



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPLICATION NO. E088 OF 2019**

**IN THE MATTER OF COOPERATIVE MURATORI & CEMENTISTI – CMC DI RAVENNA**

**AND**

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

**AND**

**IN THE MATTER OF AN APPLICATION FOR RECOGNITION OF A FOREIGN PROCEEDINGS**

**COOPERATIVE MURATORI & CEMENTISTI – CMC DI RAVENNA.....APPLICANT**

**RULING**

1. The issues raised herein invite this Court to discuss the procedure and circumstances under which Cross-Border Insolvency proceedings can be recognized in Kenya.
2. Cooperative Muratori & Cementisti - CMC DI Ravenna (hereinafter CMC DI Ravenna) is a manufacturing and labour cooperative company registered in Italy with a registered office in Ravenna, via Trieste 76. An annexure to its articles of association shows that it has established branches in no less than 35 countries. One such branch is CMC DI Ravenna Kenya Branch.
3. In an application anchored on the provisions of Section 720 of the Insolvency Act (the **Act**) and its Fifth Schedule (the **Schedule**), CMC DI Ravenna seeks a raft of orders as follows:-
  1. The Honourable Court be pleased to recognize the foreign proceedings currently before the Court of Ravenna in Italy where the Applicant is a party.
  2. The Honourable Court be pleased to recognize the decree of the Court of Ravenna in Italy issued on 6<sup>th</sup> December 2018 and extended on 6<sup>th</sup> February 2019 granting the application by the Applicant, COOPERATIVE MURATORI & CEMENTISTI – CMC DI RAVENNA, filed under Article 160 and 161 Section 6 of the Italian Royal Decree No. 267 of 16<sup>th</sup> March 1942.
  3. The Honourable Court be pleased to accept the Applicant's undertaking to give notice within a reasonable time, through the Foreign Representatives, 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.
  4. The Honourable Court be pleased to accept the Applicant's undertaking to give notice within a reasonable time, through the Foreign Representatives, to all persons within the Republic of Kenya whose rights, obligations or interests may be affected by orders sought in this Application.
  5. The Honourable Court be pleased to stay and or issue an injunction barring any and all adverse Civil actions, operations of any orders and decrees issued against COOPERATIVE MURATORI & CEMENTISTI – CMC DI RAVENNA and its subsidiaries and or Branches specifically in Nairobi HCCC 96 of 2019, Barclays Bank of Kenya Limited Vs CMC Di Ravenna, Italy, Nairobi CMCC 6523 of 2018 Iota Excavations and Rentals Limited Vs CMC Ravenna (Kenya Branch) Limited, Nairobi CMCC ESS Equipment Kenya Limited Vs CMC Di Ravenna (Kenya Branch) Limited pending the hearing and determination of this Application.

6. The Honourable Court be pleased to stay and or issue an injunction barring any and all adverse Civil actions, operations of any orders and decrees issued against COOPERATIVE MURATORI & CEMENTISTI – CMC DI RAVENNA and its subsidiaries and or Branches specifically in Nairobi HCCC 96 of 2019, Barclays Bank of Kenya Limited Vs CMC Di Ravenna, Italy, Nairobi CMCC 6523 of 2018 Iota Excavations and Rentals Limited Vs CMC Ravenna (Kenya Branch) Limited, Nairobi CMCC ESS Equipment Kenya Limited Vs CMC Di Ravenna (Kenya Branch) Limited pending the hearing and determination of the foreign proceedings in the Italian Court in Ravenna.

7. 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 COOPERATIVE 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.

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

9. This Honourable Court grants any relief the Court may deem fit to grant that may be available to the Applicant.

10. The costs of this application be provided for.

4. The application is resisted by some Kenya creditors namely Charlston Travel Limited, Sika Kenya Limited, Gilanis Supermarket Limited, ESS Equipment Kenya Limited, C.K Patel Limited, Oilfield Movers Limited, Rift Valley Water Service Board, Signion freight Ltd.,Iota Excavation and Rentals, and Toplivo Company Limited(jointly **the Kenyan Creditors**). The Creditors take not dissimilar positions and it is convenient to discuss their arguments together.

5. The Motion before Court is supported by affidavits sworn by Antonio Gaiani and Alfredo Fioretti. Antonio is one of three Judicial Commissioners appointed by the Court of Ravenna to, inter alia, monitor the activities undertaken by CMC Ravenna in order to reorganize, restructure and rescue the company. He depones that the Company filed a preventive application on 4<sup>th</sup> December 2018 with the Italian Court to commence the process of voluntary arrangement with creditors pursuant to Article 160 and 161 of the Italian Bankruptcy Law. It is said that this procedure is akin to that under part IX of our Act.

