IN THE COURT OF APPEAL AT NAIROBI

(CORAM: KIAGE, JAMILA MOHAMMED & ODUNGA, JJ.A.)

CIVIL APPEAL NO. E154 OF 2023

(CONSOLIDATED WITH CIVIL APPEAL NOS. NAI. E155, E424 & E425 OF 2023)

BETWEEN

CYTONN HIGH YIELD SOLUTIONS (CHYS) IN LIQUIDATION)……………………………………………1ST APPELLANT
CYTONN REAL ESTATE PROJECT NOTES (CPN) IN LIQUIDATION)……………………………………………2ND APPELLANT
CYTONN INTEGRATED PROJECT LLP (CIP) ………………………3RD APPELLANT

AND

OFFICIAL RECEIVER……………………………………………1ST RESPONDENT
MICHAEL MUTUA MWINZI……………………………………2ND RESPONDENT
STEPHEN KIBUGA GAKUO……………………………………3RD RESPONDENT
JOEL JAMENYA AMUSAVI……………………………………4TH RESPONDENT
MARTHA WAWERU……………………………………………5TH RESPONDENT
CYTONN INVESTMENTS MANAGEMENT PLC………………6TH RESPONDENT
OLOLUA ESTATES LLP……………………………………………7TH RESPONDENT
CAROLINE KIMETO……………………………………………8TH RESPONDENT
GEORGE KIRIGI THOGO………………………………………9TH RESPONDENT
DR HUMPHREY MURIITHI……………………………………10TH RESPONDENT
JANE GATHONI NGÁNGÁ……………………………………11TH RESPONDENT
ABIGAEL CHELAGAT…………………………………………12TH RESPONDENT
PAUL CHEGE MBUGUA………………………………………13TH RESPONDENT
MARY JENNIFFER RUTH CHEGE……………………………14TH RESPONDENT
JUSTIN OJIAMBO KHADULI…………………………………15TH RESPONDENT
DENNIS OKUMU OLOLA………………………………………16TH RESPONDENT
RUTH MUMBUA NZIOKA………………………………………17TH RESPONDENT
EZEKIEL ODUK…………………………………………………18TH RESPONDENT

AND

CREDITORS' COMMITTEE FOR CPN LLP (IN LIQUIDATION ………………………………………………INTERESTED PARTY

(An Appeal from the Rulings and Orders of the High Court at Nairobi (A. Mabeya, J) delivered on the 6th January 2023

in

***Insolvency Petition No. E063 and E064 of 2021**)*

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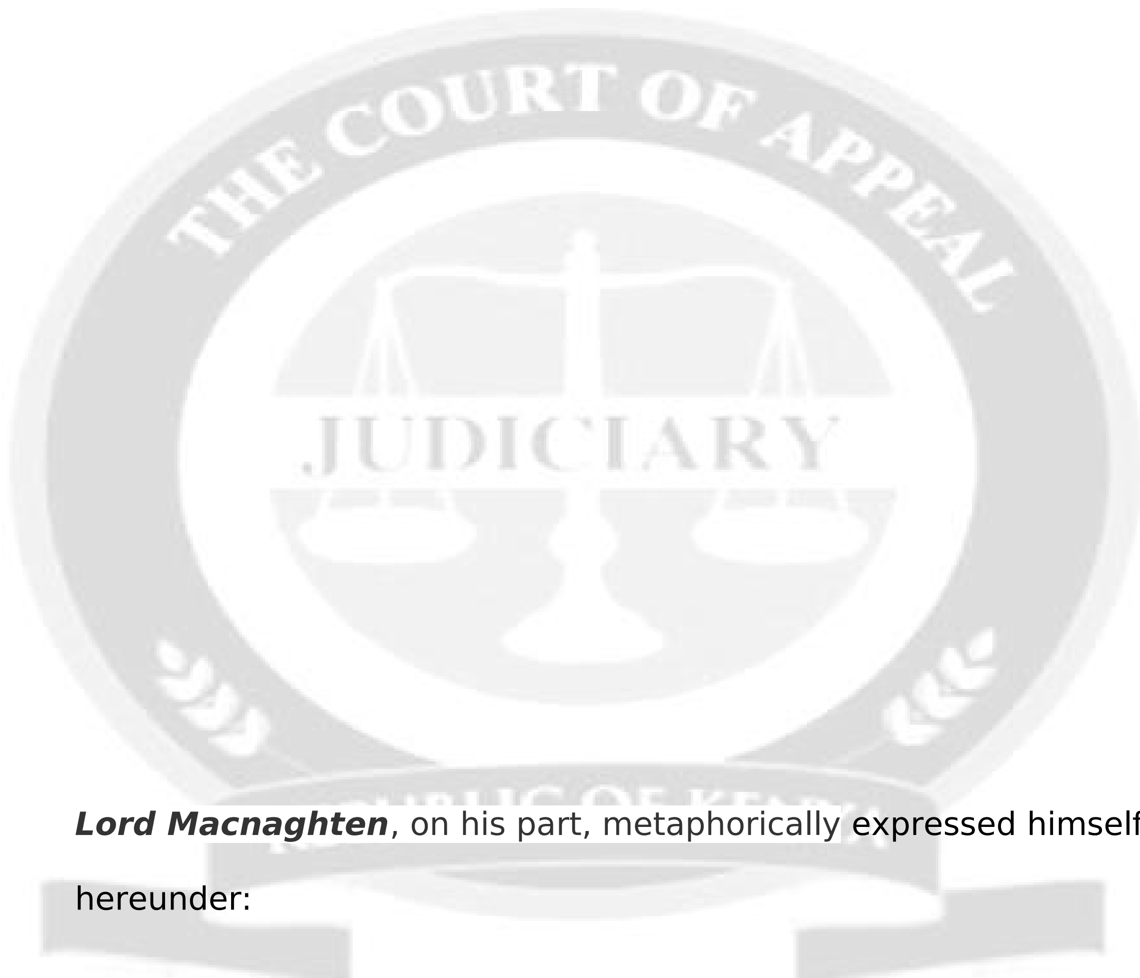
JUDGMENT OF THE COURT

1. In the celebrated House of Lords case of ***Salomon v Salomon & Co Ltd***

[1897] AC 22, Lord Halsbury L.C. expressed himself as hereunder:



2. ***Lord Macnaghten***, on his part, metaphorically expressed himself as hereunder:

> ***"When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith,' to use the words of the enactment, 'of exercising all the functions of an incorporated company.' Those are strong words. The company attains maturity on its birth. There is no period of minority - no interval of incapacity. I cannot understand how a body***

corporate thus made "capable" by statute can lose its individuality by

> ***issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability."***

3. Although, according to their Lordships, they were merely giving meaning to the statute law, it is widely accepted that ***Salomom v Salomon*** was the juridical birth of the principle of corporate personality as we know of it today. Corporate personality, no doubt, is one of the greatest legal innovations in the commercial world. However, in our greatest strength therein lies our weakest link. This is very true of this landmark innovation. Unscrupulous corporators have time and again sought to reconfigure this very noble innovation with devious intents.

4. These four appeals arise from the judgment of ***A. Mabeya, J***. delivered on the 6th January 2023 in ***Insolvency Petition Nos. E063 of 2021*** and ***E064 of 2021.*** We have consolidated the judgment in the four appeals in deference to the overriding objective in ***sections 3A and***

3B of the

Appellate Jurisdiction Act which is geared towards the facilitation of the just, expeditious, proportionate and affordable resolution of the appeals governed by the said Act. The objective enjoins us, in the exercise of our powers under that Act or in the interpretation of any of its provisions, to seek to give effect to it. The advent of overriding objective, it has been held by this Court:

> ***"ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; and results in the timely disposal of the proceeding at a cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be "O2" compliant because they exist for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."***

See ***Hunker Trading Company Limited v Elf Oil Kenya Limited Civil***

[2010] 1 KLR 226

5. The subject of Insolvency Petition No. E063 of 2021 was Cytonn High

Yield Solutions LLP (CHYS LLP) while Insolvency Petition No. E064 of 2021 was

in respect of Cytonn Real Estate Project Notes (CPN) (the companies). Both petitions were supported by affidavits sworn by Edwin Harold Dayan Dande (Edwin Dande) in his capacity as the Chief Executive Officer of Cytonn Investment Management PLC (CIM) and CPN. Both CPN and CHYS LLP were registered as limited liability partnerships under the ***Limited Liability Partnership Act, 2011*** on 16th September 2016 and 26th September 2014, respectively. CHYS was initially registered as Cytonn Cash Management Solutions LLP before changing its name to Cytonn High Yields Solution LLP on 22nd June 2018. CPN on the other hand was registered as Cytonn Project Notes LLP and changed its name to Cytonn Real Estates Project Notes LLP on 12th July 2018. CIM is the Principal Partner in CPN and CHYS and a board member of CHYS.

