there are outstanding amounts of electricity, salaries of expatriate staff and that he had not received a statement of affairs from the applicant however as an experienced Receiver and Insolvency practitioner, there are certain steps that have to be taken before the operations of the applicant are normalized like notifying all stakeholders of the appointment, analyzing the funds in the bank accounts, issuance of new contracts to all employees and registering all claims of creditors but however he is unable to do the same because of lack of cooperation with the directors of the applicant. He contended that the applicant had not been compliant with KRA and that being the receiver he could not access the head office premises of the applicant. He defended the insurance that was taken as being realistic and averred that as receiver he intended to offer a Bank Guarantee to Total Kenya when the plans to resume operations are finalized.

6. The 2nd Respondent vide replying affidavit deponed on 30th July, 2018 by Dr. Jacob Owuor Ogola the head of remedial Management Unit of the 1st Respondent opposed the application. The deponent averred that between 2012 and 2014 the 2nd Respondent advanced monies to

the applicant and which were secured by amongst others debentures that were fixed and floating charges dated 30th April, 2012 and a further debenture dated 30th January, 2014 as well as a series of fixed charges over Parcels of Land LR 17849, 17851, 17852, 17853, 17854 and 17855 dated 30th April, 2012 and 30th January, 2014. He averred that the applicant defaulted in its obligation to make timely payment of the monies and the 2nd Respondent demanded for payment which was not forthcoming leading to the position that the applicant was unable to pay its debts and in addition the applicant was given several opportunities to repay its debt to the 2nd Respondent. The deponent averred that the applicant hoped that it would receive monies in form of compensation from the land that stood to be acquired to make way for the SGR and use the same to repay the monies owed to the 2nd Respondent. However the same did not materialize because the government abandoned the project to be undertaken on the applicants land. That the 2nd to 5th Respondents undertook a valuation of the applicants land and that there was a variation in the valuation by C.P. Robertson- Dunn Valuers & Estate Agents and Axis Real Estate and that the valuation by C.P. Robertson- Dunn Valuers should be taken skeptically because it was not prepared with the participation of the 2nd to 5th Respondents. He averred that strategic investors were interested in investing in the applicant on conditions that the applicant refused to accept and later vide agreement signed on 14th December, 2017 the 2nd to 5th Respondents agreed to finance insurance premiums for the applicant to a sum of Kshs 9,172,610 as well as a further Kshs 25,844,357 and that the sum of Us$ 45,000,000/-would be paid by the applicant on or before 31st January 2018 but that the applicant failed to effect payment prompting the appointment of the 1st Respondent vide deed dated 18th May, 2018 and at the time of the said appointment the 2nd to 5th Respondents were apprehensive that the applicant may not be able to pay their debts. The deponent on advice from his counsel averred that the provisions of Section 690 (4) and 690(2) of the Insolvency Act, 2015 allow for the appointment of receivers for the holders of a floating charge entered into before 18th January, 2016 when the Insolvency Act 2015 came into force; that the debenture in favour of the 2nd Respondent was created on 30th April, 2012 before the coming into force of the Insolvency Act; that Section 690(4) of the said Act was a preservation of the rights of lenders to property recognized and enshrined in Article 40(3) of the constitution; the provisions of the Insolvency Act that have been invoked by the applicant had no application to the appointment of the receiver over the applicant. The deponent averred that the applicant had not indicated their full indebtedness to their creditors and it is in the interest of justice that the applicant remained under receivership of the 1st Respondent appointed by the 2nd to 5th Respondent on 18th May, 2018. Vide further affidavit deponed on 9th October, 2018, the deponent averred on behalf of the 2nd Respondent that the applicant was operating at below capacity and requested the 2nd Respondent to allow for sharing of securities with the 3rd Respondent but the 2nd Respondent declined because of the outstanding amount and as per the Central Prudential Bank Guidelines no additional borrowings could be allowed. With regard to the Barak Fund proposal of 2014 the deponent averred that the same was not a contract for it was qualified as being subject to contract and in any event he had doubts that any additional facilities would have rescued the applicant.