6. It is averred that the Court issued a Decree on 6<sup>th</sup> December 2018 accepting the request to commence the business rescue plan and which it extended to 6<sup>th</sup> April 2019. In a subsequent affidavit sworn by Fabrizio Corsini ,said to be a duly appointed legal counsel appointed by CMC DI Ravenna , he states that a reorganization plan was filed before the Italian Court on 8<sup>th</sup> April 2019 and the same was before the Court for examination as at the date of his affidavit, being 12<sup>th</sup> April 2019 .

7. It is deponed that, in the meantime, the Court in Italy issued orders granting a moratorium to the Company barring creditors from proceeding with adverse actions against it as the Court considers the rescue plan. It is the decree and those orders that the Company seeks to be recognized in Kenya. This Court is told that the Italian proceedings have been recognized in Singapore and a similar application is pending determination in South Africa.

8. The Court has considered the application and its opposition and frames following issues for discussion and resolution;

i. Is there a proper applicant before Court?

ii. If the answer to (i) is in the affirmative, does the application meet the requirements of paragraph 17 of the Schedule.

iii. Even if the answer to (i) and (ii) above are in the affirmative, does the grant of the orders nevertheless prejudice Kenyan creditors or is otherwise contrary to public policy.

9. As a preamble it needs to be observed that the United National Commission on International Trade Law (UNCITRAL Model Law on Cross-border Insolvency) has the force of law in Kenya in the form set out in the Fifth Schedule of the Act. Section 720 embeds it into our national law as follows:-

#### S. 720. Cross border insolvency

The United Nations Commission on International Trade Law (Model Law on Cross-Border Insolvency) has the force of law in Kenya in the form set out in the Fifth Schedule.

10. Apparent from the wording of Section 720 is that the model law is Kenyan law on cross-border insolvency to the extent set out in the Fifth schedule. This is in tandem with the aspiration of the Model Law that while it provides a template on how a country may structure its legislation on cross-border insolvency, each country elects the extent to which it adopts the provisions. In this regard “Uncitral Model Law on Cross-Border Insolvency: The Judicial Perspective” makes this important observation on how cross-border insolvency law should be interpreted;

While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins, the domestic law of most States is likely to require interpretation in accordance with national law; unless the enacting State has endorsed the “inter-national” approach in its own legislation. In any event, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.

11. Paragraph 2 of the Fifth Schedule sets out the objectives of cross-border insolvency regime in Kenya to be:-

2. Purpose of this Schedule

The purpose of this Schedule is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of attaining—

- (a) co-operation between the courts and other competent authorities of Kenya and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximisation of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses with a view to protecting investment and preserving employment.

12. Paragraph 3 is then on the scope of application of the Schedule and reads:-

3. Scope of application of this Schedule

(1) Except as provided in subparagraph (2), this Schedule applies—

- (a) assistance is sought in Kenya by a foreign court or a foreign representative in connection with a foreign proceeding;
- (b) assistance is sought in a foreign State in connection with a proceeding under this Act and any other written law relating to insolvency in Kenya;
- (c) a foreign proceeding and a proceeding under this Act and any other written law relating to Insolvency in Kenya in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under this Act or any other written law relating to insolvency in Kenya.

(2) This Schedule does not apply to a company that holds a licence granted under section 5 of the Banking Act if—

- (a) the Central Bank of Kenya has intervened in the management of the company in accordance with section 34 of that Act and that intervention has not ceased; or
- (b) the licence of the company is suspended as a result of the operation of section 47 of that Act.

13. Texts on cross-border insolvency make reference to two forms of cross -border insolvency laws; universality and territoriality. These are described thus;

“...Under universalism, the liquidation of an insolvent debtor with assets in multiple countries is carried out in the country where the debtor has its center of main interests (COMI). The court in the COMI would have global reach to cover the debtor's assets worldwide. The law that would apply would also be the law of that country. Conversely, under territoriality, creditors in each country where the debtor's assets are located commence proceedings within their own jurisdiction using their own laws. This is often called the “grab rule” because local creditors race to grab the assets that are situated in the local jurisdiction (often to the detriment of other creditors in other parts of the world) before international liquidation proceedings can reach the far-flung assets...”

*(Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling)*

*Professor Sandeep Gopalan\* and Michael Guihot\*\**

14. This Court agrees with Counsel Anami for the Applicant that Kenya has adopted the universality model and this would be clear from paragraph 18(3) on presumptions concerning recognition;

18. Presumptions concerning recognition

(1) If the decision or certificate referred to in paragraph 17(2) indicates that the foreign proceeding is a proceeding within the

meaning of paragraph 2(a) and that the foreign representative is a person or body within the meaning of paragraph 2(d), the Court is entitled to presume that that is the case.

