



**Family Bank Limited v Administrator, New Generation Service  
Store Limited & another (Insolvency Cause E047 of 2022)  
[2024] KEHC 1481 (KLR) (Commercial & Admiralty) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1481 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
INSOLVENCY CAUSE E047 OF 2022**

**JWW MONG'ARE, J**

**FEBRUARY 19, 2024**

**IN THE MATTER OF NEW GENERATION SELF SERVICE  
STORE LIMITED T/A NEW GENERATION SELF-SERVICE STORE**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPLICANT**

**AND**

**ADMINISTRATOR, NEW GENERATION SERVICE STORE  
LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NCBA BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling determines three applications. The first application filed by the Administrators is dated 23<sup>rd</sup> August 2022, the second application filed by Qwetu Sacco Savings and Credit Society is dated 19<sup>th</sup> July 2022 while the third application filed by Family Bank is dated 15<sup>th</sup> November 2022.
2. The Administrator's Notice of Motion dated 23<sup>rd</sup> August 2022 is brought under Sections 682, 683 & 685 of the *Insolvency Act* No. 18 of 2015, Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 51 Rule 1, Order 40 Rules 1, 2, 4, 10 and 11 of the *Civil Procedure Rules* 2010. In the said application, the Administrator seeks the following orders:-
  - i. An order to enjoin Beach Ways Enterprise Limited, Francis Ngugi Kamau. a.k.a Francis Ngugi, Samuel Kamau Ngugi a.k.a Samuel Ngugi, Thomas Njoroge, Wilson Gikonyo Kamau a.k.a Wilson Gikonyo, Bon Nature Tours, Travel & Safaris Limited, Awale Enterprises



Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited as the 1<sup>st</sup>, - 9<sup>th</sup> Respondent Respectively to defend the instant application.

- ii. An order directed to the National Transport and Safety Authority to register caveats prohibiting the transfer or disposition of Motor Vehicles Registration Numbers KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938.
- iii. An interim injunction restraining Beach Ways Enterprise Limited, Francis Ngugi Kamau. a.k.a Francis Ngugi, Samuel Kamau Ngugi a.k.a Samuel Ngugi, Thomas Njoroge, Wilson Gikonyo Kamau a.k.a Wilson Gikonyo, Bon Nature Tours, Travel & Safaris Limited, Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited from transferring, selling disposing off or otherwise alienating Motor Vehicles Registration Numbers KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938.
- iv. An order setting aside the sale and transfer of Motor Vehicles Registration Numbers KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938 by Beach ways Enterprise Limited, Francis Ngugi Kamau. a.k.a Francis Ngugi, Samuel Kamau Ngugi a.k.a Samuel Ngugi, Thomas Njoroge, Wilson Gikonyo Kamau a.k.a Wilson Gikonyo, Bon Nature Tours, Travel & Safaris Limited, Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited.
- v. An order directed to the National and Transport Authority to rectify its records relating to KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938 to revert them to New Generation Self Services Store Limited.
- vi. An order directed to Beach Ways Enterprise Limited, Francis Ngugi Kamau. a.k.a Francis Ngugi, Samuel Kamau Ngugi a.k.a Samuel Ngugi, Thomas Njoroge, Wilson Gikonyo Kamau a.k.a Wilson Gikonyo, Bon Nature Tours, Travel & Safaris Limited, Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited, to hand over vacant possession of KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938.
- vii. An order directed to Francis Ngugi Kamau. a.k.a Francis Ngugi, Samuel Kamau Ngugi a.k.a Samuel Ngugi, Thomas Njoroge, Wilson Gikonyo Kamau a.k.a Wilson Gikonyo to pay the full purchase price received by each of them in the event the court finds the sale of the properties



to Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited is found to be in good faith.

