In re Cytonn High Yields Solutions (In Liquidation) (Insolvency Petition E063 of 2021) [2024] KEHC 81 (KLR) (Commercial and Tax) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 81 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY PETITION E063 OF 2021

A MABEYA, J

JANUARY 17, 2024

IN THE MATTER OF THE LIMITED LIABILITY PARTNERSHIP ACT CAP 30A OF 2012

IN THE MATTER OF CYTONN HIGH YIELDS SOLUTIONS (IN LIQUIDATION)

IN THE MATTER OF CYTONN INVESTMENT PARTNERS FIFTEEN LLP

RULING

1. The official receiver filed the application dated 27/9/2023 under sections 420, 443(1)(a), 444, 445, 465(3) of the *Insolvency Act*, ("the Act"), part three of the third schedule of the Act, paragraph 17 of the Fifth Schedule of the *Limited Liability Partnership Act*.

2. He sought to have the title documents for the property known as Riverun, located in LR No 5910, Ruiru ("the property") deposited with him. That there be variation of the consent in relation to the apportionment of the joint venture agreement in the following terms; that 40.1 acres be apportioned to the official receiver acting as the Liquidator of Cytonn High Yield solutions and Cytonn Real Estate projects LLP and 59.08 acres to be registered in the name of Muiruri Laban Limited. He also sought to allowed to undertake valuation, division and sale of the property under the supervision of the Court.

3. In support of the application, the official receiver relied on the grounds on the face of the application and the supporting affidavit of Mary Gakuru sworn on 27/9/2023. It was contended that Cytonn Investments Management Plc ("CIMP"), Muiruri Laban Limited ("MLL") and Cytonn Real Estate LLP (Managing Partner) ("CRELLP") entered into a Joint Venture Agreement dated 8/9/2016.

4. The terms of the agreement were that MLL was the registered proprietor of the property with 50% governing rights, CRELLP had the technical knowhow of the property and CIMP would raise funds for the project and they each acquired 25% rights. That pursuant to the JVA, Cytonn Investment Partners five LLP was registered with the sole aim of capital appreciation and development of the property.

5. It was averred that Cytonn High Yields Solutions LLP ("CHYS") entered into a financing agreement with CIP12 LLP to loan the incorporated special purpose vehicle with Kshs 1,000,000,000/- with the sole aim of meeting the needs of the land owner in the joint venture agreement.

6. That on 30/5/2018, Cytonn Real Estate Project Notes LLP ("CPN") entered into a financial agreement with CIP LLP to loan the SPV Kshs. 100,000,000/- to facilitate the acquisition and development of the property in Ruiru known as Riverrun on Land Reference No 28223/3, Kiambu. That since the project did not take off, and vide an agreement dated 11/11/2022 the same was dissolved and the property was apportioned between MLL and CIMP.

7. In furtherance of this, the parties put up an advertisement in the daily newspapers to the effect that the project was impossible to proceed with. And upon dissolution of the JVA, the parties resolved that CIMP & CRELLP jointly take ownership and possession of 40.43 acres of the property and MLL 59.08 acres.

8. It was further contended that, in its ruling delivered on 6/1/2023, the Court preserved the property. The Official Receiver contended that the apportionment of the property as per the dissolution agreement has the effect of disadvantaging the creditors of CHYS and CPN.

9. The application was opposed by Cytonn Investment Partners Five (CIP 5LLP) and Cytonn Investment Partners Twelve (CIP 12 LLP) vide grounds of opposition dated 8/10/2023. It was averred that CIP 5LLP and CIP 12 LLP were separate and distinct legal entities from CHYS that is in liquidation. That the property was not owned by CHYS and that CIP 5 LLP and CIP 12 LLP were capable of holding the property in their own name. it was further averred that as long as CIP 5 LLP and CIP 12 LLP remained solvent, the Official Receiver should follow due process for recovery of debts.

10. The application was further opposed by Kenneth Ochieng Macakiage vide a replying affidavit dated 6/10/2023. He observed that he was an investor/purchaser of the off-plan development project at the property. That the application by the Official Receiver infringed on his rights as a substantial investor in the property under consideration and would further affect innocent investors who were not part of the proceedings.

