



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Agro Irrigation and Pump Services Limited (Insolvency Cause E025 of 2023)  
[2024] KEHC 13790 (KLR) (Commercial and Tax) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13790 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E025 OF 2023  
A MABEYA, J  
NOVEMBER 7, 2024  
IN THE MATTER OF AGRO IRRIGATION AND PUMP SERVICES LIMITED  
- AND -  
IN THE MATTER OF THE INSOLVENCY ACT NO 18 OF 2015**

**RULING**

1. This ruling determines two applications; the application dated 20/6/2024 by the administrator for extension of the term of administration and the application dated 18/8/2023 by the company/respondent to determine the administration.

**Application dated 18/8/2023**

2. The application is brought under section 3(1)(c), 534(1) and (2) of the *Insolvency Act*, Regulation 10(4) of the Insolvency Regulations 2016, Article 40 of *the Constitution* of Kenya 2010, sections 1A, 1B, 3, 3A and 63e of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Rules 8(b), 15, 16 and 17 of the High Court Organization Rules.
3. The application seeks orders for revoking and setting aside the appointment of Madhav Bhandarias the administrator of the respondent company. The Motion was premised on the grounds on the face of it and the affidavit of Mahesh HalaL sworn on 18/8/2023. It was contended that for more than 23 years, the company had been trading in the manufacture of PVC and PPR pipes, borehole and installation of irrigation systems.
4. That the applicant and the bank registered some debentures between the years of 2010 and 2012. That the bank was not a holder of a qualifying floating charge to warrant administration. It was the applicants position that the employees had not received a salary for the month of July, 2024 and the company had been unable to meet its obligations for remitting statutory deductions.
5. That although there had been a default in payment of the facilities owing to the effects of the covid 19 pandemic, a sister company, Desire Flora Limited was in discussions with an investor who is expected



- to inject USD 9,500,000 and the said monies will be utilized to repay the debt owed to the bank. That the administration would jeopardize the company and jobs were likely to be lost.
6. The administrator, Madhav Sudhir Bhandari, opposed the application vide a replying affidavit dated 31/8/2023. He stated that the company was placed under administration on 4/7/2023 by the bank by virtue of being a debenture holder of various debentures against the company. That upon breach of the facilities, notices were sent to the applicant for settlement of the decretal amount. That the company admitted the debt but had failed to rectify the default in the said notices.
  7. That the company was and continues to be in default and debt stood at Kshs. 1,011,353,345/15 and the more the bank was delayed the more the debt increased. That on his appointment, the role of a receiver and manager was similar to the role of an administrator. That in order not to disadvantage the debenture holders who held debentures that predated the *Insolvency Act* section 534(2)(b) ought to be interpreted in a purposive manner.
  8. The bank filed a supplementary affidavit sworn by Peris Wairimu Chegeon 7/9/2023. She stated that the applicant company and its sister company had created a third further debenture for Kshs 470,000,000/- over the assets of the company and those for Agro-Irrigation and Pump Services Limited. That this debenture consolidated all the existing securities issued to the companies and it expressly provides for the appointment of an administrator.
  9. The respondent raised a preliminary objection on 31/8/2023 on the grounds that the suit had been filed in violation of section 581 of the *Insolvency Act* (“the Act”) as Mr. Mahesh Halai was exercising a management function by appointing an advocate. That the suit was in violation of section 560(1) (d) of the Act.
  10. This application was canvassed by way of written submissions which I have considered. The bank submitted that the director of the company under administration, was performing a management function by appointing an advocate to file the application without the consent of the administrator which has in turn interfered with the exercise of the administrator’s functions. That in doing so, the director had committed an offence under section 581(4) of the *Insolvency Act*.
  11. With respect to the appointment of the administrator, it was submitted that the debenture was a three-way debenture executed by the bank and its sister company and it sought to consolidate all existing securities issued to the companies. In this regard, the bank was a holder of a qualifying charge and was entitled to appoint an administrator. Counsel submitted that there was no investor and the company was terribly indebted to a tune of 1billion and had numerous creditors.
  12. The director submitted that, the third debenture dated 27/4/2022 did not meet the test set out in section 534(2)(a) and (b) of the Act since it did not relate to the company but to Desire Flora Kenya Limited. That that the company had a plan for repaying its debts and it only sought 6 months to source for an investor.

#### **Motion dated 20/6/2024**

13. This Motion was brought under Article 159 of *the Constitution* of Kenya, sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 rule 7 of the Civil Procedure Rules, sections 522, 573, 579, 580, 593 and 594 of the *Insolvency Act*, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
14. The application was for extension of the administration for a further period of 12 months from 4/7/2024. It was supported by the affidavit of the administrator Madhav Sudhir Bhandari sworn on 20/6/2024. He stated that he was appointed as an administrator for the company by the bank which



