



Bhatt & another v Olam Aviv Kenya Private Limited (Insolvency Petition E031 of 2022) [2025] KEHC 5625 (KLR) (Commercial and Tax) (7 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E031 OF 2022
NW SIFUNA, J
MAY 7, 2025
IN THE MATTER OF DIAMOND INDUSTRIES LTD UNDERADMINISTRATION)
AND
IN THE MATTER OF THE INSOLVENCY ACT, NO. 18 OF 2015
JOY VIPINCHANDRA**

BETWEEN

JOY VIPINCHANDRA BHATT ADMINISTRATOR

AND

**DIAMOND INDUSTRIES LIMITED (UNDER
ADMINISTRATION)AD DEBTOR**

AND

OLAM AVIV KENYA PRIVATE LIMITED CREDITOR

RULING

1. There are two applications for determination, namely the motion dated 15th August 2023 and the motion dated 15th August 2023.

The Creditor's Motion dated 15th August 2023

2. This is an Application by the Creditor (Olam Aviv Kenya Private Limited- hereinafter also referred to as Olam. The Application has sought nullification of the sale of the assets of Diamond Industries Limited (the Debtor). The Application is supported by the grounds on its face and the supporting and



supplementary affidavits sworn by the Creditor's Director Shailendra Mishra on 15th August 2023 and 5th September 2023, respectively.

3. The Application is opposed through the replying and further affidavits sworn by the Administrator, Joy Vipinchandra Bhatt on 23rd August 2023 and 23rd October 2023 on behalf of the Debtor and his behalf.

The Administrator's Motion dated 15th August 2023

4. In that Application Joy Vipinchandra Bhatt the Administrator has sought an extension of her term for a year. The Application is supported by the grounds on its face, the supporting and further affidavits sworn by him on 15th August 2023 and 3rd October 2023, respectively.

The Parties' Submissions

5. Both Applications were canvassed through written submissions. The Creditor filed written submissions dated 3rd November 2023. The Administrator filed two sets of written submissions dated 6th and 4th November 2023 to the first and second applications respectively.

Analysis and Determination

6. I have considered the applications, the parties' respective affidavits, evidence, submissions and authorities. The issues for determination are:
 1. Whether the Creditor has made a case for the examination of the Administrator and the nullification of the disposal of company assets.
 2. Whether the Administrator has made a case for the extension of the administration.
7. The Creditor's application was principally anchored on Section 591, 592, 597 of the [Insolvency Act](#). Section 597 provides that:

“597. Court may terminate administrator's appointment on application of creditor

- (1) A creditor of a company that is under administration may make an application to the Court for an order terminating the appointment of an administrator of the company.
- (2) An application under subsection (1) may be made only if it alleges an improper motive—
 - (a) in the case of an administrator appointed by the Court—on the part of the applicant for the order; or
 - (b) in any other case—on the part of the person who appointed the administrator.
- (3) On the hearing of an application made under subsection (1), the Court may make—
 - (a) an order terminating the administrator's appointment with immediate effect or from a specified later date;



- (b) an order dismissing the application; or
- (c) an interim order.
- (4) If the Court makes an order under subsection (3), it may also make—
 - (a) an order adjourning the hearing conditionally or unconditionally; and
 - (b) such ancillary orders as it considers appropriate.”

8. The burden is upon the Creditor to show that the conduct of the administrator warranted his removal. In *Cytonn Real Estate Project Notes LLP v. Official Receiver (Insolvency Petition E064 of 2021)* [2023] KEHC 12 (KLR) (Commercial and Tax) (6 January 2023) (Ruling), the Court observed as follows:

“... the burden was upon the creditors to show that the conduct of the Administrator warranted his removal. The question therefore is whether the applicants have demonstrated that there was improper motive by the Administrator in carrying out the Administration of the company.

