



**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)**

Neutral citation: [2023] KEHC 12 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E064 OF 2021**

**A MABEYA, J**

**JANUARY 6, 2023**

**BETWEEN**

**CYTONN REAL ESTATE PROJECT NOTES LLP ..... APPLICANT**

**AND**

**OFFICIAL RECEIVER ..... RESPONDENT**

**RULING**

1. This ruling determines two applications, one dated 19/5/2022 by the Creditors and the other one dated 5/10/2022 by the Administrator. I propose to consider the Creditors' application first.
2. The Motion dated 19/5/2022 was brought under Order 51 Rule 1 of the *Civil Procedure Rules*, sections 3A and 63(c) of the *Civil Procedure Act* and section 597(1)(2)(a) of the *Insolvency Act 2015*. It sought the termination and lifting of the Administration of Cytonn Real Estate Project Notes ("CPN"). It also sought the preservation of the assets/projects identified as; the Alma, Applewood/ Miotoni, Riverrun, Ridge and Taraji all indicated as available for Administration and have them put in the custody of the Official Receiver. There was also a prayer for the Creditors to be allowed to enforce the corporate guarantee.
3. The grounds for the application were set out on the face of the application and in the supporting affidavit of a creditor John Bosco Matheka. It was the applicants' case that since his appointment, the Administrator had not undertaken anything substantial in the Administration process. That the Creditors' Committee had, in a virtual meeting held with the Administrator in March, 2022, raised certain questions arising from the Statement of Proposal but the same had remained unanswered. That the Administrator had failed to obtain relevant information pertaining to the company giving the reason as being that the information had been withheld from him.



4. It was the applicant's contention that the management of the company had continued to be in-charge of the company even after the Administration Order had been made. That the company had continued to advertise for conversions as well as advertising some assets for sale. That the Administrator had not revealed to Court and to the Creditors that two months prior to the Administration order, he had been engaged with the company.
5. The respondent opposed the application vide a replying affidavit dated 23/6/2022 sworn by Edwin Harold Dayan Dande. He contended that the purpose of the Administration was to provide an avenue for a credible balance sheet, restructuring CPN's debt as well as establishing whether the company's debt obligations could be successfully restructured.
6. That the Creditors had stayed the agenda 2 of the first creditors meeting and therefore could not accuse the Administrator of not taking the right steps in the Administration. It was further averred that the applicants had referred to the Special Purpose Vehicles (SPVs) but those were separate legal entities that were not under Administration. That the project LLPs were not part of the proceedings and ought not be condemned unheard and they were not prohibited from dealing with their own assets by virtue of the Administration order.
7. He further stated that the project LLPs were allowed to get into contracts for assignment of CPN's debts in exchange for real estate units just as other creditors were allowed to do. That the project LLPs did not require permission from the Administrator to deal with their own assets.
8. The application was also opposed by the administrator Kereto Marima in a replying affidavit sworn on 8/7/2022. He stated that he had given to the members of the Creditors' Committee the consent to act, nondisclosure agreement, guidance note and the code of conduct. That only four members of the Committee signed the nondisclosure agreement and four of them had not signed the guidance note and the code of conduct thus hampering the workings of the Creditors Committee.
9. He further contended that the Loan Notes were the only assets of CPN and he had made demands on the repayment thereof from the SPVs but had not received any. That his Statement of Proposal demonstrated that CPN could not be rescued as a going concern as there was no credible funding model available and the principal partner Cytonns Investment Management Plc ("CIMP") had passed a resolution to wind down the fund.
10. The application was canvassed by written submissions which I have considered. The applicants' submissions are dated 27/5/2022 while those of the respondent are dated 24/6/2022.
11. The respondent submitted that there was no evidence to show that the principal partner had ill motive in applying for Administration. That the Administration orders were specific to CPN and could only affect the operations of CPN estate project notes and that the application was against the rules of natural justice as it condemned the project LLPs and their members together with the lenders without being heard.
12. It was also submitted that the applicants misrepresented some facts stating that the assets of project LLPs were disclosed as available, that the Administrator had failed to disclose working with CPN and that the Creditors Committee had authorization from other creditors to file the motion.
13. For the applicants, it was submitted that Edwin Harold Dayan Dande, the Chief Executive Officer of CPN and CIMP had admitted that CPN was a collection basket where funds were raised by investors and in turn the SPVs would borrow the same in form of Loan Notes. That the same assets the applicants had indicated that they were available for Administration were being used by CPN to



lure selected creditors to convert their debts into apartments. The applicants submitted that that this would prejudice the rest of the creditors prejudiced.

