Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited; I&M Bank Limited (Creditor); Registrar of Companies (Interested Party) (Insolvency Cause E049 of 2021) [2023] KEHC 18685 (KLR) (Commercial and Tax) (9 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E049 OF 2021

A MABEYA, J

JUNE 9, 2023

BETWEEN

CAPE HOLDINGS LIMITED (UNDER ADMINISTRATION) ..... APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED ..... RESPONDENT

AND

I&M BANK LIMITED ..... CREDITOR

AND

THE REGISTRAR OF COMPANIES ..... INTERESTED PARTY

RULING

1. Before Court for determination are two applications. The application dated 19/4/2022 for removal of the administrator and the application dated 19/9/2022 seeking the extension of the term of the administrator.

Application dated 19/4/2022

2. This application was made by Synergy Industrial Credit Limited ("Synergy"). The same was premised on sections 597(1), (2)(b) and (3) and 601(a) of the *Insolvency Act*, sections 1A, 1B and 3A of the *Civil Procedure Act*.

3. The application sought to terminate and/or revoke the appointment of Ms. Vruti Shantilal as an administrator of the company, Cape Holdings Limited (hereinafter "CHL"). It further sought to lift or set aside the administration of CHL.

4. In support of the application, Synergy relied on the grounds on the face of it and on the supporting affidavit of Jacob Mbae Meeme sworn on 19/4/2022. The grounds were that CHL was placed under administration on 12/10/2021 by I&M Bank ("the bank") as the debenture holder who had a floating charge over its assets for an aggregate sum of US Dollar 25,000,000.

5. Synergy's position was that the administration was geared to obtain a moratorium on all the legal proceedings against CPL and more specifically High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc Application No. 126 of 2015 Cape holdings Versus Synergy Industrial Credit Limited.

6. According to Synergy, the bank's move to place the company under administration was meant to stop execution against CPL for it would an automatic moratorium under section 560 of the *Insolvency Act*. That there was no evidence that the company was incapable of paying its own debts and the Statement of Accounts supported this position. That even the Statutory Declaration did not make any allegation that CPL was unable to pay its debts.

7. The applicant contended that in placing CPL under administration, there was improper motive on the part of the bank. With regard to the administrator, the applicant contended that her conduct demonstrated that, he intention was to ensure that CPL remained under administration. That as the appointee of the bank, the administrator had no obligation to the general body of creditors but the bank and CPL. That CPL was liquid as it was utilizing surplus rental income from L. R. No. 209/19436 to facilitate construction over L. R. No. 5884/16 registered in the name of 3rd parties.

8. The bank opposed the application vide a replying affidavit dated 17/5/2022 sworn by Peris Wairimu Chege, the Assistant General Manager, Legal Department. Her view was that the subject of the application was the substratum of pending appeals between the same parties. The bank observed that the appeals arising from the ruling dated 10/12/2021 relied upon by the Synergy were still pending in the Court of Appeal which had granted a stay to the said ruling.

9. The deponent observed that the facility was advanced by the bank on 23/9/2020 before the Court of Appeal pronounced its judgment on 6/11/2020. That the debenture was executed on 15/12/2020 and registered on 8/1/2021. That the bank had a right under clauses 12 and 13 of the debenture to apply for the placement of the company under administration. That the bank was not aware of any orders impeding the issuance of securities by Cape Holdings Limited and denied willfully obstructing the applicant's litigation.

10. The bank urged that the Court should balance the interests of one creditor against the interest of the other creditors as a whole. That in doing so, the Court should be concerned about the financial position of CPL, the administrator's proposed strategy for administration and the period the administrative order has been in force. That upon being served with the garnishee order, the debenture crystallized and the bank was at liberty to appoint an administrator under clause 14 of the debenture over all the property of CPL.

11. In opposition to the application, the Administrator, VRUTI SHANTILAL SHAH filed a replying affidavit sworn on 11/11/2022 and a Notice of Preliminary Objection dated 18/5/2023. In the objection, she urged that the application was a collateral attack on 5 matters that were pending before the Court of Appeal. That the application was an affront to the principles of equity and overriding objective; offended the principle of Audi Alteram Partem; offended the objectives of administration under section 576 of the *Insolvency Act* ("the Act") and that Synergy was guilty of material non-disclosure.

