



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY NOTICE NO. E012 OF 2018

IDEAL LOCATIONS LIMITED.....APPLICANT

VERSUS

PETER OBONDO KAHU & ATUL PREMCHAND SHAH

(in their capacity as Joint Administrators of

Beacons (EA) Limited (under Administration).....RESPONDENTS

RULING

1. The ruling is in respect to the application dated 7th August 2019, in which the applicant seeks the following orders: -

1. Spent

2. That this Honourable court be pleased to issue an interim injunction as against the Joint Administrators herein restraining them and any other officials, employees under their authority from dealing in any way whatsoever with the property of Deacons (East Africa) PLC and conducting any other business in regard to the said company pursuant to their appointment dated 23rd November 2018, pending the hearing and determination of the instant application inter partes.

3. That this Honourable court be pleased to terminate/revoke in toto the appointment of the Joint Administrators herein dated 23rd November 2018 in regard to Deacons (East Africa) PLC.

4. That the costs of this application be borne by the respondents.

2. The application is supported by the affidavit of the applicant's Director **Mr. Anish Maheshkumar Doshi** and is premised on the following grounds: -

1. That on the 16th November 2018, the Directors of Deacon (East Africa) PLC presented to this Honourable court and that the Official Receiver its notice of intention to appoint an administrator pursuant to the provisions of Section 541 and 545 of the Insolvency Act No. 18 of 2015.

2. That pursuant to the provisions of Section 545 of the Insolvency Act, No. 18 of 2015, the Directors of Deacons (East Africa) PLC similarly served upon the company's creditors the said notice of intention to appoint an administrator through an advertisement in a local daily newspaper on the 18th November 2018.

3. That before the statutory seven (7) day period as provided by Section 545(3) (c) of the Insolvency Act No. 18 of 2015 could lapse on the 25th November 2018, the company prematurely moved this Honourable Court on the 23rd November 2018 and illegally appointed the Joint Administrators herein.

4. That the appointment of the Joint Administrators herein by the Directors of Deacons (East Africa) PLC before the lapse of the statutory seven (7) days period is void ab-initio as the same did not comply with the mandatory provisions of Section 545 (3) (c) of the Insolvency Act, No. 18 of 2015.

5. That the said notice of appointment dated 23rd November 2018 was tainted with an improper motive and material non-

disclosure at paragraph 17 of the affidavit of Statement of Facts of the Muchiri Wahome, the Chief Executive of Deacons (East Africa) PLC deponed on the 23rd November 2018 and filed herein on the same day which deliberately failed to disclose that the Notice of Intention to Appoint an Administrator was published on the 18th November 2018 and at the time of filing the said affidavit, the seven(7) day statutory period had not yet lapsed.

6. That the said notice of appointment was meant to achieve an improper motive of frustrating the applicant's recovery of substantial rent arrears from Deacons (East Africa) PLC which had leased shop number 4 premises at the Applicant's City Mall at Nyali, Mombasa.

7. That the said notice of appointment was meant to achieve an improper motive of using the said illegal and premature appointment to lock up the applicant's shop number 4 premises at City Mall in Nyali, Mombasa with the company's property still in the shop, while not paying up any rent to the applicant and denying the applicant an opportunity to lease the property to another tenant this occasioning the applicant loss and damage to date.

8. That since all the actions of the Joint Administrators are premised upon and emanate from non-compliance with the provisions of Section 545(3) (c) of the Insolvency Act, No. 18 of 2015, the same are not only an illegality but void ab-initio and therefore their continued stay in office as joint administrators is actually prejudicial to the company's creditors as all decisions being currently made by the Joint Administrators are tainted with illegality.

3. The respondents opposed the application through the Grounds of Opposition dated 14th August 2019 wherein they list the following grounds:-

1. That the application is belated, ill-conceived, misinformed and tainted with malafides for the reasons that: -

(i) It seeks orders that are untenable in the circumstances of this case.

(ii) It is vexatious and does not meet the threshold requirements for grant of the orders sought.

(iii) It is bad in law and an abuse of the court process in light of the Rules and Practice & Procedure.

(iv) It bears grounds not supported by any facts as deponed to in the supporting affidavit.

(v) It is fatally defective.

2. That the application offends the express, mandatory provisions of; -

(i) Section 586 and 591 Insolvency Act, 2015, Laws of Kenya.

(ii) Clause 5, Fourth Schedule, Insolvency Act, 2015 Laws of Kenya.

(3) That the application is therefore grossly incompetent, fatally defective, frivolous, vexatious, wholly unmerited and ought to be struck out ab initio for being an abuse of the court process.

(4) That it is therefore only in the interests of justice that the applicant's said application be dismissed with costs to the respondents.