3. The application is supported by the grounds set on its face as well as the affidavit of Madhav Sudhir Bhandari sworn on 23<sup>rd</sup> August 2022. The gist of the application is that upon the Administrator upon appointment and while conducting investigations on the status of the company, discovered that part of the company's assets had been unlawfully, illegally and fraudulently transferred to the directors of the company, who thereafter transferred to other companies where they were also directors and that at the time of the transfers, the company was insolvent and has been unable to pay its debts whose the default dates back to December 2021 while the illegal transfers occurred in the year 2022.
4. The Administrator argued that there is no evidence of the company receiving any consideration for the transfers of the said assets. That the directors of the company who are also directors of Beach Ways Enterprises Limited let an entire go-down and office space to Beach Ways Enterprise Limited and the sum of Kshs.35,000/= and Kshs.30,000/= respectively and that there is no proof of the consideration paid.
5. The Administrator argues that no evidence has been adduced to demonstrate that the company was indebted to Beach Way Enterprises Limited and it owed a sum of Kshs.28,032,947/= and Kshs.5,150,000/=, respectively as claimed. The Administrator further contends that the resultant transfer of the vehicles was fraudulent and in bad faith and was aimed at defeating the interest of the creditors. Further, the Administrator states that Bon Nature Tours Travel & Safari was a company incorporated on 24<sup>th</sup> February 2022 after the company's property was unlawfully transferred to one of its the directors, John Ngugi Njenga.
6. In response to the application dated 23<sup>rd</sup> August 2023, Tahmeed Transporters Limited filed the Replying affidavit sworn by Rashid Omar Abdalla on 3<sup>rd</sup> October 2022, in which he depones that vide a sale agreement dated 19<sup>th</sup> May 2022 Tahmeed Transporters entered into a sale agreement with Bon Nature Tours Travel & Safari Limited for the purchase of Motor Vehicles Registration Numbers ZC7101, ZE8859, ZE3884, ZE3885 and ZE3887 and paid a consideration of Kshs.5 million and a transfer was affected to Tahmeed Transporters, that the transfer was legal as Tahmeed Transporters did not deal with the New Self Generation Service Store and therefore not in a position to tell that the company was under insolvency proceedings.
7. That the Administrator has failed to prove the issue of fraud on its part and that Tahmeed Transporters was an innocent purchaser for the value it did not have previous knowledge that the Motor Vehicles belonged to the insolvent company. That no illegality has been demonstrated in the sale agreement and that the transfer to Tahmeed Transporters was regular and there was no legal basis to reconvey the trailers back to the company without concrete legal reasons. Tahmeed Transporters argued that the application by the Administrator was in bad faith and aimed and defeating the Tahmeed Transporter's title to the motor Vehicles.
8. The second Application is dated 15<sup>th</sup> November 2022, by Family Bank Limited, brought under Section 570 of the *Insolvency Act* and all other enabling provisions of the Law. The bank seeks the approval for enforcement and realization of the securities created in favour of Family Bank Limited at the current market value against the properties of the Company being titles in respect to the following properties: Kilifi Mtwapa 3882, Kilifi/Mtwapa 3883, Kilifi/ Mtwapa 3884, Kilifi/Mtwapa 3885, Voi Town L.R. No. 1956/428, Voi Town L.R. No. 1956/478, Voi Town L.R. No. 1956/850, Voi Town L.R. No. 1956/844, Voi Town L.R. No. 1956/845.