12. In the replying affidavit, the Administrator stated that she had taken all necessary action to maintain the company as a going concern and the same time sought to have the best outcome of the company. She faulted Synergy for failing to attend the creditors meeting held on 20/12/2021. That there was a pending judgment in the Court of Appeal in Civil Appeal (application) No 81 of 2016 Synergy Industrial Credit Limited vs Cape Holdings Limited Under Administration.

13. She further averred that there were still other pending matters in various courts and tribunals. That the application was an attack on the said cases and its aim was to frustrate the hearing of the pending appeals. That the issue on the manner of her appointment was sub-judice and pending in the Court of Appeal.

14. The application was canvassed by way of written submissions which I have considered.

Application dated 19/9/2021

15. This application was by the Administrator. It was brought under Article 159 of *the Constitution* of Kenya, 2010, sections 1A and 1B and 3A of the *Civil Procedure Act*, sections 522, 572(1)(a) and (2)(e), 573(1)(b), 593 and 594 of the *Insolvency Act*, 2015, section 923(1)(a) and 2(c) of the *Companies Act*, 2015, Order 5 rule 17(1)(2) and (4), Order 50 rule 6 and Order 51 rule 1 of the Civil Procedure rules 2010.

16. The application sought the extension of the term of the Administrator for a further period of 12 months or any sufficient time to allow completion of the administration of the company and the appeals in the Court of Appeal.

17. The application was supported by the grounds on the face of it and by the supporting affidavit of the Administrator sworn on 19/9/2022. Her case was that her term as Administrator was coming to an end and it would be necessary in the interest of justice to extend the same in line with section 522 of the Act.

18. She took the view that the outcome of the judgment of the Court of Appeal would substantially impact the actual debt owed to a major creditor and maintain the company as a going concern. She contended that the term should be extended to ensure that the administration is completed together with the pending cases in various courts and tribunal. That in order for her to finalize the affairs of the company, it was imperative to allow the extension sought.

19. In opposition to the application, Synergy filed grounds of opposition dated 7/10/2022 and a replying affidavit sworn by its legal officer, JACOB M. MEEME on 21/10/2022. It contended that the extension of the term would not serve the objectives listed under section 522 of the Act. That no evidence had been proffered to show that CPL was unable to pay its debts and that it was therefore unnecessary to keep it under administration as it had no financial issues and had not defaulted in its obligations.

20. It was contended that the administration had been engineered to safeguard CPL against the execution of the decree in Misc. Application No 114 of 2015 Consolidated with Misc. App No 126 of 2015 Cape Holdings Ltd under administration Versus Synergy Industrial Credit Limited. The Administrator was faulted for failing to perform her duties as quickly and as efficiently as required under section 524 of the Act as there was no report showing what had been done since the last status report given in December, 2021.

21. With regard to creditors, it was stated that out of the total debt of Kshs. 5,438,889,965/-, Synergy's amount was Kshs. 5,125,481,913/- while Kshs. 189,573,965/- was tenant's deposits leaving a sum of Kshs. 94,726,356/- only. According to Synergy, the actual creditors of the company were Kshs. 29,107,028/- who provide utilities that are settled on a regular basis.

22. It was contended that the Administrator had not stated any achievement borne out of the administration. That no action had been taken by the Administrator to show how the assets of the company would be used to realize the debt owed. With regard to the pending cases, it was urged that the same was not dependent on the process of administration and there was no evidence that administration would affect the case.

23. The bank filed its response to the application in a replying affidavit sworn by PERIS WAIRIMU CHEGE on 25/10/2022. It was averred that, having placed CPL under administration on 12/10/2021, the bank supported the extension of the term sought. That the administration should be extended to allow the administrator to undertake her functions and await the conclusion of the matters in various courts.

24. The company submitted that section 594(2) of the Act gave the court the authority to extend the term of administration for a period of 6 months and it could go up to 12 months only on exceptional circumstances. It was submitted that the administration should be extended to allow the determination of various matters pending before the courts which significantly had an impact on the actual debt owed to a major creditor. Further, it was submitted that the extension would benefit all creditors. With respect to the pending cases, counsel submitted that the delay in their determination had greatly interfered with the administration process.

