



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Windingup Cause 44 of 2003

IN THE MATTER OF ALVIK PRESTIGE LIMITED (formerly known as ALVIK KENYA LIMITED) AND IN THE MATTERS OF THE COMPANIES ACT CAP. 486 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 224 OF THE COMPANIES ACT

RULING

By a Notice of Motion dated the 28th July, 2004 and filed on 3-08-2004 the Applicant herein, moved the court for orders that-

- (a) any disposition and/or transfer of the property belonging to the debtor, Alvik Prestige Limited, after the commencement of the Winding-up proceedings herein be declared void;***
- (b) that the said Alvik Prestige Limited be returned to the position obtaining as at the date of the Winding-up Petition;***
- (c) that the costs of the application be provided for.***

The motion was supported by the Affidavit of one ***Chetan Ajit Kumar Shah*** sworn on 28th July, 2004 and filed together with the motion on 3-08-2004, and was further supported by the Supplemental Affidavit of the said ***Chetan Ajit Kumar Shah*** sworn on 2nd February, 2005 and filed on 7th February, 2005. The motion was also based upon the grounds following-

- (1) that a Winding-Up Petition was filed on 27-11-2003 and was advertised on 16-12-2003, and on 2-01-2004;
- (2) that thereafter all the property owned and/or belonging to the debtor Alvik Prestige Limited was transferred to M/S Silentnight Kenya Ltd;
- (3) that no leave of the court was obtained to effect the said transfer and/or disposition;
- (4) in the circumstances the said transfer and/or disposition was/is void;

Mr. Chetan Ajit Kumar Shah also points out in his Supplemental Affidavit that this Court ordered that the debtor herein be wound up. The Winding Up Order was made on 12-10-2004.

The motion was opposed and according to the Replying Affidavit of Harveen Gadhoke who was with David Mutisya Ndonge, one of the Joint Receivers and Managers sworn on 16-09-2004 but filed on the

next day 17-10-2004, the debtor Alvik Prestige Limited had issued a Debenture dated 11-06-2002, in favour of Barclays Bank of Kenya Ltd (**the Bank**) under which the debtor had charged all its goodwill book debts property and assets whatsoever both present and future, including its uncalled capital in favour of the Bank to secure an advance of Kshs.52,000,000/=.

The other facts and arguments on either side will appear in the course of this Ruling. The facts may be summarized as follows:-

- (1) the debtor (Alvik Prestige Ltd) charged its property and assets under a Debenture dated 11-06-2002 (the Debenture) to secure an advance of Kshs.52,000,000/= (the loan) by the Bank.**
- (2) the debtor in the ordinary course of business incurred a further debt to the Applicant herein/Shah Timber Mart) in the sum of Kshs.2,107,838.20 (the further debt).**
- (3) In the event the debtor failed to pay the further debt and the Applicant after the necessary statutory notice of demand filed a petition under the Companies Act, to wind up the Debtor.**
- (4) following the first advertisement of the Petition, another creditor, Sacfee Silvering Ltd. filed notice through its Advocates Kilvin Mogeni, for Ramesh Manek, of intention to appear at the hearing of the Petition in support of the Winding Up of the debtor. A further notice on behalf of Universal Engineering Systems Ltd for a claim of the sum of Kshs.224,370/= was filed by their Advocates Hamilton Harrison & Mathews.**
- (5) There was the Affidavit of Harbhajan Singh Mehangra in support of the Winding Up Petition against the debtor in respect of a claim of Kshs.2,068,866.72 filed by Kabaka & Associates on 6 - 01 - 2004.**
- (6) The Petition was advertised on 16th December, 2003 in the East African Standard, and in the Daily Nation on 2nd January, 2004.**
- (7) The joint Receivers and managers were appointed on 4-02-2004, and advertised the debtors property for sale on 12-02-2004 with the closing date for bids being 20 days later on 24-02-2004.**
- (8) The Affidavit of Harveen Gadhoke does not state when the assets of the debtor were sold. From Exhibit CAKs 5 to the Supporting Affidavit Chetan Ajit Kumar Shah attaching a caption of an advertisement of a showroom relocation sale Silentnight/Alvik Prestige, suggests that the sale was consummated soon after the closing date of the offers of 24-02-2004.**
- (9) The Replying Affidavit of Harveen Gadhoke merely says in paragraph 7 that “there was no surplus realized and some of the creditors were informed so.” The Receiver is careful not to mention what was realized from the sale of the debtors assets which are by their own advertisement on 12-02-2004 appear to be quite substantial.**

The rest of Mr. Harveen Gadhoke's Affidavit an experienced hand in matters of Receivership is short on facts, but very argumentative on matters of law, which he rightly depones on advice of his Advocates on record. I shall revert to these arguments in due course. Suffice it to say, that the real question raised in this application is whether the sale and/or disposition of the debtors assets by the “Receiver/Managers appointed by the Bank without reference to the court was void in terms of section 224 of the Companies Act; Chapter 486, Laws of Kenya.