11. I have considered the pleadings by the respective parties. It is common knowledge that in its ruling of 6/1/2023, the Court placed CHYS and CRE LLP under liquidation and appointed the Official Receiver as the liquidator. I think that the Court should put the matter into perspective. In that decision, after a whole year of trying to revive the Companies, the said companies could not be revived. The Court found that the promoters and owners of the said companies were involved in a fraudulent scheme to the detriment of the members of the public.

12. Indeed, in its ruling of 7/12/2023, the Court stated as follows: -

> " Before delving into these issues, it is imperative to make some preliminary but pertinent remarks. On 1/10/2021, the Company and a related Company CPN came to Court seeking orders for administration. The orders were made pursuant to resolutions made by the respective boards of directors. The two companies convinced the Court that they needed be under administration in order to enable them restructure as their then debts amounting to over Kshs.13billion could not be repaid and the creditors had come calling.
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> The Court gave the administration orders and appointed Mr. Kerita Marima, who had been proposed by the said Companies, as the Administrator for both Companies. During the course of administration, the Administrator confirmed to this Court and the Court found as a fact that; the promoters of the two companies were related, that they had established a

milliard of SPVs in the name of Partneship LLPS. That the two Companies were receiving monies from the public for investment. That the monies would then be channeled to these SPVs to acquire properties which would be developed and then sold out to purchasers and the proceeds paid to the investing public.

As at the time the two Companies came to Court, they were holding deposits or investments from the public in excess of Kshs.13 billion. The Administrator and the Court found that these funds had been 'lent' to the SPVs who had in turn purchased the properties that they were developing. There were no securities whatsoever that was offered for these 'lendings'. This was probably because the Companies and these SPVs were not only related, but belonged to the same promoters.

In its decision of 6/1/2023, the Court found that the two Companies were involved in a scheme which was akin to a fraud, such that, their promoters, who were the same promoters or were closely related to the SPVs, intended to keep the investors away from their monies by pumping the investors' money into SPVs in which the promoters were in control of. They would, in the event the Companies collapsed, as they eventually did, claim, that the SPVs were separate entities from the Companies and therefore laugh all the way to the bank and leave the investors of the Company languishing in the perpetrated poverty!

It is for this reason that the Court invoked the doctrine of tracing and preserved these properties so as not to defeat the rightful claims of the creditors by the clever dealings of the promoters of the two Companies and the related SPVs. It is also against this background that the Court ordered the two Companies liquidated and the said properties preserved pending the proof that these properties were acquired by the monies advanced by the Companies to these SPVs.

The Court would not countenance a well-orchestrated scheme of fraud, based on the intangible doctrine of separate legal personality of Companies, to defeat the lawful and constitutional rights and claims of the creditors of these Companies.

In granting the preservation orders, the Court was alive to the fact that; the Insolvency Petitions were supposed to have been advertised and all and sundry who had claims against the Companies were supposed to appear and oppose or support the proceedings. The order of liquidation was therefore made in rem and it binds all including the SPVs. They were aware of the claims which the Companies presented to the Administrator and the Court's findings. The Court observed that those who had claims in the preserved properties would have an opportunity of showing that the said properties were not acquired by the proceeds of the monies advanced by the Companies under liquidation. The time for such proof is now!"

13. In repeat the same here and add that, to the extent that the promoters of the Companies under liquidation are the same as those of the Partnership LLPs or are closely related. And to the extent that the said Companies took monies from the public and 'lent' the same to the associated Partnership LLPs or SPVs with no security at all, the owners of the collapsed Companies as well as these related Partnership LLPs or SPVs cannot hide from the Court's torch as it seeks to fins the monies of the unsuspecting public that was hoodwinked to invest in the collapsed Companies.

14. The Court would invoke the doctrine of tracing and trace the creditors' monies to the properties acquired by the Partneship LLPs and SPVs and have the same returned to the public. The smokescreen of legal personality would not do in the face of this well-orchestrated fraud that has seen the innocent public lose over Kshs.13billion.

15. Those who invested in these collapsed Companies are truly languishing in painful poverty while the promoters of the Companies as well as the Partnership LLPs and SPVs making rounds in these Courts postponing the day of reckoning. That won't do. The Courts would not tire from pursuing justice and meting it out for the victims. One wonders where the Regulatory watchdog was when Kenyans sank their billions into this bottomless pit. This is really a sorry state of affairs, and the faster this matter is brought to a closure the better.

