



REPUBLIC OF KENYA



**In re Zarara Oil & Gas Company Limited (Miscellaneous Application E532 of 2021)  
[2021] KEHC 191 (KLR) (Commercial and Tax) (3 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 191 (KLR)

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

**MISCELLANEOUS APPLICATION E532 OF 2021**

**DAS MAJANJA, J**

**NOVEMBER 3, 2021**

**IN THE MATTER OF THE ZARARA OIL AND GAS COMPANY LIMITED**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015**

**AND**

**IN THE MATTER OF AN APPLICATION OF RECOGNITION  
OF FOREIGN INSOLVENCY PROCEEDINGS**

**Where insolvency proceedings had commenced in a foreign country was prima facie proof that a debtor was in financial distress.**

Reported by Ribia John

***Law of Insolvency** – application for recognition – foreign representative – definition of – what factors did the court consider in determining if one was a foreign representative - whether the applicant was a foreign representative with the capacity to administer the re-organisation or the liquidation of the company’s assets or financial affairs or to act as a representative in the foreign proceedings - Insolvency Act, (No. 18 of 2015), sections 560 and 720; Insolvency Act, Fifth Schedule, paragraph 13.*

***Law of Insolvency** - application for recognition – pre-requisites to prove that a debtor was in financial distress – list of creditors – financial statements - whether a foreign representative when applying to the High Court of Kenya for the recognition of foreign insolvency proceedings had to list all creditors and provide financial statements to prove that a debtor was in financial distress – whether insolvency proceedings commenced in a foreign country was prima facie proof that a debtor was in financial distress - Insolvency Act sections 560 and 720; Insolvency Act, Fifth Schedule paragraphs 4, 17 and 19.*

***Law of Insolvency** – application for recognition – public policy exception – factors the court considered - what factors did the court consider in determining whether the public policy exception could defeat an application for recognition (the decision to recognise foreign proceedings was subject to whether the action was manifestly contrary to public policy of Kenya - Insolvency Act, sections 560 and 720; Insolvency Act, Fifth Schedule, paragraphs 8 and 19.*



*Law of Insolvency – priority of tax – priority over other creditors - whether in insolvency proceedings, the taxing body, the Kenya Revenue Authority, was to be paid taxes owed before any other creditor was paid – Tax Procedures Act, (No. 29 of 2015), section 34(2).*

### **Brief facts**

The applicant was a liquidator and foreign representative of Zarara Oil and Gas Limited (the company) and made an application that sought to recognize the decree of the Republic of Mauritius in relation to the company's liquidation proceedings commenced in the Republic of Mauritius.

The company was an oil and gas company that extracted oil in Kenya. In the course of its activities the company encountered liquidity problems and was unable to meet its commitments. Subsequently, the company's board of directors resolved that the company was to be placed into liquidation in accordance to Mauritius' insolvency law. Subsequently the foreign representative that also served as the administrator filed the instant application that sought to get the proceedings in Mauritius recognized by the High Court of Kenya.

The creditors opposed the application on grounds that the applicant had not attached a list of creditors or any financial statements to show that the company was in financial distress. The Kenya Revenue Authority (KRA) opposed the application on grounds that KRA should have priority to tax the company for any tax arrears before the company engaged in paying back its creditors.

### **Issues**

- i. Whether the applicant was a foreign representative with the capacity to administer the re-organisation or the liquidation of the company's assets or financial affairs or to act as a representative in the foreign proceedings.
- ii. What did the court consider in order to determine whether a grant of recognition would be contrary to the public policy of Kenya?
- iii. Whether a foreign representative when applying to the High Court of Kenya for the recognition of foreign insolvency proceedings had to list all creditors and provide financial statements to prove that a debtor was in legal distress.
- iv. What factors did the court consider in determining whether the public policy exception could defeat an application for recognition (the decision to recognize foreign proceedings was subject to whether the action was manifestly contrary to public policy of Kenya)?
- v. Whether insolvency proceedings commenced in a foreign country was *prima facie* proof that a debtor was in financial distress.
- vi. Whether in insolvency proceedings, the taxing body which was the Kenya Revenue Authority, was to be paid taxes owed before any other creditor was paid.