7. The 3rd Respondent vide a replying affidavit deponed on 30th July, 2018 by Francis Kiranga, the manager, Recoveries of the 3rd Respondent opposed the application. He averred that between 2010 and 2014 the 3rd Respondent advanced monies to the applicant that were secured by Debenture dated 29th December, 2010 to secure Kshs 800,000,000/- and a further debenture dated 30th January, 2014 to secure Kshs 580,000,000/- and a series of Fixed charges and further charges over the parcels of land LR 17849, 17851, 17852, 17853, 17854 and 17855 dated 7th October, 2010. The deponent averred that the monies advanced were to be paid in a timely manner however despite demand for payment the applicant defaulted between 2015 and 2017 leading to the conclusion that the applicant was unable to pay its debts. The deponent averred that as at 2018 the 3rd Respondent was owed Kshs 1,132,646,373.18/- and for this reason the 1st Respondent was appointed receiver on 18th May, 2018 vide deed marked as Exhibit FK1. Vide undated supplementary affidavit the deponent alluded to bank statements of the applicant and that the same speak to the fact that the applicant failed to repay the amounts advanced to them by the 3rd Respondent and thus sought that the court uphold the appointment of receiver over the applicant.

8. The 4th Respondent vide a replying affidavit deponed on 30th July, 2018 by Ben Mwaura, the Senior manager, Recoveries of the 4th Respondent opposed the application. He averred that between 2010 and 2014 the 4th Respondent advanced monies to the applicant that were secured by Debenture dated 7th October, 2010 to secure Kshs 350,000,000/- and a series of Fixed charges over the parcels of land LR 17849, 17851, 17852, 17853, 17854 and 17855 dated 7th October, 2010. Copies of facility letters and charges and debentures were annexed and marked BM1.The deponent averred that the monies advanced were to be paid in a timely manner however despite demand for payment the applicant defaulted between 2015 and 2016 leading to the conclusion that the applicant was unable to pay its debts. The deponent averred that as at 2018 the 4th Respondent was owed Kshs 776,593,367.48/- and for this reason the 1st Respondent was appointed receiver on 18th May, 2018 vide deed marked as Exhibit BM1. Vide further affidavit filed on 11th October, 2018 the deponent averred that the receiver was appointed under the Debenture and not under the Land Act and therefore there was no requirement to give notice under the Land Act. He reiterated that the 4th Respondent is still owed and the steps taken by the 4th Respondent were not premature but that the appointment of the 1st Respondent was right and further that the applicant has failed to address how it plans to repay the vast sum of monies it owes the 4th Respondent and that the applicant as at 2018 was in no position to repay the amounts it owed the Secured lenders.

9. The 5th Respondent vide a replying affidavit deponed on 30th July, 2018 by Stephen Kimwele, the General Manager, corporate Banking of the 5th respondent opposed the application. He averred that between 2013 and 2015 the 5th Respondent advanced monies to the applicant that were secured by Debenture dated 30th January, 2014 to secure Kshs 1,515,000,000/- and a series of Fixed charges over the parcels of land LR 17849, 17851, 17852, 17853, 17854 and 17855 dated 30th January, 2014. The deponent averred that the monies advanced were to be paid in a timely manner however despite demand for payment the applicant defaulted between 2015 and 2016 leading to the conclusion that the applicant was unable to pay its debts. The deponent averred that as at 2018 the 5th Respondent was owed Kshs 1,417,745,314.76/- as per the bank statements emanating from the 5th Respondents books kept in the ordinary course of business and for this reason the 1st Respondent was appointed receiver on 18th May, 2018 vide deed marked as Exhibit SK1.

10. The application was canvassed vide submissions. The applicant vide submissions dated 31st August, 2018 filed by their advocate on record submitted that certain issues were not in contention namely:-

- The applicant and 4th Respondent executed a debenture facility on 7.10.2010 for Kshs 350,000,000/=.

- The applicant and 2nd Respondent executed a debenture facility on 30.4.2012 for Kshs 1,200,000,000/=.
- The applicant and 2nd Respondent executed a supplementary debenture facility on 30.1.2014 for Kshs 950,000,000/=.
- The applicant and 5th Respondent executed a debenture facility on 30.1.2014 for Kshs 1,515,000,000/=.
- The applicant and 3rd Respondent executed a debenture facility on 30.12.2010 for Kshs 800,000,000/=.
- The applicant and 3rd Respondent executed a debenture facility on 30.01.2014 for Kshs 580,000,000/=.

