



**In re Cape Holdings Limited (Insolvency Petition E010 of 2024)
[2024] KEHC 15655 (KLR) (Commercial and Tax) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E010 OF 2024
JWW MONG'ARE, J
DECEMBER 9, 2024
IN THE MATTER OF CAPE HOLDINGS LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT (CAP 53 - LAWS OF KENYA)**

RULING

Introduction & Background

1. There are five applications for the court's determination; the applications dated 11th March 2024 and 26th July 2024 by Synergy Industrial Credit Limited ("Synergy") and the applications dated 14th March 2024, 6th June 2024 and 22nd July 2024 by Cape Holdings Limited ("Cape Holdings"). Synergy seeks to discharge, vary, and/or set aside the orders issued on 23rd July 2024 by the Court that restrained it from dealing or interfering with the property L.R. No. 209/19436 (IR 120877) (the suit property). It further seeks the revocation of the appointment of MR. PONANGIPALLI VENKATA RAMANA RAO and MR. SWAROOP RAO PONANGIPALLI as joint Administrators of Cape Holdings, that the Cape Holdings be discharged from Administration and that I&M Bank be restrained from appointing an Administrator to Cape Holdings under the Debenture dated 15th December 2020.
2. On the other hand, Cape Holdings seeks the court to recall and determine the pending application dated 6th May 2024 in Misc. 114 of 2015 Cape Holdings Ltd (Under Administration) v Synergy Industrial Credit Ltd for hearing together or in consolidation with the application dated 6th June 2024 and prayer 6 in the application dated 14th March 2024 in respect of setting aside the decree and taking of accounts.
3. Cape Holdings also seeks to admit the Administrator's Report and Minutes of the Creditors Meeting and grant leave to the administrators to dispose the suit property, set out proposals to all creditors for the settlement of all lawful debts and mediation if Synergy declines the settlement offer. The parties have responded to the various applications by way of sworn affidavits and a preliminary objection and they have supplemented their arguments by filing written submissions.



Analysis and Determination

4. Having gone through the applications, the responses thereto and submissions, I do not wish to belabour so much on the same as the issues for determination therein have more or less been determined by the Court of Appeal in *I&M Bank Kenya Limited & another v Synergy Industrial Credit Limited & 2 others* [2024] KECA 855 (KLR) and by the court in Misc. Application No. 114 of 2015. Cape Holdings seeks inter alia an order of fresh accounts and setting aside of the decree issued to Synergy in Misc. Application No. 114 of 2015. However, these prayers are already spent as the court in Misc. Application No. 114 of 2015 stated in the ruling of 19th November 2024 that it would be against the doctrine of res judicata for the court to review the merits of the Award by determining and recalculating what amount is due to Synergy by Cape Holdings. The court and the Court of Appeal have also stated that the decree issued by the court in Misc. Application No. 114 of 2015 has already been executed and that the execution was completed by the attachment of the suit property on 14th January 2022. As the decree has already been executed, there is nothing to set aside and I am in agreement with Synergy's position that the prohibitory order registered against the suit property title in execution of the decree was neither conditional nor disclaimed any part of the suit property as not being covered by the prohibitory order. The Court of Appeal also stated that the prohibitory order was never challenged and thus remains proper and therefore, this court cannot now interrogate the limits or propriety of the prohibition order as the same has already been settled. This in effect sinks Cape Holdings' prayers that sought to set aside the decree and order fresh accounts in respect of the debt due to Synergy. Synergy's application dated 26th July 2024 is also effectively allowed as the interim orders of 23rd July 2024 can no longer stand.
5. Turning to the prayers in respect of the Administration, I agree with Synergy that this court (Mabeya J.,) In re Cape Holdings Limited [2021] KEHC 366 (KLR) expressed doubts and questioned the circumstances under which the subject Debenture of 15th December 2020 was created. The court held that the timing of the administration under the said Debenture was not meant for the purpose known under the *Insolvency Act* but was meant to buy a Moratorium for Cape Holdings to enable it evade its legal obligations under a lawful decree. The Court of Appeal shared in these sentiments as Kiage JA., in *I&M Bank Kenya Limited & another v Synergy Industrial Credit Limited & 2 others*(supra) held as follows:
 86. I think, with respect, there is much persuasive force in the view, propounded by Synergy, that the placing of Cape Holdings under Administration was a well-calculated move resorted to by the Bank in thinly veiled collusion as one last ditch attempt to aid Cape Holdings in its spirited quest to evade execution of the long-outstanding decree once all room for legal stratagems had been exhausted.
 87. What is writ large on the record is an Administration activated under the most suspicious timing – immediately the Supreme Court placed the final nail on the coffin of legal manoeuvring. The Bank took this drastic action against a company that was not in default and whose accounts clearly indicated that it was patently solvent. It was so solvent that it was demonstrable from the Bank statements that it had rental income far exceeding the monthly loan repayments, and part of the surplus funds were being used by its directors, with the Banks knowledge and concurrence, to put up a construction on their other company's different property, being L.R. No. 5884/16 Riverside Towers.
 88. I am thus persuaded, on a balance of probabilities, in fact more, that the statutory management was executed for the sole purpose of aiding Cape Holdings to escape execution. It appears to me to be a rather ingenious and cynical exploitation of a statute to perpetuate an injustice against



a decree holder. Given the collusion and the mala fides, it sounds ill, in my way of thinking, that the Bank should expect to benefit from the salutary jurisprudence that is founded on debentures that are created and resorted to in good faith, a virtue signally lacking in the case at hand.

89. . My inevitable answer on the question whether the Bank did sufficiently establish its legal interest in the suit property is in the negative.
6. The above holding by the Court of Appeal asserts and fortifies the position that Cape Holdings is (mis)using administration proceedings under the *Insolvency Act* to evade satisfying the decree held by Synergy. This is a classic case of abuse of the court process which the court cannot countenance and I am in agreement with Synergy that the placement of Cape Holdings under Administration is prejudicial to the former's rights and interest and is a fetter to Synergy to fully execute and obtain benefit from the lawful decree it holds. As such, the Administration proceedings against Cape Holdings cannot proceed as the present proceedings are an abuse of the court process and also in light of the Court of Appeal's findings that I&M Bank has no legal interest in the suit property, over which the impugned Debenture was created.

Conclusion and Disposition

7. In the foregoing, this court finds and holds as follows in its dispositive orders:
1. The applications dated 14th March 2024, 6th June 2024 and 22nd July 2024 by Cape Holdings are dismissed.
 2. The applications dated 11th March 2024 and 26th July 2024 by Synergy Industrial Credit Limited are allowed.
 3. The appointment of Mr. Ponangipalli Venkata Ramana Rao And Mr. Swaroop Rao Ponangipalli as Joint Administrators of Cape Holdings Limited be and are hereby revoked.
 4. Cape Holdings Limited be and is hereby discharged from Administration.
 5. I&M Bank Limited be and is hereby restrained from appointing and Administrator to Cape Holdings Limited under the Debenture dated 15th December 2020.
 6. The costs of the aforementioned applications and this petition shall be borne by Cape Holdings Limited and I&M Bank Limited jointly and severally.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 9TH DAY OF DECEMBER 2024

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J. W. W. MONGARE

JUDGE

In the Presence of:-

1. Mr. Allen Gichuhi (SC) for the Applicant (Cape Holdings Ltd).
2. Ms. Asli Osman for the Respondent (Synergy Industrial Credit Ltd).
3. Mr. Kabaiku for the Interested Party (I & M Bank Ltd).
4. Amos - Court Assistant