- is a secured creditor. That his term for administration was set to lapse on 4/7/2024 and there was need to extend the administration in order to achieve the objectives of administration.
15. He averred that since the Court had initially suspended the administration, the statutory period of 12 months was not yet over. That he had been diligently undertaking his duties which included securing the assets of the company, providing vaccinations for the dogs and valuating the financial position of the company. That he had kept the assets of the company in good condition and conducted assessment of the plant and machinery.
  16. The application was opposed by Mahesh Halal, a director of the company vide a replying affidavit sworn on 22/7/2024. He stated that since the administrator took over the company, its operations had come to a halt. That the administrator locked out all the company's staff and refused to pay their wages or remit statutory deductions to the relevant bodies. That he had failed to pay a single business permit for the Nairobi City County as well as the land rent and rates. That at the commencement of administration the company's bank account had Kshs. 2,674,654/- for settlement of business certificates, which money was transferred from the said account.
  17. The application canvassed by way of written submissions which I have carefully considered. The director submitted that the administrator was obligated to maintain the core business of the company but had grounded its operations. That business permit had not been paid for and the administrator had failed to settle with KRA. That the administrator was not interested in maintaining the company as a going concern contrary to section 522 of the Act.
  18. I have considered the parties contestations, rival submissions and the authorities relied on. Having done so, three issues arise for determination namely;
    - a. Whether the preliminary objection is merited;
    - b. Whether the appointment of the administrator should be revoked; and
    - c. Whether the term of administration should be extended.
  19. On the first issue, guidance is to be sought from Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 on the definition of a preliminary objection. In that case, a preliminary objection was defined as consisting a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. It is argued on the basis that facts are agreed and are not to be established.
  20. In *Brownstone Agencies Ltd & another vs. County Government of Bomet & another* [2022] eKLR cited with approval the case of *Oraro v Mbaja* (2005) eKLR, where Ojwang J (as he was then) held: -

“A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed”.
  21. In the present case, the preliminary objection was raised on the grounds that the application was filed in violation of sections 581 and 560 of the *Insolvency Act*. The administrator challenged the directors stating that they were still performing a management function by appointing an advocate and that the company had no capacity to sue or be sued.



22. Section 560(1) of the *Insolvency Act* provides for a moratorium against the company once administration kicks in. No legal action or proceeding can be undertaken against the company without the consent of the administrator or approval of the Court.
23. On the other hand, section 581 of the Act provides: -
- “(1) A company under administration, or an officer of a company under administration, shall not perform or exercise a management function without the consent of the administrator.
  - (2) For the purpose of subsection (1)—
    - (a) "management function" means a function or power that could be performed or exercised so as to interfere with the exercise of the administrator's functions; and
    - (b) consent may be general or specific.
  - (3) A company that contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding one million shillings.
  - (4) An officer of a company who contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.”
24. The above provisions limit the interference by the directors where a company is under administration. I find that by appointing an advocate to bring the application challenging the administration, that per se does not violate the provisions of the law cited. The only problem was that the application was purported to be made on behalf of the company. It should have been made for and on behalf of the directors.
25. In this regard, I find that the application was competent and the preliminary point is without merit and is dismissed.
26. The second issue is whether the appointment of the administrator should be revoked. The director sought that the appointment of the administrator be revoked. The applicant argued that the administrator was not appointed by a holder of a floating charge as the bank did not hold a qualifying floating charge. In its response the bank, admitted that the first two debentures were created before the *Insolvency Act* but however, the company executed the third debenture which consolidated all existing securities issued to the companies.
27. Section 534 of the Act provides what constitutes a floating charge.
28. I have examined the third debenture annexed to the supplementary affidavit of Peris Wairimu Chegesworn on 7/9/2023. The debenture clearly states that the companies provided continuing security for their obligations in favor of the bank. It specifies that the charge created ranks as a first charge on all property and assets covered by the existing securities. It provided for appointment of an administrator in case of a default. Therefore, I do not concur with the applicant's assertion that the bank lacks a qualifying charge over the company's assets.



29. Furthermore, the court finds that administration, which operates under judicial oversight, offers a more favorable path for the company than receivership. While receivership is often aimed at liquidating assets and ultimately killing a company, allows for a reorganization of the company to maintain it as a going concern.
30. In this regard, the Court finds that administration is in the best interests of the company and its creditors. The third further debenture pertains not only to the company but also to its sister company.
31. The third issue is whether the term of administration should be extended. The term of an administrator automatically ends after 12 months. The *insolvency Act* however makes a provision for extension of the term by six months.
32. In *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), the court observed that: -
- “The totality of the foregoing is that, the power to extend administration is in the discretion 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.”
33. 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.”
34. In *Re Biomethane (Castle Eaton) Ltd* [2019] EWHC 3298 (Ch); [2020] BCC 111, Norris J buttressed the approach taken 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.
35. In view of the foregoing, an extension of the term of administration is not an automatic right. The courts discretion will be exercised judiciously. The Court will be concerned about the status of the company and whether the extension will meet the objectives of administration. The status of the creditors and whether they will be prejudiced by the said extension and whether it is in the interest of the company to sustain that extension.
36. In this case, the administration was initially challenged and an injunction had been issued temporarily stopping the administration. Later, the injunction was lifted to permit the administration. Besides,



the administrator has enumerated the activities that he has conducted during the time of the administration to the satisfaction of the Court.

37. Under section 522 of the Act, the objectives of administration are to maintain the company as a going concern, achieve a better outcome for all creditors, and realize the company's assets to facilitate distributions to secured and preferential creditors.
38. The record shows that the administrator has actively defended several lawsuits involving the company, filed reports detailing the company's status, and managed its assets responsibly. These actions align with the objectives of administration and indicate that the process is being carried out effectively to protect the interests of both the company and its creditors.
39. In this regard, I find that this is a proper case to extend the administration in order to rescue the company as a going concern or achieve the objectives of administration under the Act. In the premises I find the application merited.
40. Accordingly, it is hereby ordered that: -
  - a. The preliminary objection dated 31/8/2023 is hereby dismissed.
  - b. The application dated 18/8/2023 for revoking the appointment of the administrator is dismissed.
  - c. The application dated 20/6/2024 is allowed and the term of administration is hereby extended for 12 months from the date of this ruling considering the initial period of injunction.
  - d. Each party to bear own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