14. That the SPVs had refused to refund the Loan Notes issued to them. That although the assets had been registered under separate legal entities, they remained under the full control of the directors of CIMP and its related entities who continued to deal with the assets in a manner prejudicial to the interests of the creditors in Administration.
15. That since appointment, the Administrator had not taken charge of the assets listed for Administration. The applicants submitted that the creditors had beneficial interests in the assets held by the SPVs.
16. I have carefully considered the application, the responses and the written submissions by the parties. The main issue for determination is whether the applicants have made out a case for the termination and the lifting of the Administration.
17. It was the applicant's contention that the Administrator had done little, if any, to aid the Administration. That the questions and issues they had raised remained unanswered. They were apprehensive as the management of the company continued to be in operation even after the Administration Order. They were aggrieved that the company was reaching out to creditors independently and offering them apartments in settlement of the debt.
18. The respondents however opposed the application stating that the process of Administration had been in fact stalled by the Creditors Committee who failed to sign the required documents such as the nondisclosure document, the code of conduct among others. The Administrator deponed that contrary to the applicants' assertions, he developed a Statement of Proposal which recommended an orderly wind down of CPN and had updated all the creditors on the progress of the Administration.
19. The Motion was founded on sections 597(1)(2)(a) of the [Insolvency Act 2015](#) (the Act) which provides that -
  - “(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”.
20. From the foregoing, 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.
21. 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.



22. The objectives of Administration are set out in section 522 of the Act 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 realize 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.  
...”

23. On 6/10/2021, CPN applied to be placed under administration. At that time, it disclosed that it had received capital contribution from 886 subscribers as at 31/7/2021 totaling Kshs 4,180,992,923/-. That as at that date, its liabilities exceeded its assets by a sum of Kshs 388,118,413/-. It pleaded for an Administration order to be made in order to give it a breathing space for ‘balance sheet restructure and preservation of value’ of its assets.
24. From the foregoing, it is clear the Administration was supposed to either maintain the Company as a going concern, achieve a better outcome for the company’s creditors or realize the property of the company for the Creditors as a whole.
25. On the basis of the foregoing, the Administration Order was made on 6/10/2021 and the Court appointed Mr Kereto Marima as the Administrator. The said Administrator had been proposed by the directors of CPN.
26. In his replying affidavit sworn on 8/7/2022, the Administrator set out the actions he had undertaken since the commencement of the Administration. He had filed the relevant notices on his appointment to the relevant bodies as well as the Creditors. He undertook the verification of claims and developed a Statement of Proposals which recommended an orderly wind down of the CPN. He contended that he had frequently updated the creditors and the last update was on 26/5/2022 and that he had sought legal opinions on various issues that affected CPN.
27. However, the Administrator did not disclose that; he had not informed the creditors as to how much assets of CPN were in his possession or under his control, the assets, if any, he had recovered from or safeguarded for distribution, neither did he tell the Court what he was doing to protect the interests of the creditors. What the administrator only deposed in his affidavit was that he had made several demands to various SPVs demanding for repayment but nothing was forthcoming.
28. As at 7/12/2022, when the matter came up for mention to extend the Administration and seek clarification from the Administrator, there was no evidence to show that the Administrator was actively pursuing the recovery of the amount owed or what he had done to recover anything from the SPVs.
29. It should be remembered that the Creditors accuse the Administrator of being complacent and not fully taking control of CPN. That the operations of CPN was still under the direction and control of the Company directors notwithstanding the Administration order. That he had failed to disclose to the Court that immediately before the petition for Administration was made, he had dealt with the