To answer this question, I shall consider the provisions of the said Section 224 of the Companies Act, aforesaid, in light of the authorities cited to me by Mr. Kariuki, learned Counsel for the creditor Applicant, and Mr. Allen Gichuhi learned counsel for the Bank and the Joint Receivers. The starting point will be the provisions of Section 224, the submissions by Kariuki followed by those of Mr. Allen Gichuhi, and thereafter I shall draw my own conclusions on the matter.

Section 224 of the Companies Act says:-

“S” 224. In a winding up by the court, any disposition of the property of the Company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.”

The Applicant’s case was that following the filing of the Winding Up Petition on 27-11-2003, and advertisement on 16-12-2003 (*in the East African Standard, Daily*) and on 2-01-2004 (*in the Daily Nation*) the Bank ought to have responded to the Petition, but instead it chose to appoint Joint Receivers who proceeded to advertise the debtor’s property without reference to the court. The Petitioner therefore claims that the appointment of the Receivers and subsequent sale and merger of the Respondent with the Interested Party was done in collusion with those parties that is the Bank, the Receivers and the Interested Party (*Silent Kenya Ltd*) to defeat the rights of other creditors such as the Petitioner. Counsel submitted that apart from mere averments by the joint Receiver, there was no evidence produced before the court to show an arm’s length *bona fide* transaction.

Counsel therefore concluded that after filing the Petition for Winding-Up of the debtor and advertising that fact in two daily papers with wide circulation, the Receiver appointed by the Debenture holder, that is the Bank, would seek the consent of the court before proceeding with any sale of the Respondent’s asset. This Counsel submitted, was the implication of Section 224 of the Companies Act whose intent is to protect creditors such as the Petitioner. Counsel submitted that it was not equitable for a secured creditor to allow its debt to accumulate in terms of arrears and interest in unpaid principal, and when another creditor (*unsecured as such*), comes forward seeking to enforce payment of moneys due to it to hijack the process by appointing receivers and those receivers disposing the assets of the debtor. They were free to dispose such assets before the commencement of the Winding-up process and as the receivers sold the debtor’s assets while the process of Winding-Up was in progress, and without the authority of the court the Receivers were in breach of Section 224 of the Companies Act, and the transaction should be declared void.

In conclusion counsel submitted from the Supplemental Affidavit of *Chetan Ajit & Kumar Shah*, that there was no sale of the debtor’s assets, but a merger, and there was no *bona fide* transaction upon which this court can exercise its discretion in favour of either the Respondent or the Interested Party.

In support of these submissions Mr. Kariuki, learned Counsel for the Petitioner referred the court to among other authorities (1) *Halsbury’s Laws of England 4th Edition Volume 7.* (2) the case of *In Re Onward Building Society* (3) *the English and Empire Digest Replacement Vol. 10* (4) *Re-Steane’s Bournemouth), Ltd.* and (5) *Law of Receivers* by P.S. Atchnttheir Pillai and P.M. Krishnan Nair as Revised by Yudhishtira, Senior Advocate.

I propose to revert to these authorities after considering the Respondent’s arguments. The appropriate point to commence this exercise is perhaps the Replying Affidavit of Harveen Gadhoke, as I said, an experienced hand and mind in the areas of Receivership, and he depones on the advice of the Respondent’s Advocates at paragraph of his Replying Affidavit that:-

(a) the Winding Up Petition, in and of itself, does not did not in any way affect the right of the Bank to appoint Receivers as it did;

(b) the assets having been lawfully sold under the

power’s conferred by the debenture cannot be returned as the same were sold within the powers conferred upon us by the debenture.

(c) the Bank as a Debenture holder does not require

the sanction of the court to realize the assets secured by the Debenture and was in no way obligated to seek and obtain leave of the Court to appoint Receivers on account of the Winding-Up Petition, as the law

is clear that leave would only be necessary in a situation where actual winding up has already commenced or where a Winding-Up Order is made and a Liquidator has been appointed which is not the case here. In any event the appointment of a Liquidator in the present case would be futile as there was no surplus left after the assets were realized.