11. Learned counsel for the applicant in the said submissions denied receipt of the demand in writing and the demand letters alluded to by the 2nd to 5th Respondents have no bearing to the secured amounts under the debenture. According to counsel the reliance on Section 690 of the Insolvency Act, 2015 by the Respondents is incorrect because the same does not apply to the holder of a floating charge created before the commencement of the said section. Learned counsel posited that the Section 690 applies to companies under liquidation or administration and the applicant is not under liquidation or administration; further that with the repeal of the Companies Act, any appointment of receivers under the said Act is not provided for under the law. According to counsel, the Respondent had to comply with the applicable law of the land and therefore the requirement for notice under Section 90 of the Land Act had to be complied with; he cited the case of **David Githome Kuhiguka v Equity Bank (2013) eKLR** where the court allowed an application because of failure to comply with Section 90(2) (b) of the Land Act in order to remedy a default. Learned counsel challenged the actions of the 1st Respondent and cited the case of **In the Matter of Imperial Bank Limited (In Receivership), Miscellaneous Application 43 of 2016** where the court observed that the receiver ought to manage the company as a going concern. He urged the court to allow the application.

12. Learned counsel for the Respondents submitted that it is not disputed that loan facilities were extended to the applicant and that demands were made that were received by the applicant. Further that despite the passage of time due for repayment, the Respondents did not take action and that the 1st Respondent was appointed as receiver who has not received a statement of affairs and that to date the applicant is indebted to the 2nd to 5th Respondents to the sum of over Kshs 6.445 billion as at June 2017 and further that the floating charges in form of debentures that the 2nd to 5th Respondents hold predate 2016 when the Insolvency Act 2015 came into force. Learned counsel submitted that the parties are bound by the contract and cited the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another (2002) EA 503** and added that the court cannot rewrite the contract for the parties. According to counsel, demands were sent in respect of each of the respective facilities advanced to the applicant and that the 1st Respondent was appointed under Section 690(4) of the Insolvency Act that saved the rights of holders of floating charges that predated the coming into force of the Insolvency Act. Learned Counsel submitted that the applicant has failed to address how he will repay the outstanding amounts and added that the applicant does not deserve the remedies sought because the 1st Respondent is an agent of the applicant by dint of the debentures advanced by the 2nd to 5th Respondents. Further that the 1st Respondent is lawfully in office and has denied any intention of disposing off the Applicant. In addition, the proposal of a voluntary arrangement is dependent on the consent of creditors under Section 628(6), a court order, or where there is no proposal made by the applicant and that the applicant company is in receivership under Section 690(4) of the Insolvency act and therefore excluded from the voluntary arrangement scheme. Learned counsel added that an injunction would serve as a bar to the enforcement of the contractual rights of the 2nd to 5th Respondents as was observed in **Mrao Ltd v First American Bank (2003) KLR 125 at 128.**

13. The pleadings and the submissions have been considered. The undisputed facts are that the 2nd to 5th Respondents advanced loan facilities to the applicant and the same was effected vide contracts that were duly executed and indeed the applicant is indebted to the said 2nd to 5th Respondents and is in breach of the said contracts.

14. The pleadings elicit the following issues for courts' determination:-

a) Whether the Applicant has a cause of action against the Respondents?

b) Whether the 2nd Respondent wrongly withdrew consent for an additional loan facility?

c) Whether the appointment of the 1st Respondent as Receiver/Manager of the Applicant was lawful?

d) Whether the 1st Respondent's take over of Business and Assets of the applicant thereon was lawful?

e) Whether there was sale of the Applicant's assets and whether the same was lawful and effectual?

f) Whether the Deed of appointment of receiver executed on 18th May, 2018 between the Respondents and the 1st Respondent's takeover of the applicant's premises were valid and or lawful?

g) Whether the parties are entitled to any of the remedies prayed for (respectively)?