9. The application is supported by the grounds set on its face and the annexed affidavit and the further Affidavit of Sylvia Wambani sworn on 15<sup>th</sup> November 2022 and 18<sup>th</sup> September 2023 respectively. The grounds in support thereof are that the company is currently under administration and the Applicant, Family Bank Limited, provided financial facilities to the company which were secured by the above-stated properties and legal Charges registered against some of them as was confirmed by the official searches provided. The company has since defaulted in the repayment of loans advanced to it by Family Bank Limited and that the outstanding loan balances stand at an amount over Kshs.226 Million, as of 31<sup>st</sup> May 2022. Family Bank Limited has prior to the filing of this Application sought the consent of the Administrator to enforce the sale but no response has been received. That the enforcement of the securities will be for the benefit of the company as liabilities of the Company will decrease. Family Bank Limited further averred that although leave of the court was not required concerning formal charges under Section 79 of the Land Act but the Applicant bank was willing to abide by any conditions set by the court.
10. Opposing the application by Family Bank Limited dated 15<sup>th</sup> November, 2022, Madhav Sudhir Bhandari, the administrator of New Generation Self Service Store Limited, swore the Replying affidavit on 19<sup>th</sup> May 2023. In his deposition in the said affidavit, he confirmed that he was appointed as an Administrator by the secured creditor, namely the NCBA Bank Kenya with effect from 22<sup>nd</sup> April 2022, and the appointment was extended by the court on 4<sup>th</sup> May 2023, that no evidence had been adduced by Family Bank Limited to support that it held informal charges to the suit properties and that it was the position by the Administrator that this court lacked the requisite jurisdiction to grant permission to allow Family Bank Limited to sell the property held under informal charges as that jurisdiction is vested with the Environment and Land Court and not the High Court as set out by Article 162(2)(b) of the Constitution of Kenya, 2010 and section 13 of the Environment and Land Act of 2012.
11. The Administrator urged the court to deny Family Bank Limited the authority being sought to sell the properties held under informal charges arguing that these securities were created when a floating debenture existed in favour of NCBA Bank and therefore were not available for alienation to another bank. The Administrator argued that the statements of accounts furnished by Family Bank were not sufficient proof of the debt. It was further argued by the Administrator that Family Bank Limited had not only contributed to the run-away debts facing the company but that it has also deliberately placed itself in a heavily under-secured position and ought not to be rewarded for its failure to protect its interest before advancing funds to the Company.
12. The third application was filed by Qwetu Sacco Savings and Credit Cooperative Society (Qwetu Sacco) and is dated 19th July, 2023 and it seeks the following orders:-
  - i. This Honourable Court be and is hereby pleased to grant leave/consent to the Applicant to realize its security rights against the New Generation Self-Service Store (under administration) over the following properties: Title Numbers 12176/20 (C.R 69692) & 1956 (CR17278), Motor Vehicles ZF4389, KBW 562H, ZE0916, KBP 142K, KBD 906F, and KBA 422E.
  - ii. The Honourable Court be and is hereby pleased to issue any further orders as may be appropriate to give effect to the Orders sought herein.
  - iii. The Costs of the Application be provided for.
13. The application is premised on the grounds set on its face and the supporting and supplementary affidavits of Charles Mtoto Kaba sworn on 19<sup>th</sup> July, 2022 and 19<sup>th</sup> June, 2023 respectively. The gist of the application is that the Qwetu Sacco granted credit facilities to the Company (New Generation



Self Service Store) amounting to Kshs.50,000,000.00/=. The said loan was secured by, inter alia, fixed legal charges registered against title numbers 12176/20 (C.R 69692) & 1956 (C.R 17278) and Motor Vehicle Registration Numbers ZF4389, KBW 562H, ZE0916, KBP 142K, KBD 906F and KBA 422E. The copies of the Certificates of Official Search confirming joint registration are exhibited at para81-86, of the supporting affidavit, by the time the company was placed under administration it had already defaulted on the Sacco Loan as it was in arrears of Kshs.37,773,213.50/=. The current application is premised on the basis that the company cannot continue with its business.

14. Opposing the application by Qwetu Sacco dated 19<sup>th</sup> July 2022, the Administrator filed a Replying Affidavit sworn by Madhav Sudhir Bhandari on 19<sup>th</sup> May 2023 in which he deposes he was appointed as an administrator to the Company on 22<sup>nd</sup> April, 2022 by NCBA Bank Kenya, secured creditor, and by virtue of his appointment, NCBA Bank's Floating debenture crystallised and fixed upon all assets of the Company including the trailers claimed by Qwetu Sacco and therefore the said Trailers do not form part of Qwetu Sacco securities, as no proof has been adduced to prove the same were acquired through financing from Qwetu Sacco Society. The Administrator argued that in the absence of such evidence, Qwetu Sacco could not claim priority rights over the vehicles and trailers, owned by the Company.
15. Further, the Administrator maintained that Motor Vehicle KBA 422E is not jointly registered by the Company and Qwetu Sacco Society and therefore there is no need to seek approvals or at all. The Administrator argued that the approval for the sale of the lands should also be refused as there is no evidence of the monies being advanced to the company to purchase the same nor was there any legal charge registered in its favour over one of the properties claimed by Qwetu Sacco being LR No. 12176/20 Taita and that the only charge registered in its favour was secured by title number LR No. 1956/509 Taita which charge was registered on 4<sup>th</sup> December 2020.
16. In addition, the Administrator maintained that the company held 13 million shares with Qwetu Sacco Society and there is no proof provided to demonstrate that the shares were no longer available for liquidation by the Sacco. It was the position taken by the Administrator that there was no indication of the value likely to be received if these properties were sold and nothing to demonstrate that there was a default in the first instance.
17. The Administrator maintained that there was no proof that statutory demand notices had been issued to the Company prior to the filing of the application seeking approvals to sell the charged properties. He urged the court to refuse the Approval sought by the Qwetu Sacco Society and allow him to administer the estate of the Company in the interests of all creditors.
18. By the court directions the three applications were canvassed by way of written submissions. All the partes filed their respective submissions which I have considered in depth but will not reproduce herein. I will however make reference to them in my analysis and determination. The parties thereafter appeared before the court to highlight the same on 18/10/2023.

