

**IN THE COURT OF
APPEAL AT
NAIROBI
(CORAM: KIAGE, JAMILA MOHAMMED & ODUNGA, JJ.A.)
CIVIL APPEAL NO. E091 OF 2024
(CONSOLIDATED WITH
CIVIL APPEAL NOS. E092, E093 & E094 OF**

2024) BETWEEN

**CYTONN INVESTMENTS PARTNERS
SIXTEEN LLP.....1ST
APPELLANT GOAL ADVISORY AFRICA LIMITED
(TRUSTEE).....2ND APPELLANT
CYTONN INVESTMENT MANAGEMENT
LIMITED.....3RD APPELLANT
CYTONN INTEGRATED PROJECT LLP.....4TH
APPELLANT**

AND

THE OFFICIAL RECEIVER.....RESPONDENT

(An Appeal from the Rulings and Orders of the High Court at Nairobi (A. Mabeya, J.) delivered on the 30th November 2023

*in
REPUBLIC OF KENYA
Insolvency Petition No. E063 of 2021)*

**JUDGMENT OF THE
COURT**

1. These consolidated appeals arise from the ruling of the High Court (Mabeya, J.) in Nairobi High Court Petition No. E063 of 2021 delivered on 30th November 2023.

2. To contextualise the dispute, **Cytonn Investments Management PLC**, (which filed both the 3rd and 4th appeals, also referred to as CIMP) and **Edwin Harold Dayan Dande**, the promoters of **Cytonn High Yields Solution** (also referred to as CHYS) and **Cytonn Real Estate Project Notes** (also referred to as CPN) (both of which are referred to herein as the Companies), approached the court, vide Petition Nos. E063 and E064 of 2021, for administrative orders following the inability of the Companies to meet their financial obligations. After the issuance of the Administration Order, the Administrator found that the Companies could not be rescued as going concerns because they had no credible funding models hence there was no likelihood of turning them around. The Administrator recommended for orderly wind-down which would include appointing a Fund Manager and Fund Administrator as well as Trustee. Two applications were then filed by the Companies' respective Creditors' Committees and the Administrator seeking the termination and extension of the administration, respectively.

3. On 6th January 2023, the learned Judge (Mabeya, J.), while dismissing the application for extension of the administration terminated the Administration of the Companies and placed them under liquidation by the Official Receiver (the respondent) and directed the Administrator to, forthwith, surrender to the respondent all the properties and their belongings as well as the documents relating to the administration. The learned Judge also ordered that the properties set out in the Motion dated 19th May 2022 be preserved until the liquidation is concluded. The said properties and their respective Special Purpose Vehicles were set out as 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.

4. At this point, it is important to set out, briefly, the relationship between **Cytonn High Yields Solution, Cytonn Real Estate Project Notes, Cytonn Investments Management PLC** (CIMP), the 3rd appellant herein, and the Special Project Vehicles (SPVs), of which **Cytonn Investments Partners Sixteen LLP** (the 1st appellant, also referred to as CIP16 LLP), is part. Cytonn Investments Management PLC was the principal partner in both CHYS and CPN. CHYS and CPN were the collection baskets into which funds collected from the investors, who are the members of the public, were deposited. These funds were applied for investment in Special Purpose Vehicles registered by **Cytonn Investments Management PLC**. The monies channelled to these SPVs was meant for acquisition or development of properties which would then be sold out to purchasers and the proceeds

therefrom used to pay back the investing public with interest. Whereas the SPVs were registered under the **Limited Liability Partnership Act** as distinct entities, from form CR12s provided by the Registrar of Companies, Edwin Harold Dayan Dande appears as the principal partner in most, if not all of the various SPVs which are all related with the predominant name “Cytonn”. As we have stated, all these SPVs were registered by the 3rd appellant, CIMP. It is therefore clear that the SPVs remained under the management and control of their promoters, CIM and Edwin Harold Dayan Dande. In order to finance the purchase or undertake projects, the SPVs entered into financing agreements with CHYS and CPN respectively, through which CHYS and CPN financed their projects on the basis of financing agreements. The SPVs were, under the various loan agreements, duty bound and/or obligated to create legal charges against the assets for the benefit of CHYS and CPN and the creditors, but which were never created.

