



NCBA Bank Kenya Limited v New Generation Self Service Store (Insolvency Notice E047 of 2022) [2024] KEHC 15663 (KLR) (Commercial and Tax) (9 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E047 OF 2022
JWW MONG'ARE, J
DECEMBER 9, 2024**

BETWEEN

NCBA BANK KENYA LIMITED CREDITOR

AND

NEW GENERATION SELF SERVICE STORE DEBTOR

RULING

1. Before this court are two applications for determination; the first one is dated 23/8/2022 and was filed by the Administrator while the second one is dated 7/12/2023 and was filed by Grain Industries Limited.
2. The first application was in the form of a Notice of Motion application filed inter alia pursuant to section 682, 683 & 685 of the [Insolvency Act](#) and Order 40 Rules 1, 2, 4, 10 and 11 of the [Civil Procedure Rules 2010](#).
3. The Administrator sought the following orders:
 1. “Spent
 2. Spent
 3. Spent
 4. Spent
 5. That this Honourable Court be pleased to set aside the transfer of motor vehicles registration number KAY337M, KAY410E, KAR142E, KCA334C, KCA331C, KCA332C, KCA330C, KCJ791B, KCH431U, KCH941S, KAS832G, KBJ743W, KBH686C, KAS372B; and trailers registration numbers, ZE3888, ZE3887, ZE3885, ZE38884, ZE3646, ZE3645, ZE3647,



ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938 to Beachways Enterprises Limited; Francis Ngugi Kamau aka Francis Ngugi, Samuel Kamau Ngugi aka Samuel Ngugi, Thomas Njoroge,; Wilson Gikonyo Kamau aka Wilson Gikonyo, Bon Nature Tours Travels and Safaris Limited, Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited.

6. That pursuant to order 5 above, the National Transport & Safety Authority be directed to rectify its records relating to KAY337M, KAY410E, KAR142E, KCA334C, KCA331C, KCA332C, KCA330C, KCJ791B, KCH431U, KCH941S, KAS832G, KBJ743W, KBH686C, KAS372B; and trailers registration numbers, ZE3888, ZE3887, ZE3885, ZE38884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938 so as to revert them to the New Generation Self Service Store Limited.
 7. That pursuant to Order (5) and (6) above, to Beachways Enterprises Limited; Francis Ngugi Kamau aka Francis Ngugi, Samuel Kamau Ngugi aka Samuel Ngugi, Thomas Njoroge,; Wilson Gikonyo Kamau aka Wilson Gikonyo, Bon Nature Tours Travels and Safaris Limited, Awale Enterprises Limited, 2 Tahmeed Transporters Limited and Al Beramo Transporters Limited be directed to forthwith hand over physical possession of KAY337M, KAY410E, KAR142E, KCA334C, KCA331C, KCA332C, KCA330C, KCJ791B, KCH431U, KCH941S, KAS832G, KBJ743W, KBH686C, KAS372B; and trailers registration numbers, ZE3888, ZE3887, ZE3885, ZE38884, ZE3646, ZE3645, ZE3647, ZE3644, ZE3643, ZE3642, ZC7101, ZE9756, ZD1940, ZE8859, ZD1939, ZD1938 to the Administrator – New Generation Self Service Store Limited.
 8. That the Honourable Court be pleased to issue such orders as may be deemed necessary under Section 685 of the *Insolvency Act* 2015 including but not limited to monetary compensation to the Company for the loss of user of each motor vehicle or trailer at the rate Kshs. 5,000.00/= per day, or such other date of their return to the Administrator – New Generation Self Service Store Limited.
 9. That in the event the subsequent transfers to any or all of Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited is found to be in good faith and for value, then Francis Ngugi Kamau aka Francis Ngugi and Wilson Gikonyo Kamau aka Wilson Gikonyo be ordered to forthwith pay to the Administrator the full purchase price received by each of them for the sales and transfer to Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited.
 10. That the costs of this application, and of implementing order (5), (6) & (7) above be borne by Beachways Enterprises Limited; Francis Ngugi Kamau aka Francis Ngugi, Samuel Kamau Ngugi aka Samuel Ngugi, Thomas Njoroge, Wilson Gikonyo Kamau aka Wilson Gikonyo, Bon Nature Tours Travels and Safaris Limited, Awale Enterprises Limited, Tahmeed Transporters Limited and Al Beramo Transporters Limited jointly and severally.”
4. The grounds of the application were that the Administrator was appointed vide a notice of appointment dated 22/4/2022 by NCBA Bank Kenya as the Administrator of New Generation Self Service Store Limited (the company) ; that the Administrator discovered that the vehicles and trailers of the company necessary for its business had been unlawfully, illegally and fraudulently transferred; that the said transfers are illegal as the company has been insolvent for some time and unable to pay its debts which led NCBA Bank to issue a demand to the company; that after receiving the said demand,



the directors of the company purported to transfer the property of the company that was used in its business without any record of valuable consideration being received.