15. Before I proceed to resolve the above issues, I want to make a general comment on the documents exhibited in the respective pleadings. No admission is at this stage made as to the contents of all such documents as facts not contested. The only facts agreed upon are the facts the parties specifically mentioned as facts that are undisputed.

Issue No. 1 – Whether Applicant has a cause of action against the Respondents?

16. To determine whether there is a cause of action a court has to look at the pleadings and not beyond. The plaint must disclose three elements:

- That the plaintiff enjoyed a right
- That the right has been violated and
- That the defendant is liable.

See: Auto Garage & Others v Motokov [1971]EA 392

17. It is generally pleaded that the applicant had a factory business. The applicant thereby has had enjoyment of interests in the business and its assets. It is pleaded that the 2nd to 5th Respondents wrongfully and unlawfully appointed the 1st Respondent as a Receiver/Manager of the applicant and he had sold company property and at an undervalue.

18. The applicant contests the appointment of receiver on the grounds that it was done without notifying the court and in contravention of the Insolvency Act and further that the same was made under the repealed Companies Act. It was further pleaded that 1st Respondent is not running the applicant company as a going concern. I find that the applicant claims a right in the factory business and its assets that its rights are infringed by Respondents. Also the 1st Respondent as an appointed receiver of the applicant vide appointment deed claims that he has right to exercise his functions and the 2nd to 5th Respondents have stated that there are amounts owing to them by virtue of facilities advanced to the applicant. I accordingly find that the applicant has a cause of action disclosed in their pleadings against the Respondents.

19. It is an agreed fact that the applicant executed facility letters with the 2nd to 5th Respondents and there was an allegation that the applicant breached the terms of the loan contract. There is an allegation that the 2nd Respondent withdrew consent for an additional credit facility and this according to the applicant was meant to service the outstanding amount that the applicant owed to the 2nd to the 5th Respondents. However, it is a trite rule of burden of proof that he who alleges or asserts a fact has a burden to prove the same. See: Sections 107-109 Evidence Act. The burden was upon the applicant to prove, on a balance of probabilities, the wrongful actions of the 2nd Respondent and the 2nd Respondent in their pleadings averred that the same would amount to breach of the Central Prudential Bank Guidelines. At this interim stage it would not be possible to make a definite determination of the 2nd issue and therefore I will reserve it for the hearing of the requisite parties in order to grant the final orders.

Issue No:3, 4 and 6 – whether the Appointment of the 1st Respondent as Receiver/Manager of the Applicant was lawful?

20. Counsel for the applicant submitted that the 1st Respondent was not lawfully appointed as a Receiver/Manager of the applicant for three reasons.

Firstly the 2nd to 5th Respondents failed to notify the court of the appointment as required by Section 537 of the Insolvency Act, 2015 and the said non-compliance meant the appointment was unlawful.

Secondly that the failure to notify the court, official receiver, contributors of the company and the company's creditors was in breach of Section 539 of the Insolvency Act.

Thirdly, that the appointment was done under the Repealed Companies Act meaning that the laid down procedures of appointment and taking office, so as to set about performing the functions of receivership had to be complied with as per the Insolvency Act 2015 and not the companies Act Cap 486 that was repealed and in the instant case it was not done.

21. To resolve this issue the court must determine:-

- Firstly whether the circumstances justified the appointment of a Receiver.
- Secondly, whether the appointment was in accordance with the provisions of the law.

22. The law in force when the debenture agreements were executed between 2010 to 2014 was the Companies Act, Cap 486. The debenture agreement provided under clause 11 that if the monies became payable, a demand shall be made. Further article 13 of the debenture executed on 7th October, 2010 in annexture BM1 provided that :

> ***"At any time after the principal monies hereby secured become payable either as a result of a lawful demand being paid or under the provisions of Clause 11 hereof, or if requested by the company and so that no delay or waiver of the rights to exercise the powers hereby conferred shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law the Bank may in writing under the hand of any of its officers of attorneys or under its common seal appoint in writing any person or any persons whether an officer or officers or agent or agents of the bank or not to be a receiver and/or manager or joint receivers or receivers and managers of the property and assets hereby charged or any part thereof (in this Debenture referred to as "Receiver) upon such terms as to remuneration or otherwise as the Bank shall think fit and may in like manner from time to time remove any receiver so appointed and appoint another or others in his or her stead. Where more than one Receiver is appointed the Receivers shall have power to act severally unless the Bank shall specify otherwise in their appointment.''***

23. It is the applicant's case that the appointment of receiver was to be governed by Section 522, 537 and 539 of the Insolvency Act 2015.