25. The bank submitted that the CPL was placed under administration pursuant to section 523 of the *insolvency Act* when Synergy threatened to execute the decree against the company. That the bank was not aware of the dispute in court and being a holder of a floating charge, it was within its right to appoint an Administrator. That the extension of the administrator's term would not at any time prejudice the respondent rather it would allow several matters pending in various courts be finalized ultimately.

26. The Court has considered the rival averments, the submissions filed and the authorities relied upon by Learned Counsel. The view the Court takes is that the two applications are but two sides of the same coin. The application for extension can be taken to be opposed by the application for removal of the Administrator. There are two issues for determination, to wit, whether the term of the Administrator should be extended for a further period of 12 months and secondly, whether the administration should be raised all together. The Court proposes to determine the first issue as its determination will determine the second.

27. It is not in dispute that the bank, being a holder of a floating charge, appointed the Administrator pursuant to section 543 of the Act on 12/10/2022. The term of an Administrator is 12 months from the date of first appointment. That term can be extended under section 594 of the Act.

28. Before dealing with the two issues, there are two preliminary issues I need to address. There was a prayer to restrain the Administrator from continuing with the administration. That prayer was supposed to be in the interim. I will therefore not deal with it as the application dated 19/4/2023 was heard in totality. The same is spent.

29. The other issue raised was that the application dated 19/4/2023 was sub-judice. There was no evidence that was produced to show that the cases pending in the Court of Appeal were dealing with the issue of termination of the administration of CPL. What the record shows is that, the pending appeals relate to the ruling of this Court dated 10/12/2021 that granted leave to Synergy to execute its decree notwithstanding the administration. Accordingly, the issues in the pending appeals are not the same as the issues in the application dated 19/4/2022.

30. I now propose to deal with the main applications. The issues for determination are, whether the administration should be extended for a further 12 months or the same should altogether be terminated.

31. Courts have variously considered the issue of continued administration or termination of the same. In Re Nortel Networks UK Ltd [2017] EWHC 3299 (Ch), Snoden J held that: -

> 'The Court's discretion under paragraph 76(2)(a) is not circumscribed in any express way, but it is readily apparent that it should be exercised in the interests of the creditors of the company as a whole, and that the Court should have regard to all the circumstances, including (i) whether the purpose of the administration remains reasonably likely to be achieved, (ii) whether any prejudice would be caused to creditors by the extension, and (iii) any views expressed by the creditors. In that regard, where a company is making distributions to its unsecured creditors within the administration process, it is likely to be appropriate that the administrator's term of office should be extended to allow the distributions to be made, rather than to require the company to go into liquidation, which might well increase the costs or delay the distribution process with no countervailing benefit." (Emphasis supplied).

32. In Re Biomethane (Castle Eaton) Ltd [2019] EWHC 3298 (Ch); [2020] BCC 111, Norris J buttressed the approach made by Snowden J and concluded that an extension was appropriate given: (i) the lack of prejudice to the only creditors with an economic interest in the administration, (ii) the consent of those creditors to the extension; and (iii) the fact that the objective of the administration still seemed likely to be achieved.

33. In Re TPS Investments (UK) Ltd (In Admin.) [2020] BCC 437, (a decision of HHJ Hodge QC sitting as a Judge of the High Court) laid out questions to be answered in order to grant an application for extension of an administration. He stated: -

> " In determining whether or not to accede to a paragraph 76(2)(a) extension application, 'four questions tend to arise'. These are:
>
> (1) Why has the administration not yet been completed?
>
> (2) Is any other alternative insolvency regime more suitable?
>
> (3) Is the extension sought likely to achieve the purpose of administration?
>
> (4) If an extension is appropriate, for how long should it be granted?'

34. Closer home, in Cytonn High Yields Solutions LLP (In administration) v Official Receiver (Insolvency Petition E063 of 2021) [2023] KEHC 16 (KLR), while considering whether to extend an administration, the Court found that the actions or in action of the Administrator were prejudicial to the creditors. The Court was concerned with the interests of the creditors. It terminated the administration when it found that the administration was at its initial stages, 12 months into the administration.