6. According to the said affidavits, Cytonn Investment Management PLC, as the principal partner in CPN, has exclusive responsibility for the day-to-day management and control of the business of CPN with the power and authority to do all things necessary to carry out the purposes of CPN. Both CPN and CHYS, it was deposed, principally operate real estate funds restricted to pre-qualified individuals/corporations admitted into the partnership in terms of their subscriptions/investments which earn interest from the profit at a pre-agreed rate for a specified period. They invite partners/subscribers to provide capital to the partnership for

agreed tenor

and return which, according to the deponent was, at the rate of between 15-18%, well above the rates offered by the Government. The investors acquire partnership interest by signing individual Contribution/Investment Agreements and by contributing the minimum capital. The sums raised are then invested into identified real estate projects through Special Purpose Vehicles (SPVs) identified by the principal partner (CIM), in form of loans, which are evidenced by loan notes, to the SPVs who are the actual owners and developers of the identified real estate projects.

7. From the proceeds of the real estate developments, the SPVs are expected to make repayments to CPN and CHYS on the basis of the loan agreements they signed with CPN and CHYS which would then be utilised in repayment of the creditors as well as fresh capital injections from either existing or new subscribers to settle its interests and capital repayment obligations to the partners as and when they fall due.

8. In this case, CIM promoted a number of real estate projects into which CHYS and CPN invested monies from creditors. The investments were to be secured by asset backed guarantee dated 21st April 2020 (the Deed of Guarantee or the Deed). It turned out that no such guarantees were executed.

9. According to Edwin Dande, as at 31 July 2021, the aggregate sum of capital contribution to CPN and CHYS was Kshs 4,180,992,923 and 11,172,133,445 from 886 and 3,116 partners, respectively. As at that date, CPN and CHYS had advanced Kshs 3,685,140,153 and Kshs 10,611,612,635 respectively to various SPVs, their associated real estate projects and other entities.

10. It was disclosed by William Dande that following the onset of COVID 19 pandemic, the restrictions imposed to control the said pandemic negatively impacted the real estate development in terms of closure of construction sites, panic, anxiety and unrest among the investors and decline in roll over rate upon maturity leading to mismatch between the funding and the investment. This led to inability on the part of CPN and CHYS to meet due demands from the subscribers and, although measures were put in place to ameliorate the crisis, the liquidity problems persisted. As at the time of swearing the said affidavits, CPN and CHYS were, "technically insolvent" as defined in section 384 of the ***Insolvency Act, 2015 (the Act)***.

11. It was this state of affairs that informed the decision to resort to a court sanctioned administration and on 11th September 2021, the principal partner, CIM, resolved that CPN applies to court for an Administration Order and proposed that Mr Kereto Marima be appointed as the

Administrator. Similarly, the Board of CHYS resolved on 3rd July 2021 that

CHYS applies to court for a similar Order. These were the prayers sought in the applications dated 23rd September 2021. Both applications were placed before the trial court, and as proposed in the application, Administration Orders were issued in respect of both CPN and CHYS and Kereto Marima was appointed as their Administrator. The court further ordered that the orders be served upon all the creditors and that the matters be mentioned on 24th November 2021 for further orders. On 24th November 2021, the court ordered the Administrator to call the First Creditors Meeting before 7th March 2022 and fixed the matters for mention to receive the report from the Administrator on 21st March 2022. These appeals, however, arise from the rulings delivered on 6th January 2023 arising from two applications dated 19th May 2022 and 5th October 2022.

12. The application dated 19th May 2022, brought by the Creditors' Committee sought orders: that the Administrator to file a report on the Administration and to produce all the Loan Notes, Bank Accounts showing the SPVs making payments to CHYS, agreements for sale, copies of Title Deeds and Certificate of Title and any other information obtained through the administration; the termination and lifting of the Administration of CHYS and CPN; that as regards CHYS a preservation order against the following assets/projects: Kilimani Asset under Cytonn

Investment Partners Sixteen LLP; the Alma under Cytonn Integrated Project; Applewood/Miotoni under

Cytonn Investment Partners Eighteen, LLP; Riverrun under Cytonn Investments Partners Five; Ridge under Cytonn Investments Partners Four, LLP; Wasini/Cysuites under Cytonn Investments Partners 20; Superior Homes under Cytonn Investment Partner Fifteen LLP; Westlands Land under Cytonns Investments Twelve LLP; Athi River Asset under Cytonn Investment Partners LLP; Tariji under Cytonn Partners 10 LLP; Mystic Plains under Mystic Plains LLP and Alpa under Project Alpa. These assets/properties had been indicated as available for administration in the affidavit of Edwin Dande in support of the petition for administration. The application sought that the assets be placed under the custody of the Official Receiver and that the creditors be at liberty to enforce the Corporate Guarantee dated 9th July 2018.

13. The applications dated 5th of October 2022 sought substantially orders that the Administrator's term be extended for a period of 12 months till 6th October 2023.

14. The applications dated 19th May 2022 were based on the grounds: that since his appointment, the Administrator had not undertaken any substantial step in the administration; that in a virtual meeting held with the Administrator, the Creditors' Committees (the Committees) had raised certain questions arising from the Statement of Proposal but the same had not been responded to; that the Administrator had failed to

obtain relevant

information pertaining to the companies on the pretext that the management denied him the same; that the Administrator was complacent and was not taking control of the companies; that the operations of the companies were still under the direction and control of their respective Company directors notwithstanding the Administration Order; that the company had continued to advertise for conversions as well as sale of some assets for sale without the consent or knowledge of the Administrator or the creditors; and that the Administrator had not revealed to the Court and to the creditors that two months prior to the Administration order, he had engagement with the companies.

15. The application was opposed by a replying affidavit dated 23rd June 2022 sworn by **Edwin Harold Dayan Dande** in which he contended: that the Administration was meritorious as the companies were unable to repay investments which had matured; that the purpose of Administration was to provide an avenue for a credible balance sheet, restructuring the debts as well as establishing whether the companies' debt obligations could be successfully restructured; that the Creditors had stayed the agenda of the first creditors meeting and, therefore, could not accuse the Administrator of not taking the right steps in the administration; that the Administrator had disclosed his past engagement by the companies before commencement of the administration in his affidavit dated 30th

September 2021; that the

Administrator had been consulted by the companies on the steps necessary to commence Administration as well as his consent for administration; that the Special Purpose Vehicles (SPVs) referred to by the applicants were separate legal entities that were not under Administration; that the SPVs were not part of the proceedings and ought not be condemned unheard as they were not prohibited from dealing with their own assets merely because there was an Administration Order against the companies; that the SPVs were allowed to get into contracts for assignment of the companies' debts in exchange for real estate units just as other creditors were allowed to do; and that the SPVs did not require permission from the Administrator to deal with their own assets.

16. The application was also opposed by the Administrator through his replying affidavit sworn on 8th July 2022 in which he stated: that during the first creditors' meeting, the Committees was formed and the members thereof were advised on their role and the documents they were required to sign; that they were given the consent to act, nondisclosure agreement, guidance note and the code of conduct; that only four members signed the nondisclosure agreement while four of them had not signed the guidance note and the code of conduct thus hampering the workings of the Committee; that the companies raised

funds from the SPVs which in turn acquired the assets and that he had made demands for repayments to the

various SPVs; that the Loan Notes were the only assets of the companies and he had made demands on the repayment thereof from the SPVs but had not received any; and that his Statement of Proposal, he demonstrated that both companies could not be rescued as going concerns as there was no credible funding model available and the principal partner Cytonns Investment Management Plc ("CIMP") had passed a resolution to wind down CPN.

17. In his ruling, the learned Judge's view was that, as regards the application by the creditors, the question was whether the applicants demonstrated that there was improper motive by the Administrator in carrying out the administration of the companies; that although what constitutes 'improper motive' has not been specified in the Act, it is to be inferred from the actions and/or inactions of an administrator which, when viewed against the objectives of administration under ***Section 522*** of the ***Act,*** fall short of those objectives or, if the Administration is carried out in a way that defeats the purpose of administration. It was the learned Judge's finding that the administration was supposed to either maintain the companies as going concerns, achieve a better outcome for their creditors or realize the properties for distribution, which objectives ought to have been achieved against the backdrop that the interests of the creditors as a whole was central in the

administration process.

18. The learned Judge noted that although in his replying affidavit the Administrator set out the actions he had undertaken since the commencement of the administration, he did not disclose that he had not informed the creditors as to how much assets of the two companies were in his possession or under his control and the assets, if any, he had recovered from or safeguarded for the companies for distribution. Neither did he state what he was actively doing to protect the interests of the creditors. That what the Administrator deposed in his affidavit was that he had made several demands to various SPVs demanding for repayment but had received nothing. The learned Judge noted that as at 7th December 2022, when the matter came up for mention to extend the administration and seek clarification from the Administrator, there was no evidence to show that the Administrator was actively pursuing the recovery of the amount owed or what he had done to recover anything from the SPVs.