5. In the meanwhile, the 3rd appellant executed asset backed guarantees, dated 21st April 2020 (the Deed of Guarantee or the Deed), in favour of the creditors. This state of affairs was what informed the actions by creditors to execute against the 3rd appellant.
6. Subsequently, applications were filed by the appellants, Cytonn High Yields Solutions LLP, the respondent and SBM Bank, as well as other parties who are not parties to this appeal. The applications by the appellants and CHYS were heard together and were determined in the same ruling which is the subject of this appeal. The said applications were dated 17th February 2023 by SBM Bank; 23rd February 2023 by Goal Advisory Africa Limited; 18th April 2023 by the Cytonn Investment Management PLC (“CIM”); 23rd February 2023 by CHYS; and two applications dated 3rd May 2023 by the respondent. The application dated 17th February 2023 filed by SBM Bank Limited was settled by the adoption of the consent, between SBM Bank Limited and the Official Receiver, dated 1st August 2023. The application dated

23rd February 2023 by the 1st appellant, sought orders, that pending the hearing and determination of the intended appeal, there be stay of the preservatory orders issued on 6th January 2023 against: the Alma of Land Reference Number Kiambaa/Ruaka/6667; Applewood of Land Reference Number 1055/29; Taraji of Land Reference Number Kiambaa/Ruaka/520; and The Ridge of Land Reference Number 28222/3 of Ridgeways.

7. The application was opposed by the Official Receiver in replying affidavits sworn by Judy Mugo on 22nd May 2023 and by **Michael Mutua Mwinzi**, a creditor, on 14th June 2023.
8. In its application dated 23rd February 2023, the 2nd appellant, **Goal Advisory Africa Limited**, sought the stay the preservation orders against the properties known as **‘the Alma’** on **LR. No Kiambaa/Ruaka/6667**, Applewood on **LR No. 1055/29**, Taraji on **LR. No 28222/3** on Ridgeways and **‘The Ridge’** on **LR. No. 28222/3** pending the intended appeal. The application supported by an affidavit sworn by

Nelson M. Ng'ang'a on 22nd

February 2023. The application was opposed by replying affidavits sworn on 22nd May 2023 by **Diana Mumo** and on 16th June 2023 by **Michael Mutua Mwinzi**, a creditor.

9. In its application dated 18th April 2023, the 3rd appellant, **Cytonn Investments Management PLC**, sought that it be admitted as an interested party and for stay of all the execution proceedings against it on the strength of the deed of guarantee dated 21st April 2020. It also sought orders restraining the creditors of the Company from taking any execution proceeding against it pending the determination of the petition. In support of the application, the applicant relied on the supporting affidavit dated 18th April 2023 sworn by **Edwin H. Dande**. The application was opposed by two affidavits sworn by creditors, **Suresh Kerai**, and **Catherine Njeri Njaimwe** as well as grounds of opposition filed by the Official Receiver dated 29th May 2023. There was also a preliminary objection filed by another creditor, **Transforming Women Welfare Society**, to the effect that, upon granting

the liquidation order, the court became *functus officio* and
Nai Civil Appeal No E091, E092, E093 & E094 of 2024 *Page 10 of*

could not

therefore grant the orders sought; and that the court lacked jurisdiction to issue protective orders and that the 3rd appellant was guilty of laches.

10. The application by the 4th appellant, who was christened Intended Interested Party, sought stay of preservatory orders issued against the Alma pending the determination of the application; that pending the hearing of an intended appeal, there be a stay of the preservatory orders; that the purchasers who had already bought into the project “the Alma” prior to the preservation orders be allowed to complete their transfers and receive their titles. It is noteworthy that there was no prayer for the joinder of the 4th appellant to the proceedings.
11. The first application by the respondent dated 3rd May 2023 sought to vest on the Official Receiver, for the benefit of the creditors, **L.R NO 2/85 (Originally 2/44/2), L.R 2/86 (Originally 2/44/3) and L.R 2/87 (Originally 2/44/4), (“the Kilimani property”)** held by Cytonn Investment

Partners Sixteen and an order compelling the 3rd appellant to
surrender

the original title documents for the said property to the Official Receiver and the latter be authorized to carry out a valuation of the same. The application was based on the affidavit of **Judy Mugo** sworn on 3rd May 2023. That application was opposed by **CIP 16** in a replying affidavit sworn by its Legal Officer, **Anthony Kimani** on 14th June 2023 as well as grounds of opposition dated 15th June 2023.

12. The second application by the Official Receiver of a similar date sought to vest 12.5% shares (being 250,000,000 ordinary shares) in Superior Homes (Kenya) PLC held by Cytonn Investment Partners Fifteen PLC with the Official Receiver for the benefit of the creditors of the Company and that the Official Receiver be authorized to make a valuation of those shares. It was supported by the affidavit sworn by **Diana Mumo**.
13. In his ruling, the learned Judge identified the issues for determination as: whether the preliminary objections dated 29th April 2023 and 1st June 2023 were sustainable; whether a

case to stay the preservation orders had been made;
whether

injunctive orders should be granted to restrain the investors of CHYS from taking any execution proceedings against the intended interested party pending the determination of the appeal; and whether the official receiver had made out a case for grant of the orders sought in the applications dated 3rd May 2023.