### **Analysis and Determination**

19. I have considered the 3 applications, the affidavits filed in support and opposition thereto and the rival submissions by the parties thereto. I will proceed to determine the first application by the Administrator separately and consolidate the 2<sup>nd</sup> and 3<sup>rd</sup> applications filed by Family Bank Limited and Qwetu Sacco as they seek similar orders.
20. The first application by the administrators dated 23<sup>rd</sup> August, 2022 seeks to enjoin Beach Ways Enterprise Limited, Francis Ngugi Kamau a.k.a Francis Ngugi, Samuel Kamau Ngugi a.k.a Samuel Ngugi, Thomas Njoroje, Wilson Gikonyo Kamau a.k.a Wilson Gikonyo, Bon Nature Tours, Travel



& Safaris Limited, Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited as the 1<sup>st</sup> - 9<sup>th</sup> Respondents to this suit.

21. The Application also seeks an order stopping and restraining the transfer, sale and disposing off or otherwise alienating Motor Vehicles Registration Numbers KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938.
22. Tahmeed transporters and Awale Enterprises opposed this application and made submissions as interested parties. On its part, Tahmeed though their legal counsel argued that it was a purchaser for value without notice of Motor vehicles ZC7101, ZE8859, ZE3884, ZE3885 and ZE3887 from Bon Nature Tours Travel & Safaris Limited, and therefore they are the registered owners of the said motor vehicles. The Sale and purchase were in good faith, that Tahmeed Transporters had no knowledge of the alleged fraud and was unaware of the internal issues of the New Generation self Service Store.
23. Further, Tahmeed Transporters averred that the Administrator has failed to prove fraud by it. That Tahmeed Transporters have proved payment of consideration for the disputed transaction and prior to the purchase agreements being created it had conducted due diligence was and had established that there were no encumbrances on the titles of the disputed assets.
24. Similar arguments were advanced by Awale Enterprises who were also represented by legal counsel during the hearing, which I have carefully considered.
25. Order 1, rule 3 of the [Civil Procedure Rules](#) provides that: -

“ All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.
26. Further order 1 Rules 10 (2) provides:-

“ The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
27. Flowing from the above provisions of the law it is clear that an application for joinder of a party or parties to a suit must be made by a party already participating in the proceedings. In the instant suit, the application has been brought by the Administrator of the New Generation Service store who is a party to the proceedings, accordingly, I am satisfied that the said Administrator has the Locus standi to bring the instant application to ensure that the court effectively and completely adjudicate the settle the issues raised in the suit.



28. This position was reinforced by the Court in the case of *Civicon Limited vs. Kivuwatt Limited and 2 Others* [2015]eKLR where the court observed as follows:-

“Again, the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, or inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a Defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case about the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, if the Plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