- Company. These allegations made on oath were neither rebutted nor denied. Indeed, it was alleged that the Company was selectively enticing some creditors to take out assets in projects developed by monies lent out by CPN in settlement of the debts.
30. The Court was not satisfied with the explanation given on how the Administrator had dealt with CPN prior to his engagement as potential Administrator. Although he was appointed by the Court, it behooved him to act professionally and not to be under the control and direction of those who proposed his appointment.
31. It is therefore no wonder that even after the Administration order, Edwin Harold Dayan Dande, who describes himself as the Chief Executive Officer of CIMP is the one swearing and filing affidavits. Further, the Court is alive to the fact that during the first Creditors' meeting meant for March, 2022, the Creditors bitterly complained that the Administrator had given them a very short notice for the meeting. The same was less than 24 hours. They were to consider and vote on the Statement of Proposal running up-to 75 pages. Indeed, they came to Court and stayed one of the agendas.
32. In allowing the stay, this Court observed: -
- “Having listened to the administrator, I am not satisfied that the time given to the creditors to interrogate the Statement of Proposal is reasonable. At least there should have been a minimum of 7days before the body of creditors can be required to interrogate the administrator on the proposal and vote on the same.
- As already stated, this is a matter of public interest. The number of creditors involved, the Interest the matter has generated, it would be unfair to expect the creditors to fully and meaningfully participate in the deliberations with the short notice given.
- Accordingly, I am inclined to allow prayer no 2 – that agenda (iii) be suspended for a period not exceeding 45 days- from 2/3/2022 ....
- It is upon the Administrator to at all times act in the best interests of the creditors. That includes giving them all the reasonable materials required and within a reasonable time as the administration of the company moves forward.”
33. Despite that clear direction of the Court, the Administrator never yielded. He was later on, in the present application, to be accused by the Creditors Committee of refusing and/or failing to answer certain questions put to him by the Committee. That he had failed to supply the Committee with information sought of him. His answer was that some creditors had refused to sign and return certain documents he required of them. These included issues of confidentiality etc. That won't do. The Administration process is there for the benefit of the Company and all its creditors. Period.
34. From the foregoing, it is clear to this Court that the Administrator was not acting in the best interest of the creditors. His actions were contrary to the objectives of the Administration. He was more of shielding the promoters of the Company than the Company and the Creditors. Nothing was being done to restructure the balance sheet and/or add value as had been originally pleaded. The Administrator was dilly dallying with the Administration while the SPVs may be busy putting up the assets for sale.
35. The applicants have also sought for preservation orders of the assets/projects disclosed as the Alma, Applewood/Miotoni, Riverrun, Ridge and Taraji and have them put in the custody of the Official Receiver. This has been opposed on the grounds that those projects belong to other entities and that it would be against the rules of natural justice.