### **Relevant provisions of the Law**

#### **Insolvency Act, Act No. 18 of 2015**

#### **Fifth Schedule, paragraphs 8,17 and 19**

##### **8. Public policy exception**

(1) *Nothing in this Schedule prevents the Court from refusing to take an action governed by this Schedule if the action is manifestly contrary to the public policy of Kenya.*

(2) *Before refusing to take an action under subparagraph (1), the Court shall consider whether it is necessary for the Attorney-General to appear and be heard on the question of the public policy of Kenya.*

##### **17. Application for recognition of a foreign proceeding**

(1) *A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.*

(2) *An application for recognition may be rejected if it is not accompanied by—*

(a) *a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;*



- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
  - (c) in the absence of evidence referred to in sub-paragraphs (a) and (b)—any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.
- (3) An application for recognition may also be rejected if it not accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
- (4) The Court may require a translation of documents supplied in support of the application for recognition into English as the official language of Kenya.

#### **19. Decision to recognise a foreign proceeding**

Subject to paragraph 8, the Court shall recognise a foreign proceeding if—

- (a) the foreign proceeding is a proceeding within the meaning of paragraph 4;
  - (b) the foreign representative applying for recognition is a person or body within the meaning of that paragraph;
  - (c) the application meets the requirements of paragraph 17(2); and
  - (d) the application has been submitted to the Court.
- (2) The Court shall recognise the foreign proceeding—
- (a) as a foreign main proceeding if it is taking place in the State if the debtor has the centre of its main interests; or
  - (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of paragraph 4(f) in the foreign State.
- (3) The Court shall hear and determine an application for recognition of a foreign proceeding at the earliest possible time.
- (4) As soon as practicable after the Court has recognised the foreign proceeding under subparagraph the foreign representative shall notify the debtor that the application has been recognised.
- (5) This paragraph and paragraphs 17, 18 and 20 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

#### **Held**

1. A foreign representative meant a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or financial affairs or to act as a representative in the foreign proceeding. The applicant had provided evidence of his appointment to administer the reorganization and liquidation of the company's assets and financial affairs. The instant application was properly before the court, and the applicant was a foreign representative.
2. The foreign representative had provided evidence of his appointment as a liquidator and the decision from the Supreme Court of Mauritius sanctioning his mandate and proving the existence of the proceedings in Mauritius. The existence of the foreign proceedings had not been contested by the creditors.
3. The proceedings in the Supreme Court of Mauritius fell squarely within the meaning of foreign proceedings and foreign non-main proceedings under paragraph 4 of the Fifth Schedule of the Insolvency Act as the company had its center of main interests (COMI) in Kenya in as much as the company was registered in Mauritius where the insolvency proceedings were commenced. It was also not in dispute that the company was registered and incorporated under the laws of Mauritius and had registered an address in Mauritius with a branch office in Kenya. The instant application complied with the provisions of paragraph 19. The Foreign Representative had complied with all the preconditions for recognition in paragraphs 17 and 19 of the Fifth Schedule to the Insolvency Act.
4. The decision to recognize foreign proceedings was subject to whether the action was manifestly contrary to the public policy of Kenya. For the public policy exception to defeat an application for the recognition it had to be demonstrated that the grant of recognition would be so clearly or plainly



- contrary to the public policy of Kenya. By inclusion of the word manifest, the public exception clause was intended to be invoked in exceptional and limited circumstances.
5. The contempt orders issued by the court were subject to a determination pending before the Court of Appeal and the same was compromised by the consent of the parties, and the conditions imposed were complied with. The company or the foreign representative had not disobeyed the court's orders so as to conclude that they had violated Kenya's public policy.
  6. Paragraphs 17(2) and (3) of the Fifth Schedule to the Insolvency Act did not impose on an applicant the duty to list all creditors or provide financial statements to prove that a company was in financial distress. The fact that insolvency proceedings had commenced in a foreign country was *prima facie* proof that the company was in financial distress. Further, the issue of disclosure could be dealt with when considering the relief, which the court could grant under paragraph 23 of the Fifth Schedule to the Insolvency Act.
  7. The court's jurisdiction to deal with the company's financial issues was circumscribed by paragraph 12 of the Fifth Schedule to the Insolvency Act as such issues were a preserve of the foreign court. The foreign representative had provided documents showing the company's creditors and financial position. The instant application was not a ploy to frustrate the judicial proceedings commenced by it as it was within the foreign administrator's purview to seek for a stay of all judicial proceedings.
  8. Treating Kenya Revenue Authority (KRA) as a priority creditor by virtue of section 34 of the Tax Procedures Act and any argument that KRA should be paid the taxes owed before any other creditor was paid would undermine the basic principle underlying insolvency. All creditors of the same class had to be treated fairly and equally. Such a position would amount to the court taking over the insolvency proceedings contrary to the Fifth Schedule to the Insolvency Act, and undermining the other creditors. Even though section 34 of the Tax Procedures Act provided for priority of taxes, the issue of payment could only arise once a liquidator collected the assets and proposed to pay the creditors. The objection by KRA to the recognition on that ground was dismissed.
  9. The court had already granted an order staying any proceedings against the company in order to protect the assets of the company in line with paragraph 21 of the Fifth Schedule to the Insolvency Act. The same orders of stay would ordinarily be granted once the foreign proceedings were recognized in order to protect the company's assets from legal proceedings by creditors. On the other hand, in order to meet the objectives of the Insolvency Act set out in section 3 which included ensuring that the company was able to operate as a going concern in order to meet its financial obligations to the creditors in full or achieve a better outcome for the creditors as a whole if it was liquidated, paragraphs 24 and 25 of the Fifth Schedule to the Insolvency Act provided that in recognizing cross border insolvencies, a company's creditors had to be protected.
  10. Paragraphs 24 and 25 of the Fifth Schedule to the Insolvency Act were intended to ensure that the local creditors' interests were secured by protecting their rights to participate in proceedings and to seek court assistance when necessary. The priority interests of KRA also had to be protected.