(d) the effect of the appointment of Receivers in

such circumstances, as is the case herein, automatically causes the crystallization of the said, charge over the Company's assets and therefore the Applicant's interests would rank behind those of the Bank as a Debenture holder in the realization process;

(e) in any event if a Winding-Up Order was given and a

Liquidator were appointed, which is not the case herein, the appointment of Receivers was a lawful right of the Debenture-holder (**the Bank therein**) that would be granted by the court as of course and therefore the appointment of Receivers would still be at liberty to take possession and to sell the Company's property and there would be no practical role for the Liquidator unless and until there would be a surplus of assets after the Bank gets paid in full. A Liquidator would not affect our power under the debenture, even if one had been appointed."

As a piece of legal advice cloaked in a sworn statement , the Receiver says that "***the Applicant should have lodged its claim with the Receivers who would then have recognized their interests and of other creditors as is the norm.....***" and adds as a by the way "***there was no surplus realized as some of the creditors were informed.***"

The Receiver also makes a legal conclusion on oath, *inter alia*, that in the circumstances and without prejudice to his other legal points, any orders sought by the Applicant's application be dismissed with costs because it lacks merit and is misconceived and as an afterthought reiterates that the applicant's application has been overtaken by events as the assets of the debtor company have already been realised.

In support of this view of the matter, Mr. Allen Gichuhi learned counsel for the Respondent relied upon not less than six (6) decided cases, as well as the provisions of Section 224 itself of the Companies Act. I shall now consider each of these authorities in turn.

In the matter of the **HOUSE OF MANJI WINDING UP CAUSE NO. 18 of 2000 (unreported)** (Milimani Commercial Courts) was the first case cited. The only similarity in this case to the case at hand is in respect of the one order sought here that the purported sale of the assets by the Receivers be declared void. In that case, Mwera J. found as a fact, that the Petition having been compromised by the consent to pay the debt albeit by installments, the Bank therein as Debenture- holder had authority and power to appoint a Receiver who in turn were not inhibited by the existence of any Winding-Up Petition as there was none. That case is clearly different from the case at hand, and is therefore no authority for the proposition that the Receivers acted within the law in this case.

In the case of **QUEENWAY TRUSTEES LTD -VS- OFFICIAL RECEIVER LIQUIDATOR OF KENYA TANNERIES LTD (Madan, Potter & Kweller J.J.A). [1983] K.L.R. 51**, the Appellant, Queensway Trustees Ltd after **ailing** in the High Court to get an order to declare that the Legal charge created in favour of the applicant by Tanneries of Kenya Ltd (***In Receivership and Liquidation***) over certain lands under a Debenture Trust Deed duly registered but perfected by registration in the Lands Title Registry at Nairobi about two years after the ***commencing of the Winding Up of the Company (Tanneries of Kenya Ltd)*** shall be treated by all concerned as valid security for the sum of Kshs.1,600,000/= and interest intended to be thereby secured "appealed against the decision of Simpson J. (***as he then was***). The Court of Appeal held *inter alia* that-

(1) ***A Winding up by the court commences, from the date of presentation of the Petition, and the***

directors are dismissed from then on, and have no powers to act on behalf of the company. Any charge executed and registered by the directors afterwards is void ab initio.

(2) When a receiver manager is appointed out of court, the management and control of the company's assets are taken out of the hands of the directors. At this stage the corporate structure may remain for purposes of discharging the usual statutory duties, to deal with assets not covered by the security under which the receiver is appointed and property held by the company in trust for third parties."

It is again clear from the facts and holdings in this case, that it has no support for the Respondent's contentions that the receiver manager's action in this case were all in accordance with the requirements of Section 224 of the Companies Act.

The next authority cited by Mr. Allen Gichuhi learned Counsel for the Respondent was **GOSLING – VS- GASKELL & BROCOTT [1897] A.C. 575.** The issue in this case was whether the Receiver appointed under a Trustee Debenture Deed was an agent of the company or of the Trustees who appointed him. Reversing to decision of the Court of Appeal, the House of Lords (Lord Halsbury L.C., Lord Watson L.J., Lord Herschell L.J., Lord Morris L.J. and Lord Davey) held that though after the Winding up order the receiver ceased to be the agent of the company, he did not thereby or at any time receive any implied authority from the trustees to act as their agent, and that as the trustees never gave him any authority in fact, they were not liable for the goods.