16. So much for the background of this monumental fraud. In the present application, the Official Receiver in exercising his right as a liquidator and is seeking that the 40.43 acres of the preserved asset Riverun be vested upon him in order to dispose off the same and make recoveries for the creditors.

17. The respondents on the other hand maintain that CIP 5LLP and CIP 12 LLP were separate and distinct legal entities from CHYS in liquidation. Mr. Kenneth Ochieng was of the view that allowing the application would prejudice all the investors who had acquired the said property.

18. The doctrine of tracing is a common law doctrine which allows a party to claim rights to an asset which has changed form with an attempt to conceal the initial asset. It allows the transmission of legal claims to the proceeds of the sale of assets as well as any asset that may have been substituted. That was the basis upon which this Court preserved the property and for which the Official Receiver is pursuing the same.

19. In *McTaggart v. Boffo* (1975) 64 D.L.R. (3d) 441 (Ont. H.C.J.), 10 O.R. (2d) 733, at para 67, the court stated: -

> " Tracing is only possible so long as the funds can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:
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> a) If, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;
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> b) The chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value without notice."

20. Further, *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd*. 2010 BCCA 357, the court noted with approval the case of *McTaggart* (*supra*) and held that: -

> " I conclude, then, that the trial judge considered the correct legal "tests" in approving a constructive trust as a restitutionary remedy for the defendants' unjust enrichment. As mentioned above, however, it is only if the Unlawful Finance Charges or their proceeds are identifiable in the hands of defendants farther up the transactional chain than the Storefront Lenders that a constructive trust may be asserted against those defendants. The process by which the plaintiffs may 'follow' the Charges up the chain is tracing – the "process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received ... can properly be regarded as representing his property". (Per Millett L.J. (as he then was) in *Boscawen v Bajwa* [1995] 4 All ER 769 (CA) at 776.) Although tracing is available both at law and in Equity (see Maddaugh and McCamus, supra, at chapters 6 and

7), the right which the plaintiffs are entitled to trace in this case is the constructive trust, an equitable property right. I agree with Professor Lionel Smith (The Law of Tracing (1997)) that the establishment of this proprietary right, which he refers to as the "proprietary base", is sufficient to establish an entitlement to trace. It is not necessary, as was once argued, to demonstrate a pre-existing fiduciary relationship"

21. The doctrine of tracing is applicable where there is *primafacie* evidence that the funds invested by the promoters or investors could be located and established. In the present case, the Court made a finding that the collapsed Companies 'lent' huge sums of monies to the related Partneship LLPs and SPVs with no security at all. That these monies belonging to the creditors who had invested in the collapsed Companies was invested in the preserved properties.

22. In the present case, the respondents and Mr Ochieng have not dispelled the fact that the property and 'deal' between the parties to the transaction on the Riverun property used the monies of the collapsed Companies. The share of the collapsed Companies or its Partneship LLPs and/or SPVs is what the Official Receiver is pursuing. The Court is of the opinion that that is the right thing to do.

23. From the evidence on record, it is clear that MLL, CIMP and CRE LLP entered into a joint venture agreement dated 8/9/2016 with respect to the property. The record further shows that in a financing agreement dated 30/5/2018, Cytonn Real Estate Project Notes LLP financed CIP 5LLP a sum of Kshs 100,000,000/-. The parties dissolved the arrangement on 11/11/2022 where the ownership and possession of 40.43 acres and 59.57 of the property was agreed at.

24. In this regard, it is clear that the investors funds amounting to Kshs. 100,000,000/- was used to purchase the 40.6 acres held by the CIMP and CRE LLP in the property. This is a fact that was neither controverted, challenged nor denied. The investors therefore have a stake in the said property.

25. 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) this court held that: -

> " 42. At the time of liquidation, those SPVs would be given an opportunity to explain themselves on the Loan Notes held by CPN. They will either pay up the Loan Notes or the assets will be liquidated to realize the value thereof. Pending that eventuality, the assets should be preserved."

26. The SPVs/respondents have not given any concrete reasons as to why the assets should not be realized for the benefit of the investors. The money loaned to the two Companies has not been paid up and the only recourse left is for the said property to be vested in the Official Receiver for him to liquidate the same for the benefit of the languishing investors.

27. The Court finds merit in the application and hereby allows the same as prayed.

It is so ordered.

DATEDAND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI ARB

JUDGE