29. The Administrator argues that the joining of the intended 1<sup>st</sup> – 9<sup>th</sup> Defendants emanate from the need to dispose the company’s property that is to be realized in the repayment of debts owed to NCBA Bank and other creditors. It was the position taken by the Administrator that the Intended Defendants have a stake in the manner in which the company’s property was illegally and fraudulently disposed of to third parties. The Administrator has adduced evidence to demonstrate that indeed the motor vehicle transfers were done during the pendency of the insolvency proceedings in an attempt to defeat the interest of the secured creditors.
30. I therefore find that no prejudice will be occasioned to the said parties by enjoining the intended 1<sup>st</sup> -9<sup>th</sup> Defendants as parties to the suit as I am satisfied and find that they are necessary parties to the suit and ought to be enjoined as they will shed light on how the properties were transferred to them and for what consideration, if any. Subsequently, I allow this limb of the Application by the Administrator.
31. The second prayer by the Administrator seeks to register a caveat by the National Transport and Safety Authority while prayer 3 seeks an order restraining the intended 1<sup>st</sup>-9<sup>th</sup> Defendants from transferring or disposition Motor Vehicles Registration Numbers KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938.
32. It is not in dispute that the above-stated motor vehicles were owned by the Company but have since been transferred to 3<sup>rd</sup> parties to defeat the process of administration and the recovery of debts owned by the company. It is thus impossible for the creditors to realize their debt from the company. Despite the arguments put forth by the two interested parties, Tahmeed Transporters and Awale Enterprises, these properties remain the assets of the Company and once the same was placed under administration and the Insolvency proceedings commenced, I am satisfied that the same were not available for alienation.
33. In an attempt to protect the status quo of the Company’s assets and the aim of not rendering the judgment of the court a purely academic exercise, it is prudent that the intended 1<sup>st</sup> – 9<sup>th</sup> Defendants be restrained from selling, transferring and disposing of the said motor vehicles to other third parties, it would also be in the interest of justice that caveats be registered by the National Transport and Safety



Authority to protect the status quo of the motor vehicles above mentioned in paragraph 40 of the judgment.

34. As regards prayer no 4, 5, and 6, I opine that this position would fully be determined after a full hearing where the court will determine if there was any consideration paid and the amount of consideration, upon taking in the evidence of the parties. I find therefore the registration of a caveat will help protect the motor vehicles from further alienation which are the subject of the dispute.
35. In conclusion I am satisfied that Application filed by the Administrator's on 23<sup>rd</sup> August 2023 has merit and allow the same to the extend described hereinbefore.
36. We then turn to the second and third application by Family Bank Limited and Qwetu Sacco Savings and Credit Society. Though these two applications are filed by different entities, Family Bank Limited and Qwetu Sacco Savings and Credit Society, both entities are seeking leave of the court to realize their securities rights against New- Generation Self-Service Store (under administration).
37. The Second Application was filed by Family Bank Limited and it seeks the approval, enforcement and realization of the securities created in its favour at the current market value, concerning the following properties: Kilifi Mtwapa 3882, Kilifi/Mtwapa 3883, Kilifi/ Mtwapa 3884, Kilifi/Mtwapa 3885, Voi Town L.R. No. 1956/428, Voi Town L.R. No. 1956/478, Voi Town L.R. No. 1956/850, Voi Town L.R. No. 1956/844, Voi Town L.R. No. 1956/845. while the third application by Qwetu Sacco seeks leave/consent to realize its security rights against the New Generation Self-Service Store (under administration) over the following properties: Title Numbers 12176/20 (C.R 69692) & 1956 (CR17278), Motor Vehicles ZF4389, KBW 562H, ZE0916, KBP 142K, KBD 906F, and KBA 422E.
38. It is evident that loan facilities were advanced to the Company by both Family Bank and Qwetu Sacco. it is also evident that the Company defaulted on the repayment of the loans to the two institutions. The company has been put under administration since it is unable to meet its financial obligations and repay its debt to NCBA Bank and other creditors including the two.
39. It is not disputed that some titles to the property were used to secure the loan advanced to the company some of which amounted to informal charges. The provisions of Section 79 (7) of the Land Act require that:- "A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect."
40. It is trite law that a party seeking to realize the security created by a formal charge one must seek leave from the court to do so. The leave is disputed by the administrator on the basis that some properties were registered without consideration that they were previously charged to NCBA Bank. The administrator has not demonstrated which properties were registered first in time by NCBA Bank and as such I find no basis to deny the creditors the right to realize their rights over interests charged.
41. While under Section 79 (6) (a) (b) of the Land Act 2012 provides for the formation of an informal charge as follows:-
  - (6) provides an informal charge may be created where –
    - a. A chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee plus interest as agreed by the chargor and the chargee;
    - b. The chargor deposits any of the following –
      - (i) A certificate of title to the land;



- (ii) A document of lease of land;
- (iii) Any other document which it is agreed evidences ownership of land or a right to interest in land.