Again, I am unable to say what the relevance of this authority is to the matter of hand. The issue in that case was merely whether the receiver, is the agent of the appointing trustees, or the company. It was understood and stated in the Trustee Debenture Deed which conferred the power upon the trustees to appoint a receiver that the receiver was an agent of the company, and where a merchant sued the Trustees and not the company, the trustees were not liable for the goods sold or services rendered to the company. Again this authority is of no avail to the Respondent.

There are however two cases cited by the Respondent's Counsel, and for which I am most grateful to them, which discuss the dichotomy and dilemma upon which the court is placed in determining the rights of a secured creditor under a Debenture or a mortgage to appoint a receiver or a liquidator of a debtor company by the appointment of a receiver manager and liquidator to take possession of the assets of the debtor company and eventually sell them in satisfaction of its secured debt and those of an ordinary unsecured creditor who files a Winding-up Petition in order to force the debtor company to pay up its debts.

The Receiver Mr. Gadhoke in his Replying Affidavit as well as Further Affidavit (sworn on 11-2-2005) seems to suggest that all that is paramount and therefore matters, is the existence of a valid and enforceable Debenture Deed or Mortgage or Charge which confers upon the secured creditor the right to appoint a Receiver/ Manager, and in the case of a Winding Up Order, the appointment of a Liquidator to put the company to death by ascertaining, selling off, distributing the proceeds to the secured creditor firstly, the unsecured creditors, secondly, and to the company, thirdly, if there is any surplus. This is all in order provided there has been no intervention by the court under a Winding Up Petition, and not merely a Winding Up Order. In the case of **RE: HENRY POUND SON & HUTCHINS [1889] 17 Ch. D. 402** a company issued debentures constituting a first charge on the whole of their undertaking and property, and empowering the holders of the debenture in the event of proceedings for the Winding Up of the company, to appoint a receiver invested with very ample powers of carrying on the company's business and managing and disposing of their undertaking and property.

An order was made for the winding up of the company and an official liquidator was appointed. The debenture holders, under their powers appointed a receiver and **applied** to the court that notwithstanding the appointment of the Liquidator the receiver might be at liberty forthwith to take possession of the Company's undertaking and property.

Rugby Q.C., Renshaw Q.C. and Theabald, Counsel for the Applicants the debenture holders argued

that:-

“the receiver appointed by the debenture holders under the power contained in their debentures, is entitled to possession of the mortgagee property, that the court never interferes with the prior rights of mortgagees, and upon being apprised of such rights gives effect to them as a matter of course.

That the applicants were entitled to the leave (to take possession of the undertaking and property) asked for ex debito justitiae, and that the only reason why it is necessary to ask for it is because the official liquidator, being the officer of the court cannot be ousted from possession without leave of the court and threatened that under the powers reserved to the debenture holders, they could sell the company’s undertaking and property forthwith (tomorrow- they said)”

Kay J. who heard the application declined to grant the application to appoint a receiver for the debenture-holders and instead appointed the official liquidator the receiver first of the debenture holders. Kay J. argued that the case before him was that of an equitable – legal interest perhaps, by virtue of the trust deed as to some part of the property but equitable to the rest – seeking to taking every farthing (cent) of these assets out of the hands of the official liquidator, and put them into the hands of a person appointed by himself, who has given no security and for whose dealings the court has no security except the solvency of the limited company which is making the application, and concluded that the court had a discretion to be used very carefully and cautiously to appoint or not to appoint (the debenture holders candidate as receiver).

Kay J. went on to ask himself, ***“What then is the sensible thing to do?”*** If the corporation (he answered), had brought an action, whether before or after the winding-up and had come after the winding-up and asked, for the appointment of a receiver, the settled practice is that the official liquidator, and no other would be appointed such receiver, unless there were some strong reason..... for not appointing him. If the mortgagee of a specific part of the company’s property asked leave to prosecute an action for the realization of his security, notwithstanding the winding-up, the court would allow him to do so..... but not for the whole of the undertaking and property of the company for that would amount to handing over all the property of the company to the mortgagee’s receiver, a course which would be beneficial to the mortgagee but which most probably would be greatly to the injury of the other creditors on whose behalf the court has taken possession. I should hesitate to allow the rights of a mortgagee to be enforced in that way, and to that extent.”