19. The learned Judge noted that the creditors complained: that the Administrator was complacent and had not taken control of the two companies, whose operations were still under the direction and control of their directors notwithstanding the Administration Order; that he had failed to disclose to the Court that immediately before the petition for administration was made, he had dealt with the Companies; and that

the directors of the Company were selectively enticing some creditors to take

out assets in projects developed by monies lent out by the two companies in settlement of the debts. These allegations, despite being made on oath were neither rebutted nor denied. The learned Judge was not satisfied with the explanation given on how the Administrator had dealt with the companies prior to his engagement as a potential Administrator and noted that although the Administrator was appointed by the Court, it behoved him to act professionally and not to be under the control and direction of those who proposed his appointment. The learned Judge noted that even after the Administration Order, **Edwin Harold Dayan Dande,** the Chief Executive Officer of CIMP, was the one swearing and filing affidavits.

20. According to the learned Judge, the explanation given by the Administrator of lack of co-operation from some of the creditors was not satisfactory since he ought to have gone to court for directions on what to do in those circumstances. It was the learned Judge's view that although the original period of 12 months of administration had come to an end, nothing substantial had been done since monies in excess of Kshs.11 billion contributed by the members of the public numbering over 3000 had sunk and not a dime had either been recovered or any effort shown by the Administrator to recover the same. In the words of the learned Judge, the Administrator:

> ***"is dilly dallying and doing absolutely nothing towards achieving any of the objectives of the Administration. He stated that he only had Loan Notes given by SPVs which he had demanded but received nothing. He never stated when he allegedly made the demands; to who and how much he demanded; what the response was and what action he had taken or intended to take in view of the recalcitrant position taken by the SPVs. The SPVs are under the control and direction of Edwin H. Dande, the Chief Executive Officer of the Company? They are all "Cytonns". From the foregoing, it is clear to this Court that the actions and inactions of the Administrator were not in the best interest of the Creditors. They were contrary to the objectives of the Act. The Administrator was more shielding the promoters of the Company than acting in the best interest of the Company and the creditors. In delaying to recover what was owed to CHYS, that was highly prejudicial to the Creditors."***

21. The learned Judge concluded that:

> ***"the Administrator was not acting in the best interest of the creditors. His actions were contrary to the objectives of the Administration. He was more of shielding the promoters of the Company than the Company and the Creditors. Nothing was being done to restructure the balance sheet and/or add value as had been originally pleaded."***

22. Regarding the prayer for preservation orders, the learned Judge found that in the Administrator's Statement of Proposal, dated 28th February 2022, it was disclosed that CHYS was owed a total of Kshs 5,808,831,300 from Cytonn Integrated Project LLP, (The Alma) – Kshs. 1,437,277,107; Cytonn Investments Partners Five LLP, (Riverrun) – Kshs.

535,897,103; Cytonn Partners Eleven LLP, (Ridge) – Kshs. 33,144,258; Cytonn Investments

Partners 12 LLP, (Riverrun) – Kshs.295,921,551; Newtown Mystic Plains, – Kshs 60,534,764; CIPS Four LLPS, (Athi river) – Kshs 236,294,957; Cytonn investment Partners Twenty LLP, (Cysuites) - 187,385,636; Cytonn Investment Partners Ten LLP, (Taraji heights) - Kshs 53,889,634; Cytonn Investment Partners Sixteen LLP, (Kilimani)- Kshs 1,730,867,063; Cytonn Investment Partners Fifteen LLP, (Superior Homes) -Kshs 383,985,131; and Cytonn Investment Partners Three LLP, (Amara)- Kshs 502,860,365. From that evidence, the learned Judge found that the monies paid by the creditors of CHYS was sunk in these projects yet there were no securities held by way of charges for the loans lent to these SPVs. It was his finding that while the said SPVs could well have been separate entities independent of the CHYS, their projects were not.

23. As regards CPN, the learned Judge found that it was not disputed that CPN was a collection company in which members of the public totalling 886 were lured in investing their monies. CPN would then lend the said monies to SPVs associated with CPN or its promoters which amount was assigned to certain projects. From the proceeds of sale of those projects, the loan would then be paid back to CPN which would in turn repay the invested sum with some returns. The learned Judge found, from the affidavit in support of the petition for administration, that as at 31st July 2022, CPN was owed a total sum of KShs.3,685,140,153 by the following

SPVs as follows: Cytonn

Integrated Project LLP, The Alma – Kshs. 562,326; Cytonn Investments Partners 18 LLP, Applewood/Miotoni – Kshs.177,889,295; Cytonn Investments Partners Five LLP, Riverrun – Kshs.119,945,554; Cytonn Partners Eleven LLP, Ridge – Kshs. 861,664,089; and Cytonn Investments Partners 10 LLP, Taraji – Kshs.1,655,584,468.

24. While appreciating that no man should be condemned unheard, it was the learned Judge's view that there is a higher calling of justice and fairness while effecting these rules. According to the learned Judge, if the SPVs were to dispose of the assets and the Loan Notes were later realized, there would be no assets to fall back on. He opined that in the circumstances, where a party can still be heard, a court of law and/or equity may temporarily restrain a party from dealing with its property awaiting an opportunity for it to put forward its case.

25. Noting that the Administrator had confessed that he had been unable to realize and recover the Loan Notes, which were mere pieces of paper, the learned Judge found that under the Common Law doctrine of tracing, the creditors would be entitled to trace their funds into these projects. It was his view that those properties be conserved/protected awaiting the realization of the assets of the two companies since ruling otherwise would be to abate a possible fraud upon the creditors as that would expose the projects to disposal by the SPVs to the extreme prejudice

of the creditors

whose monies were used to acquire them. In his view, at the time of liquidation, those entities would be given a hearing either to dispute the Loan Notes or pay up the same. He however, took into account the fact that the Creditors' interests were not taken into account and the administration was still under the initial stages.

26. In light of lack of satisfactory explanation for the inordinate delay by the Administrator, the learned Judge invoked ***Section 580*** of the ***Insolvency Act,*** and concluded that, although the Administrator had the power to take any action which was likely to contribute to the effective and efficient management of the affairs and property of the two companies, he had not performed his said duty to the satisfaction of the court. He noted that in his affidavit, the Administrator admitted that the companies could not be rescued as going concerns because they had no credible funding model hence there was no likelihood of turning them around and therefore there was no justification in extending the term of the Administrator or appointing a new one.

27. According to the learned Judge, it was not in dispute that the companies were seriously ailing and the creditors had suffered and continued to suffer as the companies were unable to pay what they owed them. Since the Administration had not worked, based on the decision in ***re Nakumat***

Holdings Limited [2017] eKLR, he was of the view that the viable option

would be to liquidate the companies.

28. As regards the application dated 5th of October 2022 that sought for extension of the Administrator's term, the learned Judge referred to ***Section 533*** of the Act that empowers the court to treat an administration application as a liquidation application and make any order that the Court would make under ***Section 426*** of the Act.

29. In the premises, the learned Judge found merit in the application by the Creditors' Committees dated 19th May 2022 and allowed the same by:-

Terminating the Administration of CHYS and CPN and placing them
Appointing the Official Receiver as the Liquidator of the companies
Ordering that the properties set out in the Motion

dated 19th May2022bepreserveduntilthe liquidation is concluded.
d) Dismissing the application dated 5th October 2022 for extension

30. The learned Judge further ordered that all pending applications for leave to proceed with executions and/or other legal proceedings be arrested to await the process of liquidation. He directed that all those claims be lodged with and be proved before the Liquidator.

31. It is against the said decision that these consolidated appeals were filed. In Nairobi Civil Appeal No. E154 of 2023, whereas the appellant is indicated as Cytonn High Yield Solutions (CHYS in liquidation), the memorandum of appeal itself indicates that it is in fact brought by Kereto Marima who describes himself as "the former Administrator of Cytonn High Yield Solutions LLP (CHYS)". In Civil Appeal No. E155 of 2023, the appellant is indicated as Cytonn Real Estate Project Notes (in liquidation) but similarly brought, against the Official Receiver only, on behalf of Kereto Marima. Although in each of the appeals 20 similar grounds were raised, in the submissions, the grounds of appeals were condensed to 5 and these were: failure to ascertain the *locus standi* of the individuals who sought termination of the administration on behalf of all creditors; unlawfully recognising the applicants in the application dated 19th May 2022 as representatives of all 866 creditors of CPN; failure to define and ascertain improper motive on the part of Cytonn Investments Management PLC; wrongful issuance of preservation orders over assets; and abuse of discretion on the question of extension of the administration.

32. It was sought that the appeals be allowed with costs, the orders of the High Court be set aside and substituted with orders dismissing with costs the application dated 19th May 2022 and allowing the application

dated 5th October 2022.