“What constitutes ‘improper motive’ has not been specified in the Act. The view I take is that, improper motive is to be inferred from the actions and/or inaction of an Administrator which when viewed against the objectives of Administration under the Act falls short of those objectives or, if the Administration is carried out in a way that defeats the purpose of Administration.”

9. The core contentions of the Creditor, in this case, are that the administrator’s actions are questionable as he has not called any creditors meeting after the initial creditors meeting to update them on the progress of administration; that the creditors’ committee has not been constituted and approved as proposed and approved at the initial creditors meeting; that the creditors have not approved the administrator’s proposal; that the administrator has not filed any report on the progress of the administration process since March 2023; that despite this, the administrator invited bids for the disposal of the Debtor’s assets to close on 15th August 2023 just before the expiry of his term on 31st August 2023; the disposal is suspect and may prejudice the rights of the creditor.

10. Section 522 of the *Insolvency Act*, provides as follows:

- (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 realise 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—
11. In the instant case, the Creditor contends that the Administrator has not complied with the *Insolvency Act* and Regulations in discharging his mandate. On the other hand, the Administrator asserted that he complied with the requirements highlighting that all creditors including OLAM were notified of his appointment through publication. He exhibited a notice to all creditors of the initial creditors meeting to be held on 7th November 2022 and circulated the statement of affairs of the company together with his proposals prior to the meeting. 63% of the creditors approved the proposals. He filed the chairman report dated 20th December 2022 containing the details of the initial creditors meeting. He also exhibited the report dated 20th March 2023 presented to all creditors to update them on the administration process and its challenges.
 12. The Administrator deposed that the initial objective of maintaining the Company as a going concern was not achievable due to the lack of financing to settle running costs and source for materials and pay for skilled labour in order to prevent departure of skilled manpower without increasing the debt to the company. He approached financiers unwilling to extend finances to the Company due to inability to meet its past financial obligations. The creditors were unwilling to have the debts converted off to equity in the Company to attain the objectives. He approached several suitors to provide further financial support or be investment partners, but the same did not elicit any favourable response.
 13. The Administrator explained that the creditors committee could not be constituted due to the subsisting orders of injunction. He therefore sought to realize the property of the Company in order to ensure a better outcome to creditors.
 14. Section 588 of the *Insolvency Act* requires that the Administrator seeks an Order of the Court to dispose of property that is subject to a security as if it were not subject to the security.
Regulation 127A of the Insolvency Regulations, 2016 provides as follows:

“For the purpose of section 573 of the Act, the administrator of a company shall convene a meeting seeking creditors' approval for the sale of substantial assets of not less than ten percent of the total assets of the company.”
 15. I now turn to the issue of whether the administrator's term ought to be extended. On this issue, the Administrator submitted that he was validly appointed. The ground for extension is that he has not finished the administration of the company. That his first task was to convene a creditor's meeting but when he convened one, the company came to court and stopped it by an injunction and the ruling is still pending. That the law requires him to seek an extension. That he was granted interim orders of extension and extended time. That as a show of good faith he has been filing quarterly status reports and sharing them with the creditors. That should the term not be extended, the company will be exposed to endless litigation by the creditors. Hence the company will move from insolvency to liquidation.
 16. The administrator applied for an extension of his term under Section 594 of the *Insolvency Act*.
 17. Section 533 (e) and (f) of the *Insolvency Act* provides as follows:
 1. On hearing an application for an administration order, the Court may:



- (e) treat the application as a liquidation application and make any order that the Court could make under section 426.
- (f) make any other order that the Court considers appropriate.

18. In the end, the Creditor's Application dated 15th August 2023 is hereby partially allowed. In terms that the bidding process commenced by the Administrator/1st Respondent and the sale of the Company's assets is hereby nullified. The Administrator's Application dated 15th August 2023 is for its part, is dismissed. In consequence, the administration of Diamond Industries Limited is hereby terminated and the company is now hereby placed under liquidation. There shall be no orders as to costs of this Application.

DATED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MAY 2025.

PROF (DR) NIXON SIFUNA

JUDGE