5. The Administrator averred that shortly after acquiring the assets, Wilson Gikonyo Kamau unlawfully transferred 10 trailers in his name to Bon Nature Tours, Travels & Safaris Limited; Awale Enterprises Limited; Tahmeed Transporters Limited and Al Beramo Transporters Limited; that a total of 14 motor vehicles were transferred to Beachways Enterprises Limited, Francis Ngugi Kamau and Samuel Kamau Ngugi; that Awale Enterprises Limited purchased assets from the company shortly after it was placed under administration and which they know or ought to have known belonged to the company.
6. The Administrator asserted that the loans advanced to the company were to be repaid through the company trading in transport and commodity supply business however that could not be achieved if all of the company's vehicles and trailers were fraudulently transferred to third parties at an undervalue of for no consideration at all.
7. The application was opposed by a replying affidavit filed by Tahmeed Transporters Limited. The affidavit was sworn on 3/10/2022 by one of its directors.
8. It was averred that Tahmeed bought vehicles from Bon Nature Tours Travel and Safari as an innocent purchaser for value and that it did not have a duty to ascertain that the vendors received any valuable consideration from previous owners of the vehicles before making the purchase.
9. The application was also opposed by Awale Enterprises Limited who filed a replying affidavit on 4/10/2023 sworn by its director.
10. It was averred that Awale entered into three separate agreements with one Wilson Gikonyo Kimani and Bon Nature Tours Travel & Safaris Limited to purchase 6 vehicles from the former and 2 vehicles from the latter respectively; that Awale bought the aforesaid trailers under the impression that they had no encumbrances as per the searches conducted then and that Awale did not enter into any negotiations with the New Generation Self Service Store at any given time therefore there was no privity of contract.

Analysis and Determination:

11. The parties filed written submissions which I have carefully considered and analyzed together with the pleadings and attachments filed herein.
12. I note that the Administrator is seeking the re-transfer of 31 vehicles and trailers back to the company on the basis that the same were sold fraudulently by the directors of the company immediately after NCBA Bank issued demand notices under the Debenture and shortly before the appointment of the Administrator was completed in an attempt to defeat the administration.
13. The application was strongly opposed by Tahmeed Transporters Limited and Awale Enterprises Limited who argued that they purchased the vehicles as innocent purchasers for value after carrying out due diligence.
14. The *Black's Law Dictionary* 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”



15. In the Court of Appeal case of *Samuel Kamere v Lands Registrar*, Kajiado [2015] KECA 644 (KLR) it was stated:

“in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

16. The Supreme Court of Kenya in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) cited the Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, which defined a “bona fide purchaser for value” as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not a party to the fraud.”

17. I concur with the authorities above. In this case, Awale Enterprises Limited carried out due diligence and entered into three separate sale agreements all dated 17/5/2022 with one Wilson Gikonyo Kimani and Bon Nature Tours Travel & Safaris Limited to purchase 6 and 2 vehicles respectively. The copies of the agreements are produced as ‘AJA-2’, ‘AJA-3’ and ‘AJA-4’ in Awale’s replying affidavit. Awale paid a consideration for the aforementioned vehicles as evidenced in the annexures marked ‘AJA-6’, ‘AJA-7’ and ‘AJA-8’ in Awale’s replying affidavit.

18. Tahmeed Transporters Limited entered into a sale agreement for motor vehicles with Bon Nature Tours Travel & Safaris Limited to purchase 5 trailers. The agreement was produced in the replying affidavit sworn on 3/10/2022 as ‘ROA-2’. Tahmeed paid a consideration of Kshs.5,000,000/- as purchase price as evidenced in by the annexure ‘ROA-3’ in the replying affidavit sworn on 3/10/2022.

19. From the foregoing facts, and guided by the authorities above, I can reasonably conclude that the two purchasers bought the said vehicles pursuant to legitimate sale agreements and paid for the same as innocent purchasers and that they did so having done due diligence.