33. Civil Appeal Nos. E424 of 2023 and E425 of 2023 which are both expressed to be brought by Cytonn Integrated Project LLP (CIP) against the Official Receiver, are clearly a duplication. Although the memorandum of appeal sets out 10 grounds of appeal, in the submissions, five thematic grounds were identified as: condemning the appellant unheard; disregarding the principle of privity of contract; disregarding the principle of separate legal personality; misinterpretation of the law on fraud, trust and tracing.

34. It was sought that the appeals be allowed, and a declaration be made that the preservation orders against the assets of the SPVs, in this case CIP, be lifted and/or set aside as well as the costs of the appeals.

35. We heard these consolidated appeals on 30th April 2025 when learned counsel, ***Mr Anthony Leshan***, appeared for the appellants in Civil Appeal Nos. E154 of 2023 and E155 of 2023, learned counsel, ***Mr Emmanuel Bita***, appeared with ***Ms Judy Mugo*** for the 1st respondent, the Official Receiver. Learned counsel, ***Mr Kavita Mwanzia***, appeared for the Creditors' Committees of CHYS LLP and CPN LLP while learned counsel, ***Mr Mumbi***, informed the Court that he had come on record for the Administrator. Learned Counsel, ***Mr Nelson Havi***, appeared for the appellant in Civil Appeal Nos. E424 of 2023 and E425 of 2023 while learned counsel, ***Mr Greg Karungi***, held brief for ***Ms Naomi Mutisya***

for the SBM Bank. Learned Counsel relied on their written submissions which they briefly highlighted.

36. As we consider the submissions, we are alive to our mandate sitting as a first appellate court. Pursuant to ***Rule 31(1)(a)*** of the Rules of this Court we are enjoined to reappraise the evidence and draw our own conclusions. That mandate, as espoused in ***Ng'ati Farmers' Co-operative Society Ltd v Ledidi & 15 Others*** **[2009] KLR 331,** ***Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates*** **[2013] eKLR** and ***Kenya Ports Authority v Kuston (Kenya) Limited*** **[2009] 2 EA 212** may be summarised as follows:

> ***(1) A first appeal to this Court from a trial by the High Court is by way of re-trial.***
> ***(2) This Court must re-evaluate, re-assess and re- analyze the extracts on the record and determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.***
> ***(3) In carrying out its mandate of reconsideration of the evidence, its evaluation and drawing its own conclusions, this Court must always bear in mind that it neither saw nor heard the witnesses and is not in a position to gauge their demeanour and should make due allowance in that respect.***
> ***(4) However, this Court is not bound necessarily to follow the trial court's findings of fact if it appears either that it clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression, based on the demeanour of a witness, is***

inconsistent with the evidence in the case generally.

(5) The responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

37. While we are keenly aware that the hearing before the trial court was on the basis of affidavit evidence as opposed to a *viva voce* hearing, the principles applicable to a first appeal apply with equal force, save that the usual benefit that accrues to the trial court based on the advantage of hearing and seeing the witness, does not apply. In other words, since evidence can either be oral or on affidavit, the duty largely remains the same.

38. While we appreciate that we have jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand and may, in appropriate cases, reverse or affirm the findings of the trial court, this jurisdiction is exercised with caution. However, if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, this Court, sitting as a first appellate court, will not hesitate so to decide.

39. In our view, the issues that we are called upon to determine are as follows:

(1) Whether the Creditors' Committee had the locus to bring the application dated 19th May 2022;
(2) Whether it was necessary for the trial court to make a finding of improper motive on the part of Cytonn Investment Management PLC before lifting the Administration Order;
(3) Whether the preservative orders were properly issued;
(4) Whether the decision to decline to extend

the administration amounted to an abuse of discretion;

(5) Whether the 3rd appellant was condemned unheard;
(6) Whether the principle of privity of contract was disregarded by the learned Judge;
(7) Whether the learned Judge disregarded the principle of separate legal personality;
(8) Whether the learned Judge misinterpreted the law on fraud; and
(9) Whether the learned Judge misinterpreted the law on trust and tracing.

40. We shall consider the submissions in support of the respective grounds concurrently with the submissions in opposition thereto and make our determination thereon.

41. On the locus of the Creditors' Committee to bring the application dated 19th May 2022, it was argued on the part of the appellants that the decisions of the Creditors' Committee including the resolution to commence legal proceedings must be in writing as required in ***Sections 574(1) and 575(1)*** of the Act, as read with Parts 2 to 10 of the 3rd Schedule to the ***Insolvency Regulations***, particularly paragraphs 30(1) and 36. These provisions, it was argued, were not complied with since there was no such resolution by the Creditors of CPN, as required by the said Act, to sanction the filing of the application dated 19th May 2022 or authorising the deponent of the supporting affidavit to do so. Reference was made to the case of ***<u>Bugerere Coffee Growers Limited v Sebaduka</u> (1970) EA 147*** for the proposition

that an action not authorised by a resolution of an entity is a nullity. It was further argued: that the consent of CPN, the Administrator or the court's

leave were not sought prior to bringing the application; that it was necessary to obtain a resolution and, in its absence, a written authority from the 866 creditors of CPN before bringing the application; and that the court erred in converting the application for an Administration Order to one for liquidation on the basis of ***Section 533*** of the Act. That according to the said section as read with ***Section 426*** of the Act, such application can only be made by the Attorney General and can only be based on the public interest; that the applicants made no attempt, prior to the filing of the application for preservation orders to satisfy the prerequisites for derivative standing by seeking the consent of the debtor (CPN), its administrator or indeed the court before initiating this adversary proceeding against CPN's debtors; that the applicants had no right to seek the prayer sought and the court had no jurisdiction to grant it.

42. In response to this issue the 1st respondent, the Official Receiver, is of the view that: the Creditors' Committees are recognised under ***Section 574*** of the Act with the mandate to assist and supervise the Administrator; that the creditors' application to terminate the administration is backed by law under ***Sections 597*** and ***591*** of the Act where the Administrator's conduct detrimentally affect the interests of the creditors; that since the creditors of the two entities were over 3000

in number, having representatives was the only way to ensure their interests were taken into consideration; that the

Statement of Proposals filed by the Administrator, recommended orderly wind down of the two entities via Creditors Voluntary Liquidation process and distribution of the proceeds to the creditors; that this proposal was based on the fact that both entities could not be rescued as going concerns as there were no credible fund models available; and that therefore, the application was properly before the court as the objectives of administration as provided under ***Section 522*** of the Act could not be met.

43. The position taken by the Creditors' Committee was: that since the application for appointment of the Administrator was made under ***Sections 531 and 532*** of the Act, the High Court reserved the jurisdiction to supervise the administration process, the conduct of the Administrator and his removal and/or termination; and that since ***Section 597*** of the Act empowers creditors to make application for termination of the administration, nothing bars the Creditors' Committee members, who are first and foremost creditors, from making a similar application as they did.

44. Section 574 of the ***Insolvency Act*** provides that:

> ***(1) A creditors' meeting may establish a creditors' committee.***
> ***(2) A creditors' committee shall perform the functions conferred on it by or under this Act.***
> ***(3) A creditors' committee may require the administrator—***

(a)to appear before the committee at any reasonable time of which the administrator is given at least seven days' notice; and

(b)to provide the committee with such information about the performance of the administrator's functions as the committee reasonably requires.

45. Section 597 of the Act provides that:

> ***(1) A creditor of a company that is under administration may make an application to the Court for an order terminating the appointment of an administrator of the company.***
>
> ***(2) An application under subsection (1) may be made only if it alleges an improper motive—***
>
> ***(a) in the case of an administrator appointed by the Court, on the part of the applicant for the order; or***
> ***(b) in any other case, on the part of the person who appointed the administrator.***
>
> ***(3) On the hearing of an application made under subsection (1), the Court may make—***
> ***(a) an order terminating the administrator's appointment with immediate effect or from a specified later date;***
> ***(b) an order dismissing the application; or***
> ***(c) an interim order.***
>
> ***(4) If the Court makes an order under subsection (3) it may also make—***
>
> ***(a) an order adjourning the hearing conditionally or unconditionally; and***
> ***(b) such ancillary orders as it considers appropriate.***

46. Section 591 provides that:

(1) A creditor or member of a company under administration may apply to the Court claiming—

> ***(a)that the administrator is acting or has acted so as to detrimentally affect the interests of the***

applicant (whether alone or in common with some or all other members or creditors of the company); or

(b) that the administrator proposes to act in a way that would detrimentally affect the interests of the applicant (whether alone or in common with some or all other members or creditors).

(2) A creditor or member of a company under administration may apply to the Court on the ground that the administrator is not performing the administrator's functions as quickly or as efficiently as
is reasonably practicable.

(3) On the hearing of an application made under subsection (1) or (2), the Court may—

(a) make an order granting relief;

(b) make an order dismissing the application; (c) adjourn the hearing conditionally or unconditionally;

(d) make an interim order; or

(e) make such other order as it considers appropriate.