4. The respondents also filed the 1st respondents replying affidavit in opposition to the application. The 1st respondent reiterates the contents of the Grounds of Opposition and states that the applicant's deponent lacks the capacity to institute the instant proceedings as he has not demonstrated that he is a Director duly authorized by the Board to swear the affidavit and to appoint M/S Ahmed Nassir Abdikadir & Company Advocates to appear in the matter.

5. He avers that the appointment of the Administrator was done by the company's Director in accordance with the Law and that it was an out of court procedure that does not require a court order to undertake.

6. He avers that the company was placed under administration on the advice of the Company's Financial and Legal Advisers after the Board of Directors' resolution of 16th November 2018 to place the company under administration.

7. He further states that the respondent complied with all the relevant provisions of the Insolvency Act and also notified all the Holders of Qualifying Floating Charges over the Company of its intention to appoint the Administrators.

8. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders of interim injunction and the revocation/termination of the appointment of the Joint Administrators/Respondents.

9. The applicant's case was that the appointment of the joint administrators contravened Section 545(3) (c) of the Insolvency Act No. 18 of 2015 (hereinafter "**the act**"). The said section stipulates as follows:

“545. Notice to be given of intention to appoint administrator

(1) A person who proposes to make an appointment under section 541 shall give to any person who is or may be entitled to appoint an administrator of the company under section 534 a notice that complies with subsection (3).

2) A person who proposes to make an appointment under section 541 shall also give such a notice to such other persons as may be prescribed by the insolvency regulations for the purposes of this section.

(3) A notice complies with this subsection only if it-

(a) identifies the proposed administrator;

(b) contains such other information (if any) as may be prescribed by the insolvency regulations for the purposes of this section; and

(c) is given at least seven days' before the appointment is to be made.

10. The applicant submitted that contrary to the express provisions of Section 545 (3) the appointment of the administrators was prematurely effected on 23rd November 2018 before the expiry of the 7 days after the Statutory Notice on 25th November 2018.

11. In a rejoinder, the respondent submitted that there was nothing untoward in the appointment of the administrators and that the same was properly done within the time frames stipulated under the Act after issuing requisite notice to the Holders of Qualifying Floating Charges over the company of the intention to appoint the administrators.

12. The respondent narrated the chronology of events that preceded the appointment of the administrators as follows: -

i) That pursuant to Section 545(2) of the Act and Regulation 104(1) of the Insolvency Regulations of 2016 (the “Regulations”) on 16th November 2018, The Company lodged with the High Court of Kenya (the “court”) and the Official Receiver the Notice of Intention together with the

ii) Upon filing the Notice of Intention, the Official Receiver issued a certificate of compliance dated 16th November 2018.

iii) The Board notified the Creditors and the Contributories of the company of their Intention to Appoint the Joint Administrators through an advertisement in the Sunday Nation Newspaper and the Standard Newspaper on 18th November 2018 in accordance with the Regulation 104(1) of the Regulations and Regulation G.05 of Schedule 5 of the Capital Markets (securities) (Public offers, Listing and Disclosures) Regulations, 2002. The Capital Markets Authority (“CMA”) had approved the issuance of the Public Notice on 16th November 2018.

iv) On 23rd November 2018, the Board appointed the Joint Administrators as Administrators of the Company and lodged with the court and the Official Receiver the Notice of Appointment together with an Affidavit of Statement Of Facts as required under Section 548 of the Act and Regulations 105 and 106 of the Regulations.

v) The Board also published a Notice of Appointment in the Standard Newspaper on 27th November 2018. The Public Notice had been approved by the CMA on 22nd November 2018.

vi) The appointment of the Joint Administrators took effect on 23rd November 2018.

13. It was the respondents’ case that the applicant has not demonstrated that the appointment of the administrators was tainted by any improper motive.

14. A perusal of the pleadings filed by the parties herein indicates that it was not disputed that the Notice of Intention to Appoint the Administrators was published through advertisement in the local dailies to wit; the Sunday Nation and Standard Newspapers of 18th November 2018.

15. It was not also disputed that the appointment of the Joint Administrators was done on 23rd November 2018. My finding is that a simple tabulation of the number of days between the date of publishing of the said Notice of appointment and the effective date of appointment, both dates inclusive, is 6 days. Clearly therefore, the appointment of the Administrators was done before the 7 days lapsed after issuance of the notice, as provided for under Section 545(3) of the Act had lapsed.

16. For the reason that the said appointment contravened the provisions of Section 545(3) of the Act, I cannot hesitate but find that the said appointment was in law a nullity and is therefore void.

17. I am guided by the finding in *Macfoy V United Africa Company Ltd* (1963) 3 ALL ER 1179 wherein it was held: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to

set it aside. It is automatically null and void without more to do, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

18. For the above reasons, I find that the application dated 7th August 2019 is merited and I therefore allow it with costs to the applicants.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Ngugi for the applicant.

Mr. Ngonze for the administrators.

Court Assistant: Silvia