The learned judge then went to say:-

“.....I think the court in a case of that kind has a discretion, and the only point before him was whether he ought to hand over all the property of the company every line of it to the receiver appointed by the mortgagee since the winding-up commenced”

and concluded that would not be a right thing to do, and in the exercise of the discretion which be conceived the court has, declined to do it, and proceeded to appoint the official receiver the receiver on behalf of the debenture holders in the first instance, as well receiver for all other creditors and also reserved the costs of the application to abide the completion of the receivership.

The Debenture-holders appealed, and the appellate court reversing the decision of Kay, J. held that the court ought not to interfere with the right of the debenture holders to appoint a receiver under their deed; and leave was given to the receiver appointed by them to take possession, notwithstanding the appointment of an official liquidator, but without prejudice to any question as to the powers of the receiver, other than the power to take possession and to sell the property. Cotton LJ. who gave the major speech referred to the judgment of Kay J, and said at page 481:-

“The argument has been this, that in this case, if the receiver is only to have such a power as a receiver appointed by the court in an action would have, he must be treated for the purposes of this application as if he were a receiver appointed by the Court.”

That appears to me to be entirely missing the point. If the court appoints a receiver at the instance of the mortgagee, the mortgagee not having without the assistance of the court, power to appoint a receiver, then the court exercises a discretion to whom it thinks best to appoint for the interests of the mortgagee and of the mortgagor, a person who, having regard to the interests of both parties, the court considers the best person. And when a company is being wound up, whether there is a winding up at the time the receiver is appointed by the court or afterwards, then the court says:-

“It is quite useless to have the expense of two receivers, the Liquidator who is, in fact, in some sense a receiver and another receiver appointed in this action.”

There the Court exercises its discretion as to whom it is to appoint. But those cases do not at all apply, in my opinion where a receiver who is asking to be let into possession, has not been appointed by the Court, but is appointed by the mortgagees under the exercise of the power given to them by the Mortgage deed. In such a case it is not left to the court to determine who shall be the receiver best for all the interest of all parties, but the mortgagee comes and says-

“My deed enables me to appoint A.B. and I have appointed him, and I ask the court to let him into possession; that being one of the powers which were given to the receiver by the deed I do not want a receiver appointed by the court, but a receiver appointed under the powers conferred by the deed under which I claim.”

In the case of ***“In re JOSHUA STUBBS, LIMITED BARNEY-VS- JOSHUA STUBBS LIMITED [1891] I CH.D 475***, a case in which Reshaw Q.C. who also urged the case of ***In re Henry Pound, Son & Hutchins*** (*supra*) and more importantly Kay L.J. (who in the first instances heard the case of ***In re Henry Pound, Son & Hutchins***) and Lindley L.J. heard and determined this case. In his judgment Kay L.J. at page 482 said:-

“I am glad this case has come before the Court of Appeal, and that the Court has had an opportunity of expressing its opinion that the two cases of In re David Lloyd & Com [1891] 6 ch D. 339 and In re Henry Pound Sun & Hutchins (supra) were not intended to alter and have not altered the rule of convenience which the court has adopted namely, that where an application is made to the court to appoint a receiver, and another application is made to appoint a liquidator, the court will take care, in order to avoid trouble and expense, that the receiver and the liquidator shall be the same person in every case where that can properly be done;

and concluded that-

(a) ***“As a general rule of convenience, where, upon a company having been ordered to be wound up, the Plaintiff in a debenture holder’s or mortgagees’ action applies to the court for the appointment of a receiver and an application is also made in the winding-up for appointment of a Liquidator, the Court will in the exercise of its discretion appoint a Liquidator to act in both capacities;***

(b) ***Also where the debenture-holders or mortgagees have, either before or after the Winding-up, obtained an order in their action appointing a receiver, and subsequently a Liquidator is appointed to the Winding-Up the court will ordinarily in the exercise of its discretion appoint the Liquidator in the place of the receiver, to act as receiver as well as Liquidator, upon the ground that under the winding-up machinery provided for under the Companies Act the Liquidator can get in such outstanding assets more expeditiously and with less expense than the receiver, but it will not in general do so where there is no substantial amount of calls and similar assets outstanding.***

(d) ***But where a receiver has been appointed by the debenture holders or mortgagees themselves under a power given to them by their security, the court will not displace him by the Liquidator.***

(e) ***Where a judge of first instance has, in the exercise of his discretion refused to displace a receiver by a Liquidator, the Court of Appeal will not, in the absence of special circumstances to justify their so doing interfere with that exercise of discretion.”***

Semble, if in the debenture – holders or mortgagees’ action an order has been made appointing a person a Manager of the Company’s business as well as receiver, the court will in case the business is one that can still be carried on, appoint the Liquidator to act as both receiver and Manager in his place.