(4) In particular, an order under this section may do all or any of the following—

(a) regulate the administrator's performance or exercise of the administrator's functions or powers;

(b) require the administrator to do or not do a specified act;

(c) require a creditors' meeting to be held for a specified purpose;

(d) end the appointment of an administrator;

(e) make provisions of a consequential nature.

47. From the above provisions, it is clear that the Creditors' Committee is anchored in law and it was pursuant to the foregoing provision that two Creditors' Committees were put in place one each for CHYS and CPN. Because of the large numbers of the creditors involved, of over 3000,

the

most prudent thing to do was to adopt a representative method of ensuring

that the interests of the creditors were taken into account. It is clear that in the conduct of administration, the Administrator is enjoined to appraise the Creditors' Committee on how the administration is being conducted. It is also clear that creditors have the power to make an application to the Court for an order terminating the appointment of an administrator of the company. That power, in our view, may be exercised by the creditors individually or collectively. In fact, ***Section 591*** of the Act expressly provides that the applicant may apply either alone or in common with some or all other members or creditors of the company. In our view the creditors may also act through their representatives in the form of Creditor's Committee. It is therefore our holding that the Creditors' Committees had the locus to file the applications for the termination of the administration. Having appointed their representatives to act for them, we find that it was not necessary for the committees to obtain resolution from the members every time they intended to take action against the administrator. They had the ostensible authority to do so and unless it is alleged and proved that what they did was not in the interest of the creditors, the actions of the committees remain valid.

48. In those circumstances, ***Bugerere Coffee Growers Limited Case*** is distinguishable. It should be noted that the action, in the instant case was not brought on behalf of the company but by creditors of the

company. What

was required was not a resolution of the company but a decision by the

concerned creditors to bring the action, whether individually or collectively. Under ***Section 109*** of the ***Evidence Act***, the burden was on the appellants, who were asserting that there was no such resolution, to prove the same since there is no requirement that the creditors, when filing a suit, must similarly file a resolution.

49. Related to this matter is whether the Committees were entitled to apply for the termination of the administration in the prevailing circumstances. ***Section 591*** provides circumstances under which an action may be brought as: where it is contended that the administrator is acting or has acted so as to detrimentally affect the interests of the applicant; that the administrator proposes to act in a way that would detrimentally affect the interests of the applicant; or that that the administrator is not performing the administrator's functions as quickly or as efficiently as is reasonably practicable.

50. As stated above the creditors' application was based on the allegations: that, since his appointment, the Administrator had not undertaken anything substantial in the Administration; that the Administrator was complacent and was not taking control of the companies whose operations were still under the direction and control of the company directors notwithstanding the Administration Order; that the companies had continued to advertise for conversions as well as sale of some assets without the consent or

knowledge of the Administrator or the creditors; and that the Administrator had not revealed to the court and to the creditors that two months prior to the Administration order, he had engagement with the company.

51. Regarding the necessity to obtain the consent of CPN, the Administrator/CPN's creditors or the court's leave before bringing the application, this action was not a derivative action. Derivative actions are actions brought, by the minority shareholder(s) who feel that wrongs have been done to a company which cannot be rectified by the internal company mechanisms like meetings and resolutions, because the majority shareholders are in control of the company. In those circumstances, the minority shareholders institute proceedings as agents of the "wronged" company to seek reliefs or relief for the company itself, all the shareholders including the wrong-doers, and not for the personal benefit of the suing minority shareholder(s). That was not the case here where the applicants were acting, not on behalf of the companies, as such, but in their own interests. No legal provision was cited in support of the submission that the applicants required authority to bring the action. As regards the Administrator, it must be noted that allegations of collusion were made between the Administrator and the directors of the companies. It would have been futile and awkward to

seek the Administrator’s authority before bringing an action against him. In our view, if the court’s leave was required,

and we are not satisfied that it was required, then by entertaining the application and granting the orders, it ought to be construed that the court had given the green light to the application.

52. It is contended that the court erred in converting the application for administration order to one for liquidation yet, based on ***Section 533*** as read with ***Section 426*** of the Act, such application can only be made by the Attorney General and only in the public interest; and the case of ***In re Garnets Mining Co. Ltd*** ***(1978) eKLR*** was cited to support the submission
that in order to justify the winding up of a company under the just and equitable rule, grounds must be given which can be examined and justified.

53. ***Section 533*** of the Act provides that:

> ***1. On hearing an application for an administration order in respect of a company, the Court may—***
> ***(a) make the administration order sought;***
> ***(b) dismiss the application;***
> ***(c) adjourn the hearing conditionally or unconditionally;***
> ***(d) make an interim order;***
> ***(e) treat the application as a liquidation application and make any order that the Court could make under section 426;***
> ***(f) make any other order that the Court considers appropriate.***
> ***2. An appointment of an administrator by an administration order takes effect—***
> ***(a) at a time specified in the order; or***
> ***(b) if no time is specified, when the order is***

made.

3. ***An interim order under subsection (1)(d) may, in particular—***

> ***(a) restrict the exercise of a power of the directors or the company;***
> ***(b)make provision conferring a discretion on the Court or on a person qualified to act as an insolvency; or***
> ***(c) do either of those things.***

54. If we understand the appellants correctly, once an administration order is made, the above section cannot be invoked. The administration in this case had been ordered by the court and was, of necessity, being conducted under the supervision of the court. The court that granted the administration order must therefore retain a residual power to ensure that the administration was being carried out in accordance with the directions issued at the time the Administration Order was made. Since the creditors have the power to apply for termination of the administration, whenever such an application is made, as was done in this case, the court has the power to consider the same and make appropriate orders in the circumstances. Such powers must include the power to direct that instead of continuing with administration, where it is clear as was the case in this matter, that the administration would not achieve its intended purpose, to treat the application for administration as that of liquidation. In any case, since the period of the administration was coming to an end, the court could either terminate it or extend it. Where there is an application for the extension of the administration, the court may well consider it as a fresh

application in which event, it could, properly, issue a liquidation order instead.

55. ***Section 426*** of the Act only applies where the application for liquidation is brought on grounds of public interest. Our reading of section 533(1)(f) of the Act, which empowers the court to "treat the application as a liquidation application and make any order that the Court could make under section 426", is that where the court treats the application for administration as that for liquidation, under whatever circumstances, it may proceed to make orders similar to those provided under ***section 426***. That provision does not state that applications for administrations can only be treated as applications for liquidation if the application is brought under ***section 426***. The reference to ***Section 426*** in ***section 533(1)(f),*** in our view, is only as regards the orders that the court may issue upon treating the application for administration as that of liquidation.

56. The next issue is whether it was necessary for the trial court to make a finding of improper motive on the part of Cytonn Investment Management PLC before lifting the Administration Order. In this instance, it is submitted that the power to terminate an administrator's appointment at the instance of a creditor is provided under ***section 597*** of the ***Insolvency Act*** and that the ground upon which the request may be made is "improper motive" on the part of the applicant for the order

of administration; that based on the

definition in ***Black's Law Dictionary***, 9th Ed and the decisions in ***Tan***

Koon v Tom Bowes & Others ***[2019] EWHC 3455 (Ch)*** and ***Halsbury's***

Laws of England, 5th Ed, improper motive was to be alleged and proved against Cytonn Investments Management PLC and not against the Administrator; that the same was neither alleged nor proved against CIM; and that instead the court dwelt on the false premise of imputing improper motive on the part of the Administrator.

57. ***Section 597*** of the Act provides that:

> ***(1) A creditor of a company that is under administration may make an application to the Court for an order terminating the appointment of an administrator of the company.***
> ***(2) An application under subsection (1) may be made only if it alleges an improper motive—***
> ***(a) in the case of an administrator appointed by the Court, on the part of the applicant for the order; or***
> ***(b) in any other case, on the part of the person who appointed the administrator.***
> ***(3) On the hearing of an application made under subsection (1), the Court may make—***
> ***(a) an order terminating the administrator's appointment with immediate effect or from a specified later date;***
> ***(b) an order dismissing the application; or***
> ***(c) an interim order.***
> ***(4) If the Court makes an order under subsection (3), it may also make—***
> ***(a) an order adjourning the hearing conditionally or unconditionally; and***
> ***(b) such ancillary orders as it considers appropriate.***

58. In this case, the Administrator was not wholly appointed by the court. The choice of the Administrator was in fact came from the two

companies. In support of the application for the appointment of the particular

Administrator, affidavits were sworn by Edwin Dande, who did not disclose to the court that the Administrator had in fact been retained by the same companies prior to the proposal to have him appointed as Administrator. Imputation of improper motive was therefore made as regards the appointment of the Administrator and since his appointment was at the instance of Edwin Dande, the alter ego of CIM which made the application, the court was entitled to terminate the administration based on the non- disclosure of Edwin Dande.