*Application allowed.*

### **Orders**

- i. *The decree of the Republic of Mauritius issued in relation to the Company was recognized by the instant court.*
- ii. *The Liquidation proceedings commenced in the Republic of Mauritius in relation to the company and in which proceedings the applicant, Yuvraj Thacoor had been appointed as liquidator of the company were recognised by the court.*
- iii. *The foreign representative was directed to give notice in one newspaper of national circulation and in the Kenya Gazette within 7 days of the court's order to all persons within the Republic of Kenya whose rights, obligations or interests could be affected by the proceedings in the Republic of Mauritius and of the court's order recognizing the decree and proceedings in Mauritius.*



- iv. *An order of stay was issued staying all proceedings, including execution proceedings, relating to the company, its assets and or other interests in Kenya.*
- v. *An order of stay was issued barring the commencement in any of the courts in the Republic of Kenya any civil proceedings of any type against the Company and its subsidiaries and or Branches (the company) pending finalization of the liquidation process.*
- vi. *The Supreme Court of Mauritius (Bankruptcy Division) was to adopt such process that would give the Kenyan creditors meaningful and affordable access (including but limited to virtual access) and participation in the insolvency proceedings.*
- vii. *The liquidator and or foreign representative were to file in the instant court and serve on the creditors and or their representatives in Kenya periodical reports of the proceedings in Mauritius and status of the insolvency every 30 days from the date of the first report being filed and served within 30 days from the date hereof.*
- viii. *An order was issued that no assets of whatever kind belonging to the company in Kenya would be permitted to leave, be transferred out or encumbered or otherwise disposed of without the leave of the court.*
- ix. *Any creditor in Kenya who was dissatisfied with the any aspect of the process was at liberty to apply to the instant court for modification or termination of the relief.*
- x. *No order as to costs.*

### **Citations**

#### **Cases**

##### ***East Africa;***

1. *Baabad, Abudulrahman Salim v County Commissioner of Lamu & 3 others* Constitutional Petition 3 of 2019; [2020] eKLR — (Mentioned)
2. *In re Cooperativa Muratori and Cementisti – CMC Di Ravenna (Insolvency)* Miscellaneous Application E627 of 2019; [2020] eKLR — (Explained)
3. *In re HP Gauff Ingeniure GmbH & Co KG-JBG* Miscellaneous Application E725 of 2019; [2021] eKLR — (Explained)
4. *Allterrain Services Kenya Ltd v Zarara Oil and Gas Ltd* Cause No E06 of 2019; [2020] eKLR (Mentioned)
5. *Oilfield Movers Ltd v Zarara Oil and Gas Ltd* Cause No E054 of 2019; [2020] eKLR- (Mentioned)

#### **Statutes**

##### ***East Africa;***

1. Banking Act (cap 488) sections 5, 34, 47 — (Interpreted)
2. Income Tax Act (cap 470) section 34(2) — (Interpreted)
3. Insolvency Act, 2015 (Act No 18 of 2015) sections 560, 720 — (Interpreted)

#### **Advocates**

1. *Mr Achoki instructed by CMS Daly and Inamdar Advocates* for for the Foreign Representative
2. *Abdullahi, Gitari and Odhiambo Advocates LLP* for for the Allterrain Services Kenya Limited and OML Africa Logistics Limited