20. I agree with the purchasers’ submissions, that they did not have a duty to ascertain the history of the previous ownership of the said vehicles. Their only duty was to be certain that the vendors were indeed the true owners of the vehicles after carrying out a due diligence. The purchasers did not enter into any sale agreement with New Generation Self Service Store who were not privy to the transactions.

21. Fraud is a criminal offence that ought to be proved beyond reasonable doubt and in this case the Administrator has not proved the same as per the required standard. In the circumstances, I find no merit in the instant application and dismiss the same with costs.



The Second Application:

22. The second application was dated 7/12/2023 and filed by Grain Industries Limited who sought an order of this court to direct the Administrator to set aside 20% of net proceeds obtained from the sale of assets of the company for purposes of satisfying the Kshs. 177,157,844.94/= that was owed to the Applicant by the company.
23. The grounds of the application included that the Applicant is an unsecured creditor of the company to the tune of Kshs.177,157,844.94/= pursuant to a decree and certificate of costs in Mombasa High Court Civil Suit No.E006/2022: Grain Industries Ltd v New Generation Self-Service Store Limited & 2 Others ; that section 474(1) & (2)(a) and 560(1)(d) of the *Insolvency Act* and regulation 96 of the Insolvency Regulations require the Administrator to set aside 20% of all the net assets of the company to satisfy debts owed to unsecured creditors.
24. The Applicant as an unsecured creditor of the company was apprehensive that the Administrator would proceed to dispose of all the assets of the company for the benefit of NCBA Bank, the secured creditor without setting aside and allocating 20% of the assets to satisfy the debt owed to the unsecured Applicant.
25. In opposition to the application the Administrator filed a replying affidavit sworn on 4/7/2024.
26. He averred that the certificate of costs was issued on 27/4/2022, five days after his appointment as an Administrator which was in violation of the law; that the only assets that he has disposed of as Administrator are those pledged to secured creditors.
27. The Administrator asserted that he is doing his best in the circumstances to ensure that unsecured creditors also recover and prayed to have the application dismissed with costs.

Analysis and Determination:

28. The Applicant filed written submissions dated 20/2/2024 and 17/10/2024 while the Administrator filed written submissions dated 10/9/2024. The court has carefully considered the same together with the pleadings filed herein. I note that the issue that arises for determination is whether the present application has merit.
29. The Applicant, an unsecured creditor of the company, filed the instant application seeking an order to direct the Administrator to set aside 20% of the net proceeds from the administration of the company to satisfy its unsecured debt of Kshs.177,157,844.94/= owed to it. The Applicant was apprehensive that the Administrator would dispose of all the assets of the company for the benefit of the secured creditor without setting aside the aforesaid 20% to satisfy the Kshs.177,157,844.94/= owed to it.
30. The Applicant is an unsecured creditor of the company pursuant to a decree and certificate of costs issued in Mombasa High Court Civil Suit No. E006/2022: *Grain Industries Ltd v New Generation Self-Service Store Limited & 2 Others*. The certificate of costs (produced as 'MN1' in the Applicant's supporting affidavit) was issued on 27/4/2022 which is after the company began the administration process on 22/4/2022. Under the *Insolvency Act*, once a company is placed under administration, no suit can be commenced or continued against the company without the Administrator's consent or the leave of the court. In this case, neither was sought, therefore, the certificate of costs relied on was issued in contravention of the law.
31. The Applicant was apprehensive that the Administrator would dispose of all of the assets of the company in favour of the secured creditors and to the detriment of the unsecured creditors including



itself. However, the Applicant has not shown the court instances whereby the Administrator disposed of the assets reserved for the unsecured creditors.

32. The Administrator stated on oath that the sales that have been carried out were done by the secured creditors or with the sanction of the court, the ruling of 19/2/2024 being evidence of a sale sanctioned by the court. This assertion has not been rebutted by evidence adduced by the Applicant. In the absence of such evidence, the court cannot make a finding based on speculation only.
33. The upshot of the foregoing is that the application is devoid of merit and is dismissed with costs.
34. In the end, both the applications dated 23/8/2022 and 7/12/2023 are dismissed.

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

J. W. W. MONGARE

JUDGE

In the Presence of:-

Mr. Gitau holding brief for Mr. Muriithi for Family Bank (A Creditor).

Mr. Shaban holding brief for Mr. Saad for the 8th Interested Party.

Amos- Court Assistant