59. On whether the preservative orders were properly issued, it was contended that the High Court ought to have upheld the objectives of insolvency as set out under ***Section 3*** of the Act and extended the administration rather that ordering the liquidation and preservation of assets; that ***Section 597(1) and (2)*** of the Act, under which the application was brought, does not provide for the making of a preservation order as it is limited to the termination of an administration; that a preservation order may be made under ***Section 356*** of the Act on the application of the Official Receiver and it accrues only in respect of a debtor's property; that the 3rd appellant was not a debtor in the insolvency proceedings hence the preservation order on its property was erroneous; that the said decision is likely to kill the 3rd appellant and with it, dwindle the compromised fortunes of its directors; that the order of liquidation was not sought for but was granted contrary

to

the decision in ***Chalicha FSC Ltd v Odhiambo & 9 Others*** (supra); that

there is no statutory power to convert an application for extension of an administrator's term under ***Section 594*** of the Act to an application under ***Section 533*** thereof; that Regulation 10 of the ***Insolvency Regulations,*** which was invoked by the applicants, expressly excludes a request for an administration order, which in any case, had already been granted on 6th October 2021; that as held in the cases of ***In re Nortel* (2017) EWHC 3399**
(Ch) and ***In the Matter of VTB Capital PLC* (2024) EWHC 2612 (Ch)**, the failure to follow the law on extension of the term of the administration and instead frog-jump from an application to extend the term to an application for an administration order, and finally a liquidation was an indication of abuse of discretion by the High Court; that on the authority of ***Mbogo & Another v Shah* (1968) EA 93**, this Court is entitled to interfere with that
exercise of discretion. Reference was made to the decision of the Supreme Court in ***Petition No. 13 of 2019***: ***Stephen Maina Githiga & 5 Others v***
Kiru Tea Factory Company Limited for the position that the court ought to evaluate the material filed by the parties and that the failure to evaluate the application for extension of time is fatal to the judgment.

60. The Official Receiver's response was that the creditors' application to terminate the administration is backed by ***Section 597*** of the Act and

that ***Section 591*** thereof allows a creditor or member of a company to challenge the Administrator’s conduct where their actions detrimentally affect the

interests of the creditors; that as a result, the court is bestowed with

discretionary powers to either terminate the Administrator's appointment, dismiss the application or make orders it deems fit; that under ***Section 594*** of the Act, the power to extend the term is discretionary and the court was not bound to extend it hence it properly exercised its discretion under ***Section 533*** of the Act; and that the Court should exercise caution in interfering with the exercise of discretion as held in the case of ***Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR***.

61. According to the Official Receiver, the reasoning of the learned Judge was based on ***Section 444*** of the Act which is couched in mandatory terms and that the orders were in line with the tenets of a liquidation process as appreciated in ***Re HLC Environmental Projects Ltd [2007] EWCA Civ 746***; that any liquidator appointed would ordinarily take over the assets of a company and the courts have ruled on the importance of preserving assets of a company in liquidation; that noting the unique circumstances of this case, the grant of preservation orders was merited and were issued pursuant to the prayer by the Creditors' Committees to safeguard the integrity of the assets and prevent dissipation or loss.

62. On whether there were valid reasons for the issuance of the Liquidation

Orders, it was submitted that since the Administrator was in charge of the two companies, it was prudent for the court to consider his professional

opinion for their orderly wind down and distribution of proceeds to Creditors; that the court did not err in exercising statutory powers under ***Section 533*** of the Act by placing the two companies under liquidation; that statute permits the court, on hearing an application for Administration Order, to treat the application as a liquidation application and make any orders it considers appropriate including an order under ***Section 426*** of the Act; that the circumstances of the case met the criteria under ***Section 424(1)(e)*** of the Act which outlines the circumstances in which a company may be liquidated by court when unable to pay its debts; and that it is trite that liquidation orders are in rem and apply collectively to all creditors as envisaged under ***Section 432(3)*** of the Act as the aim of liquidation is to ensure realisation of assets is done in an orderly and equitable manner, focusing on the assets available to satisfy debts owed by the company.

63. It was further contended: that setting aside/rescinding the Liquidation Order is contra statute as the Act does not provide for such a circumstance; that setting aside liquidation would mean that the entities revert to administration which had been proven not viable; that the court should be guided by the decision in the case of ***Credit Lucky Limited v National***

***Crime Agency* [2014] EWHC 83 (Ch)** where the court discussed the

principles governing the court’s exercise of its discretion to rescind a

winding up order; that setting aside the liquidation order will prejudice

the

creditors and leave them in a worse position than they already are in and

this regard reference was made to **Derek French: *Applications to Wind Up Companies***, 3rd Ed p. 399 para 6.1072 where it was appreciated that this discretionary power is to be exercised cautiously and only in exceptional circumstances which circumstances do not exist.

64. According to the Committees, ***Section 594*** of the Act provides for the circumstances in which the Administrator's term in office may be extended; that in ***Cape Holdings Limited (under Administration) v Synergy Industrial Credit Limited; I & M Bank Limited (Creditor); Registrar of Companies (Interested Party)*** ***[2023] KEHC 18685***, it was held that the power to extend the term of Administrator being discretionary, the court will examine the purpose for which the extension is sought since the extension should be for the objective of furtherance of the objectives of administration and the Administrator must show what he has done for the period of administration to justify the extension sought; that as held in ***Re Nortel Networks UK Ltd*** ***[2017] EWHC 3299 (Ch)***, the power to extend the term should be exercised in the interest of the creditors of the company as a whole, having regard to the circumstances including whether the purpose of the administration remains reasonably likely to be achieved, whether any prejudice would be caused to creditors by the extension

and any views expressed by the creditors; that similar holdings were made in and in ***Re Biomethane (Castle Eaton) Ltd [2019] EWHC 3298 (Ch);*** ***[2020] BCC 111***

and ***Re TPS Investments (UK) Ltd (In Admin)*** ***[2020] BCC 437***; that

accordingly, extension of the term of administration is not an automatic right; that from the Administrator's Report, demand letters were sent to SPVs for information were responded to by Edwin Dande, the same person who applied for the companies to be placed under administration; that the Administrator, in his report stated that rescue of the companies as going concerns was not possible and the only option was for orderly wind-down which would include appointing a Fund Manager and Fund Administrator as well as Trustee; that the Administrator having confirmed that the objectives of administration under ***Section 522*** of the Act could not be achieved with extension of the terms, the High Court exercised its discretion rightly in not extending the administration and in invoking the provisions of ***Sections 426 and 533*** of the Act; that ***Section 522*** of the Act empowers the court to treat an administration application as a liquidation and make any order that the court would make under ***Section 426*** of the Act; and that nothing in the appeal warrants the setting aside of the decision of the High Court which should be upheld by dismissing the appeal.

65. We have already found that the High Court had the power to terminate the administration once satisfied that the same was not serving the objectives of the administration. Whereas we agree with the position of the Supreme Court as expressed in ***Stephen Maina Githiga & 5 Others v Kiru Tea Factory Company Limited*** (supra) on the need

for the court ought to

evaluate the material filed by the parties, where evaluation would not serve

any purpose, it would be meaningless to expect the court to do so simply because it is a procedural requirement. In a case such as this, where the court has decided to terminate the administration, it makes no sense and amounts to a waste of time for the court to proceed and evaluate the application for the extension of the administration. In other words, the decision terminating the administration rendered the application for its extension moot.

66. It is clear that under ***Section 593*** of the Act, an administration process automatically lapses after one (1) year from the date the order is given and that the power to extend the term of the Administrator is under ***Section 594*** of the Act. Accordingly, this Court would not be justified in interfering with that exercise of discretion unless proper grounds are laid for so doing. Such grounds were identified by the Supreme Court in the case of ***Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR** in which the said Court expressed itself as follows:

> ***"We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v. Bashir (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:***
> ***'In this context a general appeal is to be***

distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (l) error of law

or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.'"

67. As was held by this Court in ***Price & Another v Hilder* [1986] KLR 95**, we

will not interfere with the exercise of the trial court's discretion merely because our decision would have been different had we been sitting as the trial court.

68. In this case, the High Court took into account the Administrator's material non-disclosure of the conflict of interest, procedural irregularities and failure to pursue the recovery of the amount owed; the Administrator's complacency and his failure to effectively take control of the operations of the two companies which were still effectively under the directions and control of the companies' directors notwithstanding the administration order being in place. The court also observed that nothing was being done to restructure the balance sheet and/or add value as had originally been pleaded but instead the Administrator was dilly dallying while the SPVs may have been busy putting up the assets for sale. It was noted that the Administrator disclosed that the two companies could not be rescued as going concerns and his recommendation was for an orderly wind down.

69. We are persuaded by the decision in ***Re Nortel Networks UK Ltd*** (supra) that the court's discretion should be exercised in the interests of

the creditors of the company as a whole having regard to all the circumstances

including: whether the purpose of the administration remains reasonably likely to be achieved; whether any prejudice would be caused to the creditors by the extension; and any views expressed by the creditors. In light of the proposals by the Administrator, it was unlikely that the purpose of the administration would be achieved by a further extension of the administration and considering the allegations made against the Administrator, the extension of the administration was likely to be prejudicial to the creditors who, by seeking to terminate the administrations were against the extension. In those circumstances there was no reasonable justification for the court to extend the term of administration.