## **RULING**

1. What is before the court for determination is the notice of motion dated 12<sup>th</sup> July 2021 filed by Yuvraj Thacoor, the Liquidator and/or foreign representative of Zarara Oil and Gas Limited (“the



Company”) and made, *inter alia*, under sections 560 and 720 of the [Insolvency Act](#), 2015 as read together with the Fifth Schedule therein seeking the following orders:

1. Spent\*
  2. Spent\*
  3. Spent\*
  4. Spent\*
  5. Spent\*
  6. Spent\*
  7. That the honourable court be pleased to recognize the decree of the Republic of Mauritius in relation to the Company
  8. That the Liquidation proceedings commenced in the Republic of Mauritius in relation to the Company and in which proceedings the applicant has been appointed as Liquidator of the Company be duly recognised by this honourable court.
  9. That this honourable court be pleased to allow the Foreign Representative give notice, within a reasonable time to be determined by the court, to all persons within the Republic of Kenya whose rights, obligations or interests may be affected by the proceedings in the Republic of Mauritius
  10. \*Repetition of Prayer No 9
  11. That upon recognition of the Foreign Proceedings this honourable court be pleased to order a stay of all proceedings, including execution proceedings, relating to the company, its assets and or other interests.
  12. That upon recognition of the Foreign Proceedings this honourable court be pleased to order a stay barring the commencement in any of the courts in the Republic of Kenya any Civil Proceedings of any type against the Company and its subsidiaries and or Branches (“the Company”) pending finalization of the Liquidation process
  13. That this honourable court be pleased to make such further order/s as it may deem fit and just in the circumstances of the case
  14. That the costs of this application be provided for.
2. The application is supported by the grounds set out on its face and the affidavits of the said Yuvraj Thacoor (“the Foreign Representative”) sworn on 30<sup>th</sup> June 2021, 12<sup>th</sup> August 2021 and 16<sup>th</sup> August 2021 respectively. It is also supported by the Official Receiver who has filed written submissions. The application is opposed by the following creditors; OML Africa Logistics Limited through the affidavits of its director Mwendia Nyaga sworn on 28<sup>th</sup> July 2021 and 11<sup>th</sup> August 2021 respectively; Allterrain Services Kenya Limited through the affidavits of its director George Maina sworn on 28<sup>th</sup> July 2021 and 11<sup>th</sup> August 2021 respectively and; the Kenya Revenue Authority (“KRA”) through the replying affidavit of Martin Tsalwa, its officer within the International Tax Office Division, Large Tax Payers Office, sworn on 30<sup>th</sup> August 2021. The parties’ respective advocates also made brief oral submissions



3. The facts giving rise to the instant application are largely common ground. The Company is a Mauritius GBC 2 incorporated limited liability company, with a branch office registration in Kenya. It was incorporated on 12<sup>th</sup> May 2011 with a stated capital of US\$11,000,000. Its sole shareholder is MRI Kenya Limited, a company incorporated in the Cayman Islands holding the 11,000,000 issued shares. The Company is mainly engaged in the exploration, development and production of oil and gas in Kenya pursuant to two Production Sharing Contracts the Government of Kenya entered into with SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited for the said exploration, development and production of oil and gas in Kenya in August 2008. In July 2011, the two entities SOHI-Gas Lamu and SOHI-Gas Dodori assigned/transferred to the Company 75% of their participating Interests in the two aforesaid Production Sharing Contracts.
4. In the course of their exploration activities, the Company had liquidity problems and was unable to meet its commitments. On 2<sup>nd</sup> November 2020, the Board of Directors resolved that the Company be placed into liquidation in accordance with Mauritian insolvency law and the Foreign Representative duly appointed as the Administrator. On 27<sup>th</sup> February 2021, the Foreign Representative applied for recognition of the Mauritian Foreign Administration proceedings and his appointment as an Administrator in Kenya. Upon filing the application for administration, the Foreign Representative was directed to advertise his appointment. Later on he was granted interim orders by the court on 17<sup>th</sup> March 2021 to administer and manage the Company pending the hearing and determination of the application for recognition of the foreign proceedings. He was also directed to file weekly reports in court.
5. The Foreign Representative's mandate as an administrator came to an end on 31<sup>st</sup> March 2021 and thereafter, the Directors of the Company, through a written special resolution dated 1<sup>st</sup> April 2021, resolved that; the Company be wound up and; the Foreign Representative be appointed as Liquidator of the Company.