24. The provisions of Section 537 of the Act are as follows which reads:-

"1) A person who appoints an administrator of a company under section 534 shall lodge with the Court—

(a) A notice of appointment that complies with subsections (2); and

(b) Such other documents as may be prescribed by the insolvency regulations for the purposes of this section.

(2) A notice of appointment complies with this subsection if—

(a) it includes a statutory declaration by or on behalf of the person who makes the appointment—

(i) *that the person is the holder of a qualifying floating charge in respect of the company's property;*

(ii) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment; and

(iii) that the appointment is in accordance with this Part; and

(b) it identifies the administrator and is accompanied by a statement by the administrator—

(i) that the administrator consents to the appointment;

(ii) that in the administrator's opinion the purpose of administration is reasonably likely to be achieved; and

(iii) giving such other information and opinions of a kind prescribed by the insolvency regulations for the purposes of this section.

(3) A statutory declaration under subsection (2) is not effective unless it is made during the period prescribed by the insolvency regulations for the purposes of this section".

In addition to observing the requirements of this section ,the appointing authority must pay heed to the provisions of Regulation 102 which elaborate on the requirements as follows:-

"(1) For the purposes of section 537 of the Act, a notice of appointment of an administrator of a company is required to be accompanied by an affidavit of statement of facts that contains the information specified in paragraph (2).

(2) The notice of appointment shall be in Form 36 set out in the First Schedule.

(3) The affidavit referred to under paragraph (1) shall contain the following information—

(a) if the application is made by a creditor on behalf of that creditor and others, the names of the others;

(b) if the application is made by the holder of a qualifying floating charge, details of the charge including—

(i) the date of the charge;

(ii) the date on which it was registered; and

(iii) the maximum amount if any secured by the charge;

(c) if the company is registered under the Companies Act 2015—

(i) its nominal capital, the number of shares into which the capital is divided, the nominal value of each share and the amount of capital paid up or treated as paid up, or

(ii) that it is a company limited by guarantee;

(d) the principal business carried on by the company;

(e) that the applicant believes, for the reasons set out in the statutory declaration in support of the application, that the company is, or is likely to become, unable to pay its debts;

(f) the address for service of the applicant or the applicant's advocate;

(g) the names and addresses of the holders of prior floating charges and details of the charges;

(h) a statement indicating—

(i) whether the company is subject to insolvency proceedings at the date of the notice; and

(ii) if it is, details of the proceedings.

Further Section 522 of the Act which sets out the objectives of Administration is useful in understanding the nature of administration. It reads;

"(1) The objectives of the administration of a company are the following:

(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.

(2) Subject to subsection (4), the administrator of a company shall perform the administrator's functions in the interests of the company's creditors as a whole.

(3) The administrator shall perform the administrator's functions with the objective specified in subsection (1) (a) unless the administrator believes either—

(a) that it is not reasonably practicable to achieve that objective; or

(b) that the objective specified in subsection (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform the administrator's functions with the objective specified in subsection (1)(c) only if—

(a) the administrator believes that it is not reasonably practicable to achieve either of the objectives specified in subsection (1)(a) and (b); and

(b) the administrator does not unnecessarily harm the interests of the creditors of the company as a whole".

25. Section 539 provides as follows:-

" (1) As soon as is reasonably practicable after the requirements of section 537 are satisfied, the person who appointed the administrator under section 534 shall notify the administrator, and such other persons as may be prescribed by the insolvency regulations for the purposes of this section, that those requirements have been satisfied.

(2) A person who, without reasonable excuse, fails to comply with subsection (1) commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings".