70. Based on the foregoing finding we find no error of law or principle in the decision arrived at. No irrelevant considerations were taken into account and there was no failure to take account of relevant considerations. The decision cannot be said to have been plainly wrong, either.

71. On the issue whether the 3rd appellant (CIP) was condemned unheard, it was submitted by the appellants that in the application by the creditors, several allegations were made, some relating to that appellant. These allegations were: that funds collected by the companies were applied for investments in amongst others, CIP; that there is no clear demarcation of assets available for administration of CHYS and CIP; and that Edwin Harold Dayan Dande, the Chief Executive Officer of CIM which is the

principal

partner in CHYS and CPN had fraudulently and illegally continued to deal with the assets available for administration.

72. It was submitted that after the 1st respondent took over possession and management of the property in contention on 5th February 2025, it let out individual units thereon and was collecting rent while claiming that the rents were being utilised to repay State Bank of Mauritius (K) (SBM) Limited, one of the creditors of CHYS. The 3rd appellant protested that, unlike CHYS, it was not under administration and that it was not named, served with or heard on the application preceding the making of the impugned decision which curtailed and dispossessed it of title and possession of the property in contention. It cited Article 24(1) of the Constitution to submit that its right to be heard as well as its rights as a proprietor of land cannot, contrary to section 25(1) of the ***Land Registration Act,*** be limited; that the "higher calling of justice and fairness" which the learned Judge relied on was not located in any enabling legislation hence the conclusion was erroneous. In this regard the 3rd appellant cited ***De Souza v Tanga Town Council*** ***(1961) EA 377***, ***Onyango v Attorney General*** ***(1986-1989) EA 456***, ***Mbaki & Others v Macharia & Another*** ***(2005) 2 EA 206*** and contended that however devious it was assumed to be, it deserved to be notified and afforded a hearing as was held in ***Christopher Ndarathi Murungaru v***

***Kenya Anti-Corruption Commission & Another* [2006] eKLR 99**

and

***JMK v MWM & Another* [2015] eKLR**.

73. In response, the Official Receiver submitted that noting that the promoters of CHYS and CPN are similar to those in the SPVs, the latter at all material times were aware and participated in administration process of the two companies; that all parties before the Court have participated in the matters before the High Court; that since their promoters participated in the proceedings nothing barred them from intervening in the proceedings; that the High Court balanced the interests of the Creditors vis-à-vis the rules of natural justice; and that if the SPVs believe that they have been overlooked, with the assets being preserved, they still have an opportunity to account to the liquidator for the Loan Notes held by CPN and CHYS and, as observed by the court, they will either settle the Loan Notes or their assets be liquidated to realise the value.

74. It is clear that one common denominator in the management of the affairs of CHYS, CPN, CIP and CIM was Edwin Dande. It was he who also swore the affidavit in support of the applications that sought to place CHYS and CPN under administration. Clearly, the 3rd appellant was aware of or ought to have been aware of the proceedings before the High Court. The purpose of service of process on parties is to make them aware of those proceedings in order in order for them to decide the appropriate step they deem fit in defending themselves. This is in line with the natural justice principles. It is a procedural step geared

towards substantive justice. Once the fact of the

existence of the proceedings is brought to the knowledge of a person, that

person cannot be heard to complain that his right to be heard was violated. As this Court appreciated in ***Union Insurance Co. of Kenya Ltd. v*** ***Ramzan Abdul Dhanji*** ***Civil Application No. Nai. 179 of 1998*** (UR):

> ***"Whereas the right to be heard is a basic natural- justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."***

75. It was also contended that the learned Judge disregarded the principle of privity of contract; that CHYS applied for administration following its inability to meet financial obligations to creditors; that CHYS had lent money to CIP to finance development of the property in contention; that the said transaction was listed by CHYS in the application for administration as a ground for dissipation of the former's liquidity; that the relationship between CHYS and its creditors on one hand and CHYS

and CIP on the other hand was contractual as they were two separate and distinct

contracts; that the liability for administration and liquidation on the part of CHYS arose from contractual obligations between it and its creditors; that it was erroneous for the High Court to saddle CIP with a liquidation order by association, through the curtailment of its rights over the property; that ***Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi***

[1985] eKLR, ***Aineah Liluyani Njirah v Aga Khan Health Services***

[2013] eKLR, ***William Muthee Muthami v Bank of Baroda*** ***[2014] eKLR***

and ***National Bank of Kenya Limited v Insurance Experts (K) Limited***

(2002) eKLR are authority for the proposition that a contract cannot be enforced against a person who is not a party to it.

76. We must stress that what the learned Judge did was to preserve the properties which, it was contended, were acquired from the monies invested in CHYS by the investors. These were the properties which were being developed by the SPVs, including CIP. The learned Judge did not make a definitive finding as regards the status of the said properties but left that determination to be made by the Official Receiver, as liquidator of the two companies. Having considered the unique relationship between the investors, CHYS, CPN, CIM and the SPVs and the allegation that although the Loan Notes Agreements mandated and

bound the SPVs to create legal charges against their assets for the benefit of CHYS and CPN and their creditors and that this was not done, it was only just that the properties in

question be preserved pending the resolution of the other issues, including

the extent of the interest of the SPVs in the subject properties. This was an interim step which could be lifted depending on the case presented to the Official Receiver or the court. No final decision had been made by the learned Judge as regards the properties in contention. As the issue was still at large, we do not agree with the appellants that the learned Judge disregarded the principle of privity of contract.

77. It was also contended and the learned Judge was further faulted for disregard of the principle of separate legal personality; that the separability of a company from a group of companies associated with it, its subsidiaries, promoters, shareholders, directors and officers and rights over a company's property is a settled principle in company law; that it is on that basis that the decision of the High Court obfuscating the distinction between CHYS and the 3rd appellant and placating the alleged fraud of Edwin Dande in the affairs of the appellant is faulted; that the view expressed by the High Court that the SPVs are separate entities and independent of CHYS but not the projects, was factually wrong and unsupported by law; that on the authority of Grower and Davies' ***Principles of Modern Company Law***, 8th Ed page 91, courts are committed to the preservation of separate legal personality of companies except where the statutory wording clearly requires this; and that the decisions in ***George W M Omondi & Another v National Bank of Kenya Ltd & 2 Others*** ***[2001] eKLR*** and ***Mosi v National***

Bank of Kenya

Limited* [2001] eKLR, *In the Matter of Tatu City Limited & Kofinaf

***Company Limited* (2013) eKLR** support the principle of corporate personality.

78. The Official Receiver's response was that while the SPVs were registered under the Limited Liability Partnerships as distinct entities, they were still under the management and control of CIMP and Edwin Dande (the promoter); that from form CR12s provided by the Registrar of Companies, Edwin Dande appeared as the principal partner in most, if not all, of the various SPVs and that the SPVs are all related with the predominant name "Cytonn"; that since the SPVs failed to create legal charges against assets for the benefit of CHYS, CPN and their creditors, the creditors had a right to claim stake in the assets; that by virtue of the financing agreements, and the fact that the funds used to purchase the properties or undertake the projects were drawn from the two entities, the SPVs formed part of the assets of CHYS and CPN; that there are exceptions to the rule in ***Salomon v Salomon*** where there is fraud, malfeasance, evasion of legal obligation or improper conduct; and that the courts are empowered to disregard corporate personality when the same is used to shield fraud, wrongful conduct or evade obligations as was enunciated in the case of ***Ukwala Supermarket v Jaideep Shah & Another* [2022] eKLR**;

79. Retracing the connection between CHYS, CIMP, Cytonn Real Estates,

Edwin Dande and Patricia Njeri Wanjama, it was submitted that the

manner in

which the SPVs were established was suspicious since the entities and the

SPVs are all undeniably connected through their shared control and promoters being the same people; that the above actions fit the definition of “connected with” under ***Section 2*** of the Act; that the High Court did not err in finding that there is a direct link between the companies and the SPVs and that following the flow of funds, there is a nexus between the monies obtained from creditors to the various SPVs through the financing agreements; and that there is also a clear admission by Edwin Dande in his affidavit itemizing the projects which were developed with funds from CHYS and CPN.