### **The Application**

6. The Foreign Representative's position is that recognition of the Mauritius proceedings is necessary as the Company has existing assets and recurring liabilities and expenses in Kenya which he needs to take control of for purposes of liquidation. These liabilities and expenses include license fees, tenancy fees, employment wages. It also states that the Company and its subsidiaries and/or branches are engaged in defending and is even facing execution in other proceedings being; *Malindi ELC Petition No 3 of 2019 Abdulrahman Salim Baabad v County Commissioner of Lamu & 4 others*, High Court Commercial Cause Number E046 of 2019, *Allterrain Services Kenya Limited v Zarara Oil and Gas Limited* and High Court Commercial Cause Number E054 of 2019, [\*Oilfield Movers Limited v Zarara Oil and Gas Limited\*](#).
7. The Foreign Representative submits that should the suits and attendant execution proceed, the Liquidation process and his functions as a Liquidator will be prejudiced to the detriment of the Company and its Creditors. In the circumstances, it urges the court to grant it interim powers and authority to administer, preserve and take control of the Company, including its assets, property and undertakings for purposes of liquidation. It also seeks a stay of all proceedings against the Company pending determination of these proceedings.

### **The Creditors' Reply**

8. The creditors OML Africa Logistics Limited and Allterrain Services Kenya Limited oppose the application. They submit that the Foreign Representative has not attached a list of creditors or any financial statements to show that the Company is in financial distress hence unable to pay its debtors.



They state that the application is a ploy to frustrate the judicial proceedings commenced by it in Kenya and that the Foreign Representative has not disclosed other pending proceedings against the Company in the Cayman Islands and pending contempt orders against the directors of the Company. Counsel submitted that one of the reasons why the court can decline to allow the application for recognition is when there is no disclosure in regards to other proceedings which involve the company. The creditors further accuse the Foreign Representative of disobeying court orders and being in contempt of court.

9. KRA states that the orders sought by the Foreign Representative cannot apply to it as section 34 of the Tax Procedures Act, 2015 (“TPA”) provides for priority of tax and subsection (2) of the section lists Withholding tax as one of the taxes ring fenced by the provision and that if a person is liquidated or is declared bankrupt, then pursuant to the aforesaid provision the taxes mentioned under the said provision shall not form part of the estate of person in liquidation or bankruptcy and shall be paid to the Commissioner before any distribution is made. It therefore submits that in this instance, the outstanding Withholding tax arrears due from the Company to KRA do not form part of its estate to be administered by the Foreign Representative and that the court should order that the Company pays KRA the outstanding withholding tax assessments before the administration of the Company can commence.
10. KRA puts forward an alternative argument that if the court recognizes the foreign proceedings, then it should order the Foreign Representative to give an unequivocal undertaking that they shall pay to KRA the amounts in due as tax arrears in full from the Company prior to any distribution of the estate.

#### **Analysis and Determination**

11. This substance of this proceeding concerns recognition of cross-border or foreign insolvency proceedings. The question for determination is whether the Foreign Representative has met the conditions for recognition of foreign proceedings and if so, whether the opposing creditors have set established grounds for refusal of the order of recognition.
12. These proceedings are governed by section 720 of Part XIII of the *Insolvency Act* which provides as follows;

#### 720. Cross border insolvency

The United Nations Commission on International Trade Law (Model Law on Cross-Border Insolvency) has the force of law in Kenya in the form set out in the Fifth Schedule.

13. Paragraph 3 of the Fifth Schedule of the *Insolvency Act* sets out the scope of application as follows;
  3. Scope of application of this Schedule
    - (1) Except as provided in subparagraph (2), this Schedule applies—
      - (a) assistance is sought in Kenya by a foreign court or a foreign representative in connection with a foreign proceeding;
      - (b) assistance is sought in a foreign State in connection with a proceeding under this Act and any other written law relating to insolvency in Kenya;
      - (c) a foreign proceeding and a proceeding under this Act and any other written law relating to Insolvency in Kenya in respect of the same debtor are taking place concurrently; or



- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under this Act or any other written law relating to insolvency in Kenya.
- (2) This Schedule does not apply to a company that holds a licence granted under section 5 of the Banking Act if—
- (a) the Central Bank of Kenya has intervened in the management of the company in accordance with section 34 of that Act and that intervention has not ceased; or
  - (b) the licence of the company is suspended as a result of the operation of section 47 of that Act.
14. Paragraph 12 restricts the court’s jurisdiction on cross border insolvencies as follows:
12. Limited jurisdiction  
The sole fact that an application under this Schedule is made to the court by a foreign representative does not subject the foreign representative or the foreign assets and financial affairs of the debtor to the jurisdiction of the court for any purpose other than the application.
15. Paragraph 13 provides that a foreign representative may commence insolvency proceedings in Kenya. A foreign representative is defined under paragraph 4 as follows;
- “foreign representative” means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the re-organisation or the liquidation of the debtor’s assets or financial affairs or to act as a representative in the foreign proceeding
16. I am satisfied that Mr Thacoor has provided evidence of his appointment to administer the re-organization and liquidation of the Company’s assets and financial affairs and thus the present application is properly before the court and that he is a Foreign Representative in line with the statutory definition above.
17. The conditions that an applicant must meet before foreign insolvency proceedings are recognised are set out in paragraph 17 which provides as follows;
17. Application for recognition of a foreign proceeding
- (1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.
  - (2) An application for recognition may be rejected if it is not accompanied by—
    - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
    - (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or



- (c) in the absence of evidence referred to in sub-paragraphs (a) and (b) —any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.
  - (3) An application for recognition may also be rejected if it not accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
  - (4) The court may require a translation of documents supplied in support of the application for recognition into English as the official language of Kenya.
- 18. In accordance with the aforesaid proceedings, the Foreign Representative has provided evidence of his appointment as a Liquidator and the decision from the Supreme Court of Mauritius sanctioning his mandate and proving the existence of the proceedings in Mauritius. In any case, the existence of the foreign proceedings has not been contested by the creditors.
- 19. Paragraph 19 provides the parameters for the court’s consideration when determining an application for recognition as follows;
  - 19. Decision to recognise a foreign proceeding
    - (1) Subject to paragraph 8, the court shall recognise a foreign proceeding if—
      - (a) the foreign proceeding is a proceeding within the meaning of paragraph 4;
      - (b) the foreign representative applying for recognition is a person or body within the meaning of that paragraph;
      - (c) the application meets the requirements of paragraph 17(2); and
      - (d) the application has been submitted to the court.
    - (2) The Court shall recognise the foreign proceeding—
      - (a) as a foreign main proceeding if it is taking place in the State if the debtor has the centre of its main interests; or
      - (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of paragraph 4(f) in the foreign State.
    - (3) The court shall hear and determine an application for recognition of a foreign proceeding at the earliest possible time.
    - (4) As soon as practicable after the court has recognised the foreign proceeding under subparagraph (1), the foreign representative shall notify the debtor that the application has been recognised.
    - (5) This paragraph and paragraphs 17, 18 and 20 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.



20. Paragraph 4 defines “foreign proceedings”, “foreign main proceedings” and “foreign non-main proceeding” as follows;

“foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under to a law relating to insolvency in which proceeding the assets and financial affairs of the debtor are subject to control or supervision by a foreign court, either for the purpose of reorganisation or liquidation;

“foreign main proceeding” means a foreign proceeding taking place in a foreign State if the debtor has the centre of its main interests in that State;

“foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a foreign State if the debtor has a business establishment in that State;

21. The proceedings in the Supreme Court of Mauritius fall squarely within the meaning of foreign proceedings and foreign non-main proceedings as the Company has its center of main interests (COMI) in Kenya in as much as the Company is registered in Mauritius where the insolvency proceedings were commenced. It is also not in dispute that the Company is registered and incorporated under the laws of Mauritius and has registered an address in Mauritius with a branch office in Kenya. I therefore find that the instant application complies with the provisions of paragraph 19.

22. Based on the substance of application, the Foreign Representative has complied with all the preconditions for recognition in Paragraphs 17 and 19. The remaining questions for consideration are whether the grounds furnished by the creditors are sufficient to deny the application for recognition and whether the court should grant the reliefs sought in the application.

23. Under paragraph 19, the decision to recognise foreign proceedings is subject to Paragraph 8 which provides as follows:

8. Public policy exception

(1) Nothing in this Schedule prevents the court from refusing to take an action governed by this Schedule if the action is manifestly contrary to public policy of Kenya.

(2) Before refusing to take action under subparagraph (1), the court shall consider whether it is necessary of the Attorney-General to appear and be heard on the question of the public policy of Kenya.