26. My considered view is that by the above provisions the Debentures gave power to the 2nd to 5th Respondents to appoint a Receiver in the event of default of payment; the applicant has not denied default of payment of the amounts advanced to it therefore the circumstances allowed the appointment of a receiver and the 1st Respondent was duly appointed. The law applicable at the time the amount became payable was the Insolvency Act, however, the instruments creating the debenture define the powers of the Receiver. Clause 13 above refers to the person appointed as the Receiver and Manager and not just a Receiver, however for purposes of the contract he is referred to as a receiver. The power of a Receiver and Manager (also called Receiver Manager) is wider than that of a Receiver. The Receiver and Manager has the extra and important managerial function. Once appointed under the provisions of Clause 13, the Receiver and Manager takes up many of the roles which ordinarily belong to the Directors of the Company. A key function of the Receiver and Manager is to keep the company as a going concern. Weighing in on the differences between the Receiver and The Receiver and Manager, Gikonyo J had this to say in **Surya Holdings Limited & 2 others vs. CFC Stanbic Bank Limited [2015] eKLR**;-

"*[24] From the outset, let it be known that, the law especially on the duties of Receiver appointed by the court, and the one appointed out of court by debenture-holder is no longer seen as disparate. The niche development of the law is found in the difference between mere receiver and ''receiver and manager''. The difference is not a moot issue but a matter of law. ''Receivers and Managers''entails not only receiving rents and profits, or getting in outstanding property, but also carrying on or superintending a trade, business or undertaking of the company. Receiver and Manager will have power to deal with the property, run the business of the company and appropriate the proceeds thereof in a proper manner for the benefit of the debenture-holder first, and of the company, secured creditors and guarantors of the company. Receiver and Manager is an agent of the Company, but*

stand in a fiduciary relationship with and owes duties to both parties. Given the very nature of the position of Receiver and Manager who has control over the property of the company and is running the enterprise as a going concern as is the case here, doubtless, has a duty to account to the law, the debenture-holder and the company".

27. Therefore by inclusion the appointment clause meant that the appointment was within the contract. The 2nd to 5th Respondents have been assailed for failing to give notice and the persons to whom the Notice would be given (for purposes of section 539) are prescribed by regulation 109 to be :-

(a) The Court

(b) Official Receiver

(c) The Directors of Company

(d) Contributory of company and

(e) The Company's Creditors

28. Counsel for the Respondents submitted that the notice was published in the nation and that the same served as notice to the company creditors. The 2nd Respondent in their affidavit averred that the appointment was served on the applicant and published in the Daily Nation and served as notice to Creditors and Debtors alluded to a notice that was received by the official receiver on 28th May, 2018 therefore I find that the official receiver and creditors and debtors were deemed to have been duly notified. The makers of the Insolvency Regulations made it a requirement that a Notice of appointment of an Administrator be lodged with the court and in this regard the court has seen the notice for the first time when the Replying affidavit was filed. The debenture agreement reserved the right to appointment of a receiver and manager to the various 2nd to 5th Respondents in the respective contracts therefore this was not an appointment by court and in any event the notices lodged with the official receiver was notice to anyone who wished to deal with a Company's property because a search on the Company was indicative that it was in administration.

29. I am in this regard satisfied that the appointment of the 1st Respondent in the manner it did was within the terms of the contract and also to a large extent in compliance with the Insolvency Act; it was lawful in that regard.

30. The applicant has assailed the movement of the 1st Respondent onto their premises. I refer to clause 14.1 of the debenture that was agreed to by the Applicant and place reliance on **Dunlop Pneumatic Tyre Co. V/s Selfridge & Co. Ltd. (1915) Ac 847** at page 853 where Viscount Hard L.C pronounced two fundamental principles:

1. Only a person who is a party to a contract can sue on it, and

2. Only a person who has furnished consideration can enforce rights or suffer obligations under the contract.

On the second principle he stated:

"A second principle in that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or some other person at the promisor's request. (emphasis mine).

He further stated:

"A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him to sue, he must have given consideration either personally or through the promisee acting as his agent in giving it."