(2) The Court is entitled to presume that documents submitted in support of the application for recognition are authentic.

(3) In the absence of proof to the contrary, the debtor's registered office in the case of a body corporate, or the person's usual residence in the case of a natural person, is presumed to be the centre of the debtor's main interests.

15. With these preliminary observations in mind, the Court turns to consider the first issue.

### **A proper applicant?**

16. The Kenyan creditors contend that as the Applicant is not a foreign representative as defined in the Fifth Schedule, the Applicant before lacks standing to institute the instant proceedings. It being common ground that the application before Court is an application for recognition of a foreign proceeding, paragraph 17(1) is explicit as to who may apply for such recognition :-

17(1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.

17. Paragraph 4 of the Schedule then defines a “ foreign representative” to be;

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

18. The objection taken up to the application, as I understand it, is that the Application is filed by CMC Ravenna (the Debtor) itself and not the supposed foreign representative.

19. I would nevertheless think that it is not controversial that, although the application is brought in the name of the Debtor, the person who moves the Motion is one of the three Judicial Commissioners said to have been duly appointed by the Court of Ravenna to administer the reorganization plan of the Debtor. In this regard is Antonio's disposition in his affidavit in support of the application:

[2] I have been advised by the advocates on record for the applicant which advise I believe to be sound and true that I am swearing this affidavit on behalf of the company as its foreign representative within the meaning prescribed under Paragraph 4 of the Fifth Schedule of the Insolvency Act No. 18 of 2015 Laws of Kenya.

20. The Court takes the view that whilst brought in the name of the Debtor what is crucial is that the foreign representative is the true owner of the proceedings. As long as it is the foreign representative who presents the application then it is the foreign representative who is the Applicant. It would be too narrow a construction to find that merely because the application is in the name of the Debtor, then the proceedings belong to the Debtor. It is the foreign representative who commences the proceedings and has ownership of them. The alleged Foreign Representative is therefore the true applicant.

21. Next I turn to consider whether the application meets the requirements of paragraph 17 of the Fifth schedule. Paragraph 17 reads:-

17. Application for recognition of a foreign proceeding

(1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) 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.

(3) An application for recognition may also be rejected if it not accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The Court may require a translation of documents supplied in support of the application for recognition into English as the official language of Kenya.

22. Annexed to the application is a copy of a Decree dated 6<sup>th</sup> December 2018 in the Court of Ravenna appointing Dr. Antonio Gaiani, Dr. Antonio Mandrioli and Dr. Andrea Ferri as the Judicial Commissioners to the company. That decree also sets out the mandate of the three

Judicial Commissioners and a timeframe of 60 days within which they are to file a preventive re-organisation proposal. To it is also a translation of the Decree from Italian to English.

23. Also accompanying the application for recognition is a copy of the application for preventive arrangement filed in the Court at Ravenna.

24. The creditors hold that the documents placed before Court are not those envisaged in paragraph 17 (2) of the Fifth schedule.

25. Before I give my view of the matter I need to observe that paragraph 17(2) is a slight variation of Article 15 of the Model law. So as to demonstrate this I reproduce Article 15;

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(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 subparagraphs (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.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

*(UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation)*

26. Two things to be noted. First, the Model Law provides that any of evidence set out in Article 14(b) **shall** accompany the application. The word shall is used and the evidence set out in (a), (b) and (c) are in the alternative. Any of the three is good enough. On the other hand our statute provides that a recognition application may be rejected if not accompanied by documents in (a) and (b) or evidence contemplate in (c). As noted earlier countries adopting the model law have the leeway as to the extent and manner of adoption. The Kenyan legislation through section 720 speaks to making the Model Law part of the national legislation but only to the extent set out in the fifth schedule. It is therefore my understanding that any modifications found in the fifth schedule are deliberate.

27. It however seems to this Court that even if it is assumed that under our legislation the requirements of the certified copy of the foreign decision and certificate are conjunctive, the use of the words “may be rejected” gives the Court wide power to grant recognition even without one. In addition, by virtue of the latitude granted by subparagraph 2(c), the Court may still accept an application that does not have either or both pieces of evidence but nevertheless has other evidence that satisfies the court as to the existence of the foreign proceeding and of the appointment of the foreign representative. This is the approach I will take.