In ***Re STEANE’S (Bourneworth) LTD [1950] I ALL ER. 21***, unknown to the Company’s directors they sealed and issued a debenture to secure advances to the company, after the Bank had presented a Petition for winding-up of the Company. After the Winding-up order was made the applicant director applied for an order under Section 227 of the Companies Act of 1948 that his debenture should not be void but should be treated as valid to the extent of the sums advanced by him and cost of preparation and registration of the debenture together with interest, and the taxed costs be added to the security.

The Court held “the legislature, having omitted to indicate any particular principles which should govern the exercise of the discretion vested in the Court by Section 227, must be deemed to have left such exercise of the discretion entirely at large and controlled only by those general principles which applied to every kind of judicial discretion; in exercising its discretion the court must decide what would be just and fair in the circumstances of each case, having special regard to the question of the good faith and honest intention of the persons concerned; and as the applicant had acted throughout in good faith, his object being merely to enable the company to fulfill its contracts, the court would make the order asked for.”

The case of *Re Para Word & Co. Ltd [1926] Ch. D. 828* was to the same effect.

To repeat the exhortation of KAY LIJ in his interlocutory remarks in the case of ***In Re JOSHUA STUBBS, LIMITED, (BARNET –VS- JOSHUA STUBBS LIMITED)***, (*supra*) “ ***I am glad***” that the Counsel for the Respondent referred to all these authorities, which are very apt in my consideration of the issues raised in the Petitioner’s application, the subject of this Ruling. I have deliberately examined, and quoted, extensively from these cases to illustrate how the receivers and managers ought to behave on behalf of their appointors, the debenture-holders or mortgagees that is to say, the secured creditors, where as here, there is a winding-up petition even though there is no winding-up order and the secured creditors are aware of the fact of a petition having been filed. In neither the Replying Affidavit nor the Further Affidavit does the Receiver Harveen Gadhoke even feign ignorance of the Petition for Winding-up of the debtor company. To this Receiver the sole issue is merely, whether there was a valid debenture, and that he was validly appointed under that Debenture. The Winding-up petition does not matter. No so, in my humble judgment of the matter.

To explain and justify this view of the matter, there are four vital Sections of the Companies Act, namely Sections 226, and 224, 225 and 221 thereof. Section 226 stands on its own under the title, ***Commencement of Winding Up***, and says-

(1) S. 226 (1) where, before the presentation of a Petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit, otherwise to direct all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.”

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the Petition for the winding-up”

Section 224 and 225 are in a group of five (5) sections which fall under the title (Petition for winding-up and Effects thereof) and say-

“Section 224. In a winding up by the court; any disposition of the property of the company, including things in action, and any transfer of shares, or alteration of the status of the members of the company, made after the commencement of the winding-up shall unless the court directs otherwise be void.”

Section 225. Where any company is being wound up by the court, any attachments, distress or

execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void.”

and Section 221 says-

S. 221 (1) An application to the court for the winding up of a Company shall be by a Petition presented, subject to the provisions of this section, either by the Company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately.”

The position in this matter is this. The Petitioner Shah Timber Mart Limited filed its Petition on 27-11-2003. It had the Petition advertised in the East African Standard on Tuesday December 16, 2003, and in Kenya Gazette Notice No. 84 of 2nd January, 2004. The Petition was served upon the Company, namely Alvik Prestige Ltd (in Receivership) on 3rd December, 2003. On 28-01-2004, the Petitioners' Counsel, **Daniel Auta Nyakundi** filed an affidavit of compliance sworn on 27-01-2004.

The Petitioner fulfilled these statutory requirements as per the Companies/Winding Up) Rules that is to say, rules, 23 (advertisement of the Petition) 24, (service of the Petition) and 28 (1) (Compliance with the Petition rules). Following the advertisement of the Petition the following creditors filed notices of intention to appear and support the Winding Up Petition.

(1) Universal Engineering Systems Ltd for a claim of Kshs.224,370/= per notice dated 21-01-2004 and filed on 22-01-2004 by Hamilton Harrison & Mathews Advocates;

(2) Miragetite Limited per Affidavit of Harbayan Singh Mehangra sworn on 20-01-2004 and filed on 26-01-2004 for a claim of Kshs.2,068,866.72.