36. It is not disputed that the CPN was a collection company. Members of the public totaling 886 were lured into investing monies in CPN. CPN would then lend the said monies to SPVs associated with CPN or its promoters which amount was assigned to certain projects. From the proceeds of sale of those projects, the loan would then be paid back to CPN which would in turn repay the invested sum with some returns.
37. It was the respondent's contention that the SPVs were registered under different entities and were not under the control of the Company.
38. In the affidavit in support of the petition for Administration at paragraph 8 thereof, the Company disclosed that as at 31/7/2022, it was owed a total sum of KShs 3,685,140,153/- by the following SPVs as follows: -
- a. Cytonn Intergrated Project LLP, The Alma – Kshs 562,326/-
  - b. Cytonn Investments Partners 18 LLP, Applewood/Miotoni – Kshs 177,889,295/-
  - c. Cytonn Investments Partners Five LLP, Riverrun – Kshs 119,945,554/-.
  - d. Cytonn Partners Eleven LLP, Ridge – Kshs 861,664,089/-.
  - e. Cytonn Investments Partners 10 LLP, Taraji – Kshs 1,655,584,468/-.
39. All this was disclosed in the evidence supporting the petition. It was the basis upon which the Administration Order was made. There is evidence on record that the monies paid by the creditors of CPN was sunk in these projects and all that CPN has in its possession are mere pieces of paper called Loan Notes for the same. There are no securities held by way of charges for what the investors sunk in CPN who in turn sunk the same into these projects.
40. It may be that the said entities are separate and independent of the CPN but not the projects. All of them are "Cytonns". They are related and if not, they are by the same promoters. This Court respects and salutes the rules of natural justice. No party should be condemned without a hearing. However, the Court must be sensitive and alive to the plight of the 886 members of the public whose over Kshs 4 Billion was sunk into these projects and therefore lean towards a lesser evil, which is the preservation of those assets. If the SPVs dispose off these assets and the Loan Notes are later realized, there would be no assets to fall back on.
41. In my view, under the Common Law doctrine of tracing, the Creditors would be entitled to trace their funds into these projects. Let those properties be preserved awaiting the realization of the assets of CPN. Ruling otherwise would be to abate a fraud upon the creditors. This would be so because, the so called SPVs may dispose of those projects to the extreme prejudice of the creditors whose monies was used to acquire the same. What if the SPVs were being used to defraud the investors? Is it not prudent to preserve those assets pending the realization of those Loan Notes? Will it be just to tell the Creditors, sorry, your money was lent to SPVs who are independent and they should be allowed to continue to freely deal with the assets that was acquired by your money, but you can't touch them?
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.
43. I have come to the conclusion that the Creditors' interests have not been taken into consideration. The initial 12 months' period is over yet the Administration is still under the initial stages and no sufficient explanation has been given for the delay. By virtue of section 580 of the Act, the Administrator had



the power to take any action which was likely to contribute to the effective and efficient management of the affairs and property of CPN. This he failed to. He did not perform his duty to the satisfaction of the Court.

44. In his affidavit, he has admitted that CPN cannot be rescued as a going concern because it has no credible funding model. In this regard, there is no likelihood of turning the company around and therefore there is no justification of extending the term of the Administrator or appointing a new one.

45. *In re Nakumat Holdings Limited* [2017] eKLR, it was held: -

“The Company is evidently unable to pay its debts. For all the reasons stated in this ruling, the Company, in my judgment, has however not shown to the required standard that an administration order is reasonably likely to achieve an objective of administration. I am not satisfied that this is a case for administration for the following additional reasons.

The level of indebtedness may be beyond salvage and neither the company nor the administrator has taken the time to address this. Secondly, there has been a lack of candor on the part of the company which in my judgment appears to have been intended to only benefit the company, yet administration as a process ranks both the company and creditors in any rescue mission on equal footing”.

46. In the present case, it is not in dispute that CPN is seriously ailing and the Creditors have suffered and continue to suffer as CPN is unable to pay what it owes them. The Administration has not worked and the Administrator has himself proposed that CPN be wound down. The Court is therefore of the view that, the viable option would be to liquidate the company and to appoint a Liquidator who will have the interests of the Creditors at heart.

47. Section 533 of the *Insolvency Act* gives the Court the power to treat an administration application as a liquidation application and make any order that the Court would make under section 426 of the Act. It provides: -

- “ 1) On hearing an application for an administration order in respect of a company, the court may
  - a. ...
  - ...
  - (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.”

48. Before me, I have an application by the Administrator for extension of the Administration. I will treat the same as one under section 533 of the Act and issue a liquidation order.

49. In the premises, I find merit in the application dated 19/5/2022 by the Creditors and I allow the same to the extent that; -

- a. The Administration of CPN is hereby terminated and CPN placed under liquidation.
- b. Since the current Administrator seem to have had links with and has been very accommodative to the promoters of CPN to the detriment of the Creditors, I hereby appoint the Official Receiver as the Liquidator of the Company. The Administrator to forthwith surrender to the Official Receiver all the properties of CPN as well all the Administration documents.



- c. The properties set out in the Motion dated 19/5/2022 would remain under preservation until the Liquidation is concluded.
- d. In view of what I have found above, the application dated 5/10/2022 for extension of the Administration is hereby declined and dismissed with costs.
- e. The pending ruling on all applications for leave to proceed with executions and/or other legal proceedings is hereby arrested to await the process of Liquidation. All those claims be lodged with and be proved before the Liquidator.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JANUARY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