28. What has been displayed in the Application in supposed fulfilment of paragraph 17(2) (a) is a copy of the Decree of the Court of Ravenna in Italy. The Applicant does not provide a certified copy of the decree or decision appointing the foreign representative. And if in further attempt to meet the requirements of paragraph 17 (2)(a), the applicant displays a copy of the preventive application said to commence the process of voluntary arrangement, he fails again. This is because the document is not a certified copy.

29. As regards condition 17(2) (b) there is no certificate from the Court in Italy affirming the existence of the foreign proceeding and/or the appointment.

30. Now, even in the face of a challenge in regard to the documents accompanying the recognition application the applicant makes no effort to avail a certified copy of the documents referred to in paragraph 17(2) (a) or the certificate in paragraph 17(2) (b) by way of a supplementary or further affidavit or in any other way.

31. And while this Court can rely on any other evidence acceptable to it as proof of the existence of the foreign proceeding and appointment of the foreign representative, no other such evidence is provided to this Court. The copies of the application for recognition in South Africa or the order recognizing those proceedings on Singapore, while, perhaps evidence of the existence of those recognition proceedings in South Africa and Singapore are not primary (and therefore acceptable) evidence of existence of the foreign proceedings in Italy and appointment of the foreign representative.

32. In addition, the provisions of paragraph 18 on presumption concerning recognition are not helpful to the applicant’s plight. The provisions read:-

18. Presumptions concerning recognition

(1) If the decision or certificate referred to in paragraph 17(2) indicates that the foreign proceeding is a proceeding within the meaning of paragraph 2(a) and that the foreign representative is a person or body within the meaning of paragraph 2(d), the Court is entitled to presume that that is the case.

(2) The Court is entitled to presume that documents submitted in support of the application for recognition are authentic.

(3) In the absence of proof to the contrary, the debtor's registered office in the case of a body corporate, or the person's usual residence in the case of a natural person, is presumed to be the centre of the debtor's main interests.

The discretion of the Court to presume the authenticity of the documents is limited certified copies of the decision or appointment or a certificate placed before it. In this case none was provided.

33. There could be consequences for Kenyan creditors once a foreign proceeding is recognized. In the matter before Court, the applicant seeks stay orders barring all adverse civil action against the Debtor's Kenyan branch by third parties. This Court must therefore be fully satisfied as to the actual existence of foreign proceedings and appointment of the foreign representative before subjecting persons within its jurisdiction to stay orders made in deference to proceedings outside Kenya. It is for this reason that the prerequisites of paragraph 17(2) are not idle.

34. One other reason would commend this Court not to accept application as presented. Paragraph 17 (3) of the Fifth schedule reads:-

17(3) An application for recognition may also be rejected if it not accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

35. Whether or not there are multiple foreign proceedings in respect to the debtor may have a bearing on the Court's decision to grant an application for recognition of a foreign proceedings and if so the conditions attaching to the recognition. That would be one reason why the statement required by paragraph 17(3) is important. In the matter before me the application is completely silent on this aspect. While reference has been made to recognition proceedings in South Africa and Singapore, paragraph 17(3) is on foreign proceedings and not applications for recognition proceedings. The two are obviously different.

36. The application is far too thin on the requirements of paragraph 17 and should not be allowed to proceed any further. And I must say this. This Court is fully cognizant of its duty to cooperate and right to communicate directly with foreign courts or foreign representatives in respect to Cross border insolvency (See paragraph 27) but surely that duty or right of communication cannot be used by this Court to fish for the pre-condition evidence required by paragraph 17 to be placed before court by an Applicant. That proof is one that the applicant must discharge.

37. What orders then should I make in view of my findings? Kenya stands as a responsible member of the community of nations. Having received the Model law as part of our laws then it is a matter of public policy that, in as much as possible, this Court plays its role in giving effect to the aspirations of the model, one of which is cooperation between foreign in cross -border insolvency matters. For that reason, the Court is inclined to make orders that will grant an opportunity to the Applicant to present an application which conforms with the law for consideration on merit.

38. The suitable order is to strike out the Motion as opposed to dismissing it. The application dated 4<sup>th</sup> April 2019 is struck out with costs to the creditors who filed grounds or affidavits in opposition.

**Dated, Signed and Delivered in Court at Nairobi this 22<sup>nd</sup> Day of November 2019**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Anami & Ndirangu for Applicant

Mutungu for Chege for Charlston Travel

Mweni for Sika (K) Ltd

Adik for Mukele for Toplivo

Kimani for Muhindi for Signion

Kimani for Kagiri for C. K. Patel

Kikuna for Oilfield Movers

Nderu holding brief Gathogo for Gilani

Ogula for Akanu for RVWSB

Ogula for Waithuta for Iota

Ogula for BBK

Court Assistant: Nixon