By Deed of Appointment dated 4-02-2004, the Bank appointed Harveen Gadhoke and Daniel Mutisya Ndoye to be Receivers and Managers (Receivers) in exercise of the power conferred upon the Bank under a Debenture dated 11th June, 2002, and registered under Section 96 of the Companies on 12-07-2002.

Barely eight (8) days later, following their appointment, (perhaps a mark of their efficiency or ruthlessness in these matters) the Receivers advertised the debtors' moveable assets (as described in the Daily Nation of Thursday, February 12, 2004) for sale, and directed that bids will be closed on 24-02-2004 (twelve (12) days after the advertisement).

By a Sale Agreement said to be dated 19th March, 2004 between (1) Alvik Prestige Limited (in Receivership) acting by its Receivers, Harveen Gadhoke and Daniel Mutisya Ndoye (the Vendor) and (2) Silent Night Kenya, Ltd, (the Purchaser) one G.J.G. Silcock Certified the amount realised for the assets described in the Agreement as Kshs.25.5 million (shillings twenty five million five hundred thousand).

Said, GJG Silcock Certified Public Account (Kenya) said that **“based upon my review of the said Sale Agreement and upon information and explanations given to me by the Receivers of Alvik Prestige Limited I further certify that the aforementioned amount to be realised for the assets described therein, is in my opinion, by way of bona fide realization of security, the best price obtainable for the security so realised without undue delay.”** The certificate is said to be given pursuant to the provisions of Section 7 (c) of the Transfer of Businesses (**Chapter 500, Laws of Kenya**) the said Section 7 (c) says-

Section 7. **“Nothing in this Act shall apply to the transfer of any business or portion thereof –**

(a)

(b)

(c) **by way of a bona fide realization of a security.**

PROVIDED that before completion of any transfer under this paragraph otherwise than pursuant to a sale by public auction, an accountant registered under the Accountants Act shall certify in writing to the Registrar- General both the amount to be realised thereby and his opinion that it represents the best price obtainable for the security so realised without undue delay.”

I observe that both the Sale Agreement and the Certificate pursuant to Section 7 (c) of the Transfer of Businesses Act above, are dated the same day. This is clearly contrary to the provisions of the said provision. What does it mean when it provides that “**before** completion of any transfer “a certificate is to be given by an Accountant registered under the Accountants Act. In my mind it means that there be a lapse of time to allow any objections to be made against the proposed transfer. How should that lapse of time to be determined?. For instance under rule 25 of the Companies (Winding-Up) rules, the Verifying Affidavit to the Petition is required to be filed within four (4) days after the Petition is presented, and that the Applicant shall be prima facie evidence of the Petition.

Thus where a Certificate is given simultaneously with the Sales Agreement for the realization of security without undue delay, I cannot say that the certificate was given before the completion of any transfer. I think that Certificate was clearly also in breach of Section 7 (c) of the Transfer of Businesses Act, even it is said to have been given in good faith.

I observe again that the amounts claimed by the Petitioner, and those creditors supporting the Petition amount in total to approximately to Khs.4.8 million (four million Eight hundred and fifty thousand shillings). It is thus a small sum compared to the Bank’s secured sum of Kshs.52. million (fifty-two million shillings). The amount is however not the issue. The issue is the mode or procedure of the realization of that security without ***undue delay*** in light of the existence of the Winding-up Petition.

The thrust of the authorities cited to me by Counsel for the Receivers (the Bank) is that the court has a wide discretion to allow a Receiver, appointed by secured creditors, whether Debenture holders or Mortgagees to be appointed in precedence to that of the Court. That was the import of the Appeals decision in the case of ***In re Henry Pound, Hutchins and In re Joshua Stubbs, Ltd*** (which I have referred to extensively in the earlier passages of this Ruling). Those cases were decided before the Reception Clause as per Section 3 (1) of the Judicature Act (Chapter 8, Laws of Kenya), which obliges this court to exercise its jurisdiction in conformity with ***inter alia*** with the constitution, other written laws, and subject to those written laws, and to the extent those laws do not apply the substance of the common law, the doctrines of equity the statutes of general application in force in England on the 12th August, 1897, ***and the procedure and practice observed in courts of justice in England at that date.”***