31. It must be noted that he/she who has a right to sue under a contract he/she also has obligations under that contract and on the converse, he who has a right to benefit under a contract has to have had consideration and I have studied the pleadings and noted that the consideration in this case is the reservation of the right to appoint a receiver and manager as well as the deed of appointment that is marked BM1. The same has been duly registered as indicated on the first page of the Debenture therefore it is valid. See **Re Monolithic Building Co. [1915] 1Ch 643** where it was observed that a Charge is void for no-registration. I find that the documents on which the right to appoint a Receiver/Manager of the Applicant was founded were valid.

Issue No: 4 and 5- Whether the take over of the applicant's Business and Assets thereon was lawful?

32. Regarding the takeover and sale, the 1st Respondent admitted that he had a list of the Applicant's debtors. On record is no evidence for sale of the applicant's assets and if there was such action, I could not make any orders without hearing the purchasers. The 1st Respondent has averred that the applicant was required to prepare and submit a statement of Affairs and he has not got any cooperation from the applicant. As indicated earlier, an analysis of the evidence on record shows that the 1st Respondent moved onto the applicant's property, however there is no indication of him offering for sale or alienating in any manner whatsoever any of the applicant's land, properties, machinery, equipment, assets or stock. In any event there are mandatory provisions of the law that would set in before such sale especially of land is effected. I have no hesitation in finding the said issue in the negative and observing that the prayer in respect of the same is premature.

I have noted the apprehensions of the applicant and caution the 1st Respondent against what would amount to bad faith. In **Yosiya Sajabi v/s Musa Umar Anireliwalla [1956]23** EACA 7 Brigg, Ag P of the East African Court of Appeal stated:-

> ***"The English rule that although a mortgagee, in selling is not a trustee for the mortgagor, he must sell in good faith and at a reasonable price, applies ... It obviously requires that a mortgagee must not take a lower price than he knows to be obtainable. It also, I think, leads to the conclusion that if the mortgagee acts in secret and conceals what he is doing from the mortgagor, he may expose himself to some suspicions of not acting in good faith.***
>
> ***This suspicions must at least be increased if the mortgagee sell in secret with knowledge that the validity of his notice of sale is challenged on grounds (which are) not prima facie unreasonable.".***

Issue No: 7 – Whether the parties are entitled to any remedies prayed for respectively?

33. The applicant prayed for interim and final injunctive reliefs as well as a declaration that the appointment of the 1st Respondent was void and that he be ejected from the suit premises and properties. The Respondents urged the court to uphold the impugned appointment because according to the 2nd Respondent whose representative averred that on advice from his advocates on record Section 690(4) of the Insolvency Act, 2015 empowered the holders of a floating charge to appoint an administrative receiver.

34. Resolution of this issue must be in line with my findings and holdings herein. These are:-

a. The Applicant has in their respective pleadings disclosed a cause of action against the Respondents and the Respondents have disclosed cause of action against the Applicant in light of (b.) below.

b. There have been amounts of money advanced to the Applicant by the 2nd to 5th Respondents and the Applicant has defaulted.

c. The alleged acts of withdrawal of consent to an additional facility by the 2nd Respondent had not been proved

d. The appointment of the 1st Respondent as Receiver/Manager of the Applicant was valid and lawful. It was an out of court appointment and the sanction of court is not necessary. Section 690(4) of the Insolvency Act does not apply to holders of a floating charge that was created before the commencement of the Section.

e. The 2nd Respondents entry onto the applicant's premises was lawful and within the premises of contract.

f. There was no proof of effectual sale or offering for sale or alienating in any manner whatsoever any of the applicant's land, properties, machinery, equipment, assets or stock.

g. There is no indication of a proposal to settle the loan amounts but there is indication of an intention to make a proposal.

35. In view of the above findings and holdings I make the orders regarding the application dated 20th July 2018 as follows:-

a) The interim Prayers (**a**) to (**d**) are dismissed.

b) The Final Prayers (**a**) to (**d**) are dismissed.

c) Prayer (**e**) in the final prayers is allowed.

d) I will not uphold the appointment made by the 2nd to 5th Respondents because it was made out of court. However I will not revoke it as it was sanctioned under the debentures and floating charges.

e) The parties shall bear their own costs

It is so ordered.

Dated and delivered at **Machakos** this **26th** day of **September, 2019.**

D. K. Kemei

Judge