42. For an informal charge to be created the above section is clear that what is required is the intention of the parties to be in writing and disclose the clear intention of offering the property as security for a loan facility. The Deposit of the title documents to the Chargee is sufficient proof of exhibiting the intention of the parties.
43. It is now trite that it is never the intention of courts to rewrite contracts for parties. This position was amplified by the Court of Appeal in the case of *National Bank of Kenya Ltd Vs Pipeplastic Samkolit (k) Ltd & Another* (2001) KLR 112 where the Court of Appeal at page 118 held as follows: - "...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."
44. From the evidence produce before this court, the Bank first wrote to the Administrator seeking the leave to sell the charged property but having received no response has been given, moved the court for the orders being sought herein. In the circumstances, I am not convinced there is a reason which would hinder this court from granting Family Bank Limited and Qwetu Sacco, the two Applicants herein, the opportunity to realise the security for the loan advanced to the company.
45. I am therefore satisfied that the two applications are merited and the same are allowed as prayed.

### **Final Disposition**

46. In conclusion and for the avoidance of doubt, the court makes the following orders:-
- i. As regards the Application filed by the Administrator and dated 23<sup>rd</sup> August, 2022 the same is partially successful. The Court's orders are as follows:-
    - a. An order be and is hereby issued to enjoin Beach Ways Enterprise Limited, Francis Ngugi Kamau. a.k.a Francis Ngugi, Samuel Kamau Ngugi a.k.a Samuel Ngugi, Thomas Njoroge, Wilson Gikonyo Kamau a.k.a Wilson Gikonyo, Bon Nature Tours, Travel & Safaris Limited, Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited as the 1<sup>st</sup> - 9<sup>th</sup> Respondent
    - b. An order be and is hereby issued restraining the transfer, sale and disposing of or otherwise alienating Motor Vehicles Registration Numbers KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938.
    - c. An order be and is hereby issued to the National Transport and Safety Authority to register a caveat on the Motor Vehicles Registration Numbers KAY 337M, KAY 410E, KAR 142E, KCA 334C, KCA 331C, KCA 332C, KCA 330C, KCJ 791B, KCH 4331U, KCH 941S, KAS 832G, KBJ 734W, KBH 687C, KBH 686C, KAS 372B, and trailers registration numbers ZE3888, ZE3887, ZE3885, ZE3884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938.



- ii. In the Application dated 15<sup>th</sup> November 2022, by Family Bank Limited, leave is hereby granted for the approval and enforcement and realization of the securities created in favour of Family Bank Limited at the current market value, being titles numbers in respect to: Kilifi Mtwapa 3882, Kilifi/Mtwapa 3883, Kilifi/ Mtwapa 3884, Kilifi/Mtwapa 3885, Voi Town L.R. No. 1956/428, Voi Town L.R. No. 1956/478, Voi Town L.R. No. 1956/850, Voi Town L.R. No. 1956/844, Voi Town L.R. No. 1956/845.
- iii. In respect to the application dated 19<sup>th</sup> July 2022 by Qwetu Sacco Savings and Credit Society, leave is hereby granted to Qwetu Sacco Savings and Credit Society to proceed to realize its security rights against the New Generation Self-Service Store (under administration) over the following properties: Title Numbers 12176/20 (C.R 69692) & 1956 (CR17278), Motor Vehicles ZF4389, KBW 562H, ZE0916, KBP 142K, KBD 906F, and KBA 422E.
- iv. Costs follow the event; the three Applicants have succeeded in their applications before this court. It is therefore only prudent for this court to order that each party bear their own costs for these applications.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2024.**

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**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

Ms. Gathoni for Mr. K'ongele for the Administrator.

Mr. Gitau holding brief for Muriithi - Family Bank – Creditor.

Mr. Wanjohi for Qwetu SACCO Secured Creditor.

Mr. Khamis Sali for Tahmeed.

Mr. Mohamed for Awale Enterprises.

Mr. Nabil holding brief for Masila for Grain Industries Ltd – Unsecured Creditors.

Amos - Court Assistant