35. The Court stated: -

> " From the foregoing, it is clear to this court that the actions and inactions of the administrator were not in the best interest of the creditors. They were contrary to the objectives of the Act. The administrator was more shielding the promoters of the company than acting in the best

interest of the company and the creditors. In delaying to recover what was owed to CHYS, that was highly prejudicial to the creditors.

...

In the present case, the administrator has confessed that he has been unable to realize and recover the loan notes. All he has as assets for the company are loan notes (mere pieces of paper he's been unable to enforce?). 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 conserved/protected awaiting the realization of the assets of CHYS. Ruling otherwise would be to abate a possible fraud upon the creditors. This would be so because, the so SPVs may dispose of those projects to the extreme prejudice of the creditors whose monies was used to acquire them.

...

I have come to the conclusion that, the creditors interests was not taken into account and the administration is still under the initial stages. No satisfactory explanation has been given for the inordinate 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 CHYS. He has not performed his said duty to the satisfaction of the court."

36. In Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others (Insolvency Petition E004 of 2021), while considering removal of an Administrator, the court observed: -

> " When the Legislature enacted the *Insolvency Act*, 2015, it made it clear what the objectives of the Act are. They are clearly set out in section 522 of the Act. In this regard, all decisions made by the Insolvency Court as relates a company under administration must align to the said objectives. As a child is to a Family Court, so is a company under administration to the Insolvency Court; every decision must be made in the best interest of that company.
>
> ...
>
> In this regard, an administrator must at all times align his decisions and actions with the best interest of the company. His duty and loyalty goes beyond the debenture holder who appoints him as such or as receiver. He must undertake his role in a manner that promotes the company as a going concern, where possible, to enable it repay off its debts and be discharged from administration and receivership."

37. The totality of the foregoing is that, the power to extend administration is in the di scretion of the Court. However, like all other discretions, the same must be exercised judiciously. The court will examine the purpose for which the extension is sought. The extension should be for the furtherance of the objectives of administration. That the administrator must be able to show the Court what he/she has done for the period of administration to justify the extension sought. What must have been done should be in tandem with the objectives of administration.

38. Further, where it is shown that the administrator has not acted towards achieving the objectives of administration, extension would be refused. Where it is also shown that the actions of the administrator are prejudicial to the body of creditors, no extension will be given. Further, where it is shown that nothing substantial has been achieved during the period of administration eg. by way of calling the first creditor's meeting, creating the creditor's committee, calling and identifying the total

debt portfolio of the company, identifying and collecting the assets of the company and making a proposal on how to turn around the company under distress, no extension would issue.

39. It should be noted that, the enactment of the detailed *Insolvency Act*, 2015 and introduction of administration was a response to the then opaque, disastrous and ruinous receivership regime. Throughout the history of commerce in independent Kenya, no receivership was ever successful. Receivers used to pounce on distressed companies and give them what Ringera J (as he then was) referred to as 'a kiss of death'. There was never any intention to turn around the fortunes of companies under distress. The receivers went in and made a kill for themselves.

40. In this regard, the *Insolvency Act* came in to address those ills. The Legislature was alive that in 12 months, a well-intentioned administration would show signs of either a turn-around for the distressed company or let it go into liquidation. It allowed extension for 6 months or 12 months where there were exceptional circumstances. An administrator is no longer the yester year receiver who would pitch tent in the distressed company and oversee its death. Administration is time bound. Period!

41. In this regard, an administrator who wishes to have his/her term extended must demonstrate to the Insolvency Court that, he/she has carried out the administration satisfactory for the initial term of the administration, that his/her actions have been towards achieving the objectives of administration as set out in section 522 of the Act, that his/her actions have been for the benefit of the body of creditors.

42. Further, such administrator must demonstrate to the Court what he/she has done for the past 12 or so months since appointment. He/she must at the very least demonstrate that the creditor's meeting has been held, he/she must have identified the total debt portfolio of the ailing company, that he/she has identified and/or collected and preserved all available or substantial assets of the company. In addition, he/she should be able to provide a proposal suitable or otherwise on turning around the company or the way forward. This will be in tandem with the requirement of whether the continued administration would achieve the objective set out in section 522 of the Act or not.