In so far as Petitions for Winding Up are concerned, the procedure and practice observed in the courts of justice in England at the reception date and it was not merely a matter of procedure and practice, but a question of observance of the applicable provisions of the Companies Acts, (namely Section 173 of the Companies Act 1929, which in turn was substantially in identical terms of section 205 (2) of the Companies (Consolidation Act 1908 and Section 153 of the Companies Act, 1862 all of England). Those provisions provide that except where there has been a previous resolution by the company for a Voluntary Winding Up, it is provided by Section 229 (2) of the Act of 1948 (reproducing Section 175 (2) of the Act of 1929, Section 139 of the Act of 1908, and Section 84 of the Act of 1862, and reproduced in Section 226 (2) of the Companies Act (Cap 486), that-

“..... the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the winding up.”

In the present case, the Petition to wind up the company was presented on 27th November, 2003 although the order to wind up the company was not made until the 12th October, 2004. By that time assets of the Company had already been sold by the Receivers on behalf of the Bank, the secured Creditor.

Section 226 (1) and (2) declares that a winding-up of a company commences upon the passing of a resolution to wind up (that is a voluntary liquidation) and in every other case the winding up by the court

shall be deemed to commence at the time of the presentation of the petition for the winding up. The effects of a petition for winding up are stated in Sections 225, and 224 of the Companies Act.

Firstly under Section 225, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void. There is of course no question of attachment, distress or execution here, this provision is cited to emphasis the effect of a Winding-Up Petition by the court.

Secondly under Section 224, in a Winding Up by the court, any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the Winding-Up, shall, unless the court orders otherwise, be void.

There is no question as to when the Winding-Up commenced. It was on the day of presentation or filing the Petition in Court. There is also no question that the Receivers disposed of the property of the debtor company without reference to the court. There is no indication either in the Replying Affidavit or the Further Affidavit of Harveen Gadhoke that the Receivers were unaware of the presentation of the Petition. The Receivers took the view that so long as they were appointed under a valid debenture, their positions too as Receivers were immune to the process of court. I do not think that is either the position of the Companies Acts here or in England, nor is it the practice and procedure of Receivers in England (so far as the cited authorities show), and cannot be in light of the clear provisions of the law as cited above.

Instead of applying to the Winding Up Court for leave to sell or realize the secured assets, the Receivers in the name of realizing the security without undue delay, ignored not only the law, but also the practice, procedure and process of court.

If I understand this area of the law correctly it is a correct proposition of law to say that where a winding up petition has commenced as in this case, the property of the debtor company is in a manner of speech subject to the custody or orders of the court, and if there are any legal or equitable rights in that property whether or not vested in parties in the action or the persons before the court, which legal or equitable rights are not the subject of the administration then going on, then the court, (nay, the law) requires that the person who claims to enforce those rights shall apply to court for leave to enforce them. The right may be a right to take possession, or a right to do various other things, but the practice and procedure of the court requires an application to be made to it. If there is such an application, the court is required to pay utmost care in determining such an application;

Indeed as Cotton L.J. said *In re Henry Pound*, Son & *Hutchins* at page 422-

“On what principle would the court proceed in considering whether the application should be granted. I conceive that it proceeds on the principle of paying the utmost respect to the legal or equitable rights of the persons whose interests are not being administered (considered) in the proceedings before it.....”

So unless those interests are brought before the court, they are likely, to diminish in relation to those in court, and if those with such legal or equitable interests in the property were to act outside (as they did in this case in respect of the sale of assets of the debtor company), they are guilty of contempt of Court. That is the reason why they must apply to the court to enable them, notwithstanding the Petition; to exercise the rights which they have under the Debenture Deed.

There being no application before Court to validate the action of the Receivers vis-à-vis the Petition, there can only be one conclusion in this matter and that is to say, the purported sale and transfer by the Receivers of the assets of Alvik Prestige Limited (*In Receivership*) by or under the Sale Agreement dated 9th March, 2004 is contrary to provision of Section 224 of the Companies Act, and is therefore void. ***In Macfoy -vs- United Africa Co. Ltd [1961] 3 ALL E.R. 1169***, Lord Denning delivering the opinion of the Privy Council at Page 1172 (1) said:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The Petitioner’s application that is the or Notice of Motion dated 28th July, 2004, and filed on 3-08-2004 succeeds and Petitioner shall also have the costs of this application.

Dated and delivered at Nairobi this 22nd day of May, 2006.

ANYARA EMUKULE

JUDGE