24. The Creditors contended that the Company has failed to comply with court orders which is against public policy. On its part, counsel for the Foreign Representative submitted that the said court order was compromised by a consent. *In Re Cooperativa Muratori and Cementisti – CMC Di Ravenna (Insolvency) HC Misc App No E627 of 2019 [2020] eKLR*, Tuiyott J considered the scope of the public policy exception and held that for the public policy exception to defeat an application for recognition it must be demonstrated that the grant of recognition would be so clearly or plainly contrary to the public policy of Kenya and that by inclusion of the word ‘manifest’ the public exception clause was intended to be invoked in exceptional and limited circumstances. The learned Judge concluded that:

(37) It does seem to this court that once a recognition application satisfies the procedural requirements of the fifth schedule and demonstrates that it is aligned to the objectives of cross-border insolvency as set out in Paragraph



2 of the schedule, then the Court in Kenya should lean towards granting recognition unless the action clearly falls within the public policy exception.

25. I have gone through the Foreign Representative's deposition sworn on 12<sup>th</sup> August 2021 and the attachments therein and I agree with his averments that the contempt orders issued by the court were subject to a determination pending before the Court of Appeal and that the same was compromised by a consent of the parties, and that the conditions imposed therein according to the record, were complied with. Thus, I do not see how the Company or the Foreign Representative has disobeyed the court's orders so as to conclude that they have violated Kenya's Public Policy.
26. Further, the Creditors OML Africa Logistics Limited and Allterrain Services Kenya Limited both stated that the Foreign Representative has not attached a list of creditors or any financial statements to show that the Company is in financial distress hence unable to pay its debtors. They further contend that the application is only a ploy to frustrate the judicial proceedings commenced by it. Paragraphs 17(2) and (3) above do not impose on an applicant the duty to list all creditors or provide financial statements to prove that a company is in financial distress. The fact that insolvency proceedings have commenced in a foreign country is prima facie proof that the company is in financial distress. Further, the issue of disclosure may be dealt with when considering the relief, which the court may grant under paragraph 23.
27. Further, the court's jurisdiction to deal with the Company's financial issues is circumscribed by paragraph 12 as such issues are a preserve of the foreign court. The Foreign Representative has also documents showing the Company's creditors and financial position. I also reject the argument that the present application is a ploy to frustrate the judicial proceedings commenced by it as it is within the Foreign Administrator's purview to seek for a stay of all judicial proceedings.
28. KRA on the other hand averred that it is to be treated as a "priority creditor" by virtue of section 34 of the Tax Procedures Act and that it should be paid the taxes owed before any other creditor is paid. As the court held in *In re HP Gauß Ingenieure GMBH & Co KG –JBG Misc Application No E725 of 2019 [2021]eKLR*, acceding to this prayer by KRA would undermine the basic principle underlying insolvency, that is, all creditors of the same class must be treated fairly and equally and would also amount to this court taking over the insolvency proceedings contrary to the Fifth Schedule, and undermine the other creditors. Even though section 34 of the TPA provides for priority of taxes, the issue of payment can only arise once liquidator collects the assets and proposes to pay the creditors. The objection by KRA to the recognition on this ground is thus dismissed.

### **Conclusion and Disposition**

29. As I have found merit in the Foreign Representative's application, I now turn to consider the nature of relief. paragraph 23 provides for the types of relief the court may grant upon recognition of the foreign proceedings;
23. Relief that may be granted on recognition of a foreign proceeding
- (1) On recognition by the court of a foreign proceeding, whether main or non-main, if necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
- (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights,



obligations, or liabilities, to the extent they have not been stayed in accordance with paragraph 22(1)(a);

- (b) staying execution against the debtor's assets to the extent it has not been stayed in accordance with paragraph 22(1) (b);
  - (c) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended in accordance with paragraph 22(1)(c);
  - (d) providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, financial affairs, rights, obligations or liabilities;
  - (e) entrusting the administration or realisation of all or part of the debtor's assets located in Kenya to the foreign representative or another person designated by the court; and
  - (f) extending relief granted under paragraph 21(1).
- (2) On recognition by the court of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Kenya to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Kenya are adequately protected.
- (3) In granting relief under this paragraph to a representative of a foreign non-main proceeding, the court shall satisfy itself that the relief relates to assets that, under the law of Kenya, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

30. The court has already granted an order staying any proceedings against the Company in order to protect the assets of the Company in line with paragraphs 21. The same orders of stay would ordinarily be granted once the foreign proceedings are recognised in order to protect the Company's assets from legal proceedings by creditors. On the other hand, and in order to meet the objectives of the *Insolvency Act* set out in section 3 which include ensuring that the Company is able to operate as a going concern in order to meet its financial obligations to the creditors in full or achieve a better outcome for the creditors as a whole if it is liquidated, paragraphs 24 and 25 provide that in recognizing cross border insolvencies, a Company's creditors must be protected on the following terms;