43. In the present case, the administrator sought to extend the period for administration for reasons that the extension would benefit the creditors as the parties await the outcome of the judgment of the Court of Appeal in Civil Appeal no 81 of 2016 Synergy Industrial Credit Limited v Cape Holding Limited (under Administration). According to the administrator, the reasons for extension of the administration was to await the completion of the pending cases.

44. In applying the principles set out above, the Court expected the administrator first to give reasons as to why the administration had not yet been completed within the first 12 months. The administrator should have also set out all that she had done during the first 12 months, the challenges, if any, she faced, the successes achieved and the way forward. This would have enabled the Court be able to determine whether the extension sought was likely to achieve the purpose of administration.

45. Having failed to set out the foregoing in her affidavit in support of the application, the Court sought to establish whether the administrator had performed her functions as set out in the law. The Court perused the record and ascertained this from the Administrator's report and statement of proposals dated 2/12/2021 and lodged with the Court.

46. In that report, the administrator outlined the only work that she had done to be, the calling for a creditors' meeting which took place in early 2022, engaging with stakeholders and assessing the assets owned by CPL. She also reviewed CPL's financial position and business and the options that available. She also indicated that she had overseen the affairs of the company.

47. It should be noted that the said report was made in December, 2021. That was a preliminary report since it was made just two months after appointment. The application for extension was made 10

months later. There is nothing on record to show what had been done between December, 2021 and September, 2022 when the application was being made. It was incumbent upon the administrator to show the Court to its satisfaction what she had undertaken towards realizing the objectives of administration as far as CPL was concerned. This she failed to do.

48. I must emphasize here that, unlike in the receivership regime when a receiver would take over a company and act as he/she wished and not realize anything tangible, not so with administration. In administration, an administrator, whether appointed by a secured creditor under a floating charge or by the court, owes a duty of care to the entire body of creditors. He/she is supposed to move swiftly, ascertain the debt portfolio of the distressed company, secure the assets of that company, assess the options available and do give his/her proposal at the earliest on how the objectives of administration is to be achieved.

49. Can that be said of this administration? No. As I have already stated, the administrator was quiet in her affidavit on what she had done for the past 12 months. She never stated what she intended to do if the administration was extended for the next 12 months. As at the time the application was being heard, the company had been in administration for close to 18 months and yet, absolutely nothing had been done in terms of administration. All the administrator stated was that, there was need to extend the term so that the pending cases can be concluded. That of course is not one of the objectives of administration.

49. It is not lost of this Court that the allegations by Synergy that CPL has never been unable to pay its debts, that it was not only able to service its debts but that it was diverting its surplus finances to develop some property owned by third parties. Evidence of this was laid before Court and the same was neither challenged nor denied.

50. Nearly 18 months into administration and the administrator is unable to tell the Court the debt portfolio of the company, the net assets identified, collected or preserved or given any proposal for attaining the objectives of the administration. No mention of what the administrator had achieved and paid to either the bank or any of the creditors. Administration is not a holiday camp but a busy workshop geared towards achieving the objectives of the Act.

51. The Court's finding is that it has not been demonstrated that the objectives of administration had been met or that the administrator is deserving the exercise of the Court's discretion to extend the term sought. An administrator ought to act in the best interest of the entire body of creditors, not just one of them. The Court is not convinced that the administration was serving the interests of all the creditors in this case. No evidence has been provided to show whether it is feasible and beneficial for CPL to continue as going concern. There has been no mention of how the administrator has secured funding from the proceeds of the company or how the statutory purpose of administration is to be met. The Court reiterates that there is absolutely no evidence of the administrator performing any administration work towards achieving the objectives of the Act after calling for the creditors meeting in early 2022.

52. The Court makes a finding that this is a clear case where the administration is being used to safeguard the interests of the bank only and shield the company from its obligations to the rest of the body of creditors. The administration herein is geared towards maintaining the moratorium pending the determination of the pending cases to the detriment of the other creditors.

53. In the premises, I find that the threshold for extending the administrators term has not been met. The application for extension of the Administration is hereby declined and dismissed with costs. In view thereof, the application for the removal of the administrator does not fall for consideration and is marked as spent. Synergy is awarded the costs of the applications.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF JUNE, 2023.

A. MABEYA, FCIArb

JUDGE