80. It was contended that the promoters of the two entities sought to place them in administration due to “severe liquidity issues” leading to technical insolvency of the two entities; that therefore CHYS and CPN are the alter egos of the promoters and the SPVs and the Court ought to disregard the prayers sought treating the SPVs as separate entities; that adherence to the “fiction” of separate legal entity in this matter would sanction a fraud or injustice since there is cogent evidence of a fraudulent scheme being perpetuated because the entities and the SPVs are all undeniably connected through their shared control and there is an exchange of funds between them with no security or charge being made in favour of the companies; that it is unjust that the SPVs want to be treated as separate legal entities and have preference accorded to them to the detriment of

investors of the two companies, whom without their funds, the projects

would be non-existent; that this was an elaborate scheme to siphon funds from investors through SPVs by deceitful actions and intent to deprive another of their right; that although the assets were registered under SPVs, they remained under the full control of the promoters and its related entities continued to deal with the assets in a manner prejudicial to the interests of the creditors, hence an abuse of the doctrine of separate legal entity; and that while the doctrine affords protection to individuals behind a corporation, the same can be subject to abuse and where this is the case, the courts are at liberty to disregard the doctrine to prevent injustice or fraud when the corporate structure is misused for example where individuals set up a company with the intention of using it as a shield for fraudulent activity to defraud creditors, avoid liabilities or conceal illegal transaction and reference was made to ***Rossendale Borough Council v Hurstwood Properties (A) Ltd*** ***[2019] EWCA Civ 364*** and ***Prest (Appellant) v Petrodel Resources Limited and Others (Respondents)*** ***[2012] EWCA Civ 1395.***

81. It was submitted that in this case, hiding behind this principle is a façade and will cause grave injustice and unfairness to third party investors and reliance was placed on ***Jiang Nam Xiang v Cok Fas-St Company Limited***

[2018] eKLR for the observation that the protection under the

corporate

personality is not a carte blanche for the company’s shareholders

and/directors; that noting the breach of fiduciary duty to the investors and

having demonstrated the nexus between SPVs and the companies, this Court should treat them as one entity "Cytonn"; and that while the issuing the preservation orders over the assets of the SPVs did not amount to lifting of corporate veil, noting the circumstances of this case, the evidence and the report filed by the Administrator pointing out the issue, the court's finding that on the preservation orders and tracing was correct.

82. On their part, the Creditor's Committee submitted that the application was premised on broad grounds of improper motive of Edwin Dande (who applied for the administration) and the inaction on the part of the Administrator to take control of the assets; that there were other grounds of the companies being collection baskets where funds were collected from investors, who were members of the public, were applied for investment in independent SPVs registered by the parent company Cytonn Investments Management PLC and CHYS LLP which had no tangible or physical assets to be administered and to this end, there was no clear demarcation of assets available for administration; that the only assets were the Loan Notes/Financing agreements while the SPVs were in business as usual and could deal with the assets in whatever manner; that Cytonn Investments Management PLC (CIM PLC) and Edwin Harold Dayan Dande were in control of all the SPVs that had been advanced funds by CHYS LLP.

83. At this stage we will refrain from delving deeply into the submissions made on behalf of the parties, lest we prejudice the pending proceedings before the Official Receiver. Suffice it to state that the appellants still have the opportunity of raising their grievances before the Official Receiver who will consider the same and make determination thereon. That determination may, itself, be subject of further court proceedings. In the circumstances, care must be taken to avoid expressing a conclusive view of the matters in contention. The practice is and has always been that in such cases, the court may, if necessary, only express its views, on the matters in controversy, on a *prima facie* basis. Otherwise, a concluded view is likely to tie the hands of the court which may eventually hear the same matters and cause embarrassment to the trial court. See ***Mansur Said & Others v Najma Surur Rizik Surur* Civil Appeal No. 186 of 2005** and ***Niazons (K) Limited v China Road & Bridge Corporation (Kenya)* Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502.** A similar view was expressed by this Court in ***Said Almed v Mannasseh Benga & Another* [2019] eKLR**.

84. It was submitted that the learned Judge misinterpreted the law on fraud and tracing. According to the 3rd appellant, the learned Judge made findings of fraud on the part of Edwin Dande, yet nowhere in the

supporting affidavit was a charge of fraud deposed to; that the Facebook post attributed to

Edwin Dande regarding the financing of *The Alma* was unauthenticated; that Edwin Dande was not claimed to be or established to have been a shareholder, director or officer of the 3rd appellant for it to be bound by the communication in the post; and there was no connection between the completion of the development on the property and the fraud alluded to. It was, therefore, submitted that the finding of fraud was unsuitable in law and the threadbare assertion in the application and hollow averments in the supporting affidavit fell short of the requirements on pleadings and establishing fraud and in this regard the 3rd appellant cited ***Bradford Third Equitable Benefit Society Borders* (1941) 2 All ER 205** and ***R G Patel v Lalji Makanji* (1971) EA 314.**

85. On application of the doctrine of tracing, the 3rd appellant contended that the learned Judge misinterpreted the law on trust and tracing. According to the 3rd appellant, on the authority of the case of ***Njenga & 3 Others v Ndua & Another* (2021) eKLR**, tracing is an equitable doctrine whose application could have arisen only if there was a trust in favour of the creditors under ***Section 25(2)*** of the ***Land Registration Act***; that the issue of tracing was also not properly before the court as it was not pleaded and hence the court proceeded against the boundaries set out in ***Galaxy***

Paints Company Ltd v Falcon Guards Ltd [2000] eKLR.

86. In response, the Official Receiver submitted that, on the material placed before the court, it appreciated the facts/context surrounding the two entities, circumstances that led them into administration and the need to balance the rights of the parties involved; that the court did not err in

its application of the Common Law doctrine of tracing because it merely afforded an opportunity to the creditors to trace their funds invested in CHYS and CPN; that having demonstrated the nexus between CHYS and CPN and SPVs through their formation and commingling of funds,

applying the doctrine of tracing offers the creditors an opportunity to identify and follow their funds, particularly in case of misappropriation or wrongful conversion; that this Court should uphold the application of the doctrine as discussed in ***Lennox Industries (Canada) Ltd v Canada***

1987 CanLII 5321 (FC) [1987] 3 FC 338 and ***McTaggart v Boffo (1975)***

64 D.L.R (3d) 441 (0nt. HCJ) 10 O.R (2d) 733; that to ensure that the

integrity of the assets was maintained the court issued preservation order over the properties of the SPVs in order to avoid dissipation and

disposition by sale; and that thereafter, the creditors and the SPVs would

pursue their claims over the preserved assets with the liquidator.

87. The 3rd appellant's submissions seem to be informed by the learned Judge's statement that:

> ***"In my view, under the Common Law doctrine of tracing, the Creditors would be entitled to trace their***

funds into these projects. Let those properties be preserved awaiting the realization of the assets of CPN. Ruling otherwise would be to abate a fraud upon the creditors. This would be so because, the so called SPVs may dispose of those projects to the extreme prejudice of the creditors whose monies was used to acquire the same. What if the SPVs were being used to defraud the investors? Is it not prudent to preserve those assets pending the realization of those Loan Notes? Will it be just to tell the Creditors, sorry, your money was lent to SPVs who are independent and they should be allowed to continue to freely deal with the assets that was acquired by your money, but you can't touch them?"

88. The learned Judge further stated that:

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89. In our view, the learned Judge did not make any definitive findings on the issue of fraud or tracing. What he did was to pose questions as to what would happen if fraud was eventually found to have been committed and there was a need to apply the principle of tracing. In those circumstances, we find no merit on the allegation that the learned

Judge made findings of fraud when the same had not been pleaded and proved. Our understanding

is that the learned Judge was, at that stage, concerned mainly with the preservation of the assets hence his rider that:

> ***"At the time of liquidation, those entities would be given a hearing either to dispute the Loan Notes or pay up the same. The Court must be sensitive and alive to the plight of over 3000 members of the public who sank their over Kshs.11 Billion into these projects and therefore lean towards a lesser evil, which is to preserve those assets for the time being."***

90. We end this judgment from where we started: ***Salomon & Co Ltd (supra).*** We reiterate that while the decision in the said case was a very useful innovation in the commercial world, its benefits have been exploited by ill-motivated persons to commit fraud, malfeasance, evasion of legal obligation and improper conduct. Regulatory authorities must, therefore, be keen to ensure that right from the point of registration, no entity is permitted to misuse the cloak of incorporation in order to shield, initiate or perpetuate fraud, wrongful conduct or evade obligations and in the process, cause harm to the public. It is doubtful in this case whether the regulatory authorities diligently exercised their mandate as expected of them. We shall say no more in that regard.

91. Having subjected the material placed before the learned Judge to fresh and exhaustive scrutiny, it is our independent finding that the learned Judge's decision cannot be faulted. We accordingly dismiss these

appeals with costs

to the Official Receiver and the Creditors’ Committees of Cytonn High Yield Solutions LLP and Cytonn Real Estate Project Notes.

92. It is so ordered.

Dated and delivered at Nairobi this 21st day of November 2025.

P. O. KIAGE

....
JUDGE OF APPEAL

JAMILA MOHAMMED

....
JUDGE OF APPEAL

G. V. ODUNGA

....
JUDGE OF APPEAL

I certify that this is a true copy of the original.
Signed

DEPUTY REGISTRAR.

THE COURT OF APPEAL
JUDICIARY
REPUBLIC OF KENYA