24. Protection of creditors and other interested persons

- (1) In granting or denying relief under paragraph 21 or 23, or in modifying or terminating relief under subparagraph (3), the Court shall ensure that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
- (2) In granting relief under paragraph 21 or 23, the Court may impose such conditions as it considers appropriate.
- (3) The court may—
  - (a) at the request of the foreign representative;



- (b) a person affected by relief granted under paragraph 21 or 23; or
  - (c) on its own initiative, modify or terminate the relief.
- (4) The court shall, on application of the statutory manager (if any) or the Official Receiver, terminate the relief granted under paragraph 21 or 23 if—
- (a) an application for recognition has been made in respect of a debtor that is a bank;
  - (b) the court has granted that application or the Court has granted relief under paragraph 21; and
  - (c) an insolvency event occurs in relation to the debtor after that application or relief has been granted.
- (5) The following are insolvency events for the purposes of subparagraph (4):
- (a) if the debtor is a natural person—the making of a bankruptcy order in respect of the person; or
  - (b) if the debtor is a company or other body corporate—the making of a liquidation order in respect of the company or the passing of a voluntary resolution for the liquidation of the company.

25. Actions to avoid acts detrimental to creditors

- (1) On recognition by the court of a foreign proceeding, the foreign representative has standing to initiate any action that an insolvency administrator may take in respect of a proceeding under this Act that relates to a transaction (including any gifts or improvement of property or otherwise), security, or charge that is voidable or may be set aside or altered.
- (2) When the foreign proceeding is a foreign non-main proceeding, the court shall ensure that the action relates to assets that, under the law of Kenya, should be administered in the foreign non-main proceeding.
- (3) Nothing in subparagraph (1) affects the doctrine of “relation back” as it is applied in Kenya.

31. The foregoing provisions are intended to ensure that the local creditors interests are secured by protecting their rights to participate in proceedings and seek court assistance when necessary. I have also noted the priority interests of KRA which must also be protected.



32. For the reasons I have set out, I allow the Foreign Representative's notice of motion dated 12<sup>th</sup> July 2021 on the following terms:

1. The decree of the Republic of Mauritius issued in relation to the Company be and is hereby recognized by this court
2. The Liquidation proceedings commenced in the Republic of Mauritius in relation to the Company and in which proceedings the Applicant, Yuvraj Thacoor has been appointed as Liquidator of the Company be and are hereby recognised by this court.
3. The Foreign Representative be and is hereby directed to give notice in one newspaper of national circulation and in the Kenya Gazette within 7 days of the court's order to all persons within the Republic of Kenya whose rights, obligations or interests may be affected by the proceedings in the Republic of Mauritius and of the court's order recognizing the decree and proceedings in Mauritius
4. An order of stay be and is hereby issued staying all proceedings, including execution proceedings, relating to the Company, its assets and or other interests in Kenya.
5. An order of stay be and is hereby issued barring the commencement in any of the Courts in the Republic of Kenya any Civil Proceedings of any type against the Company and its subsidiaries and or Branches ("the Company") pending finalization of the Liquidation process.
6. The Supreme Court of Mauritius (Bankruptcy Division) shall adopt such process that shall give the Kenyan creditors meaningful and affordable access (including but limited to virtual access) and participation in the insolvency proceedings
7. The Liquidator and or foreign representative shall file in this court and serve on the Creditors and or their representatives in Kenya periodical reports of the proceedings in Mauritius and status of the insolvency every 30 days from the date of the first report being filed and served within 30 days from the date hereof.
8. An order be and is hereby issued that no assets of whatever kind belonging to the Company in Kenya shall be permitted to leave, be transferred out or encumbered or otherwise disposed of without the leave of this court.
9. Any Creditor in Kenya who shall be dissatisfied with the any aspect of the process shall be at liberty to apply to this court for modification or termination of the relief.
10. There shall be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**



Mr Achoki instructed by CMS Daly and Inamdar Advocates for the Foreign Representative.

Instructed by Abdullahi, Gitari and Odhiambo Advocates LLP for Allterrain Services Kenya Limited and OML Africa Logistics Limited

--- instructed by Kenya Revenue Authority.

Instructed by the Official Receiver.