14. In his ruling the learned Judge traced the background of the dispute reiterating the events that led to the issuance of the orders of administration against the two Companies and the appointment of **Kerita Marima**, who had been proposed by the said Companies, as the Administrator for both Companies. He noted that during the course of administration, the Administrator confirmed to the court and the court found as a fact; that the promoters of the two companies were related and that they had established a myriad of SPVs in the name of Partnership LLPS; that the two Companies were receiving monies from the public for investment; that the monies would then be channelled to these SPVs to acquire properties which would be

developed and then sold out to purchasers and the proceeds paid to the investing public; that as at the time the two Companies came to court, they were holding deposits or investments from the public in excess of Kshs.13 billion which funds had been 'lent' to the SPVs who had in turn purchased the properties that they were developing; and that there were no securities whatsoever that were offered for these 'lendings', probably because the Companies and these SPVs were not only related, but belonged to the same promoters.

15. The learned Judge then alluded to his decision of 6th January 2023 that led to the liquidation of the two Companies and the preservation of their properties pending the proof that these properties were acquired by the monies advanced by the Companies to these SPVs. The learned Judge reiterated that the court would not countenance a well-orchestrated scheme of fraud, based on the intangible doctrine of separate legal personality of Companies, to defeat the lawful and constitutional rights and claims of the creditors of these

Companies. He held

that the order of liquidation was made in rem and binds all including the SPVs who were aware of the claims which the Companies presented to the Administrator and the court's findings. He observed that those who had claims in the preserved properties would have an opportunity of showing that the said properties were not acquired by the proceeds of the monies advanced by the Companies under liquidation.

16. As regards the preliminary objections, the learned Judge cited **Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696** and **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR**, and found that the court was not *functus officio*. He also found that for the court to establish the authenticity of the guarantee document dated 21st April 2020, it was necessary to examine the evidence presented by parties and interrogate the same before making a determination thereon hence the preliminary objection was untenable for being based on matters of fact and not law.

17. On the issue of the joinder, the learned Judge held, based on the Supreme Court decision in **Francis Kariuki Muruatetu & Another v Republic & 5 others Petition No 15 as consolidated with Petition No 16 of 2013 [2016] eKLR**, that for a party to be admitted to a proceeding, leave should be sought by a formal application which should demonstrate the stake the party has in the proceedings, the prejudice to be suffered in case of non-joinder and its input in the matter. However, since the court has the discretion to admit parties even on its own motion, the preliminary objection had no merit.
18. On whether the court should stay the preservation order of 6th January 2023 in order to allow the purchasers to complete transfers of their titles pending appeal, the learned Judge reiterated the principles guiding such orders under Order 42 rule 6 of the **Civil Procedure Rules**, and held that the purpose of stay pending appeal is to preserve the substratum of the case. He restated that when making the order of preservation, the court expressly stated that those parties

laying claim on the

preserved properties may be given an opportunity to be heard before final appropriation orders are made. In his view, that opportunity was availed by way of the present applications but no evidence was presented by the applicants to prove otherwise than that those projects were founded, acquired and/or developed by the funds of the creditors invested in the Company. It was his view that the applicants failed to particularize the loss they would suffer if the properties continued to be preserved. He found that the burden was on the applicants to disassociate the SPVs projects from the monies advanced to them by the Company for which they only issued paper money, which the court rejected on 6th January 2023 as being no security at all for the billions of shillings advanced by the Company to the SPVs. According to the learned Judge, the greater prejudice would be to release the preserved properties or delay further the realization of the assets of the Company for the benefit of the suffering public. He found no merit in the two applications dated 23rd February 2023 for stay pending appeal by the 1st

and 2nd

appellants and dismissed them with costs.

19. Regarding the issue whether injunctive orders should be issued to restrain the investors of CHYS from taking any execution proceedings against the SPVs pending the determination of the petition, the learned Judge held that there was no petition pending in which any injunction could be issued to await its determination since what is ongoing is the liquidation process of the Company.
20. On the merits, the learned Judge cited the judicial decisions of **Giella v Cassman Brown (1973) EA 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR**, and noted that the deed of guarantee was not part of the proceedings before it; that the documents presented before court had been challenged and it was not the place of the court to start inquiring on their authenticity or otherwise, in insolvency proceedings, which are concerned with issues that assist the liquidation process; that the 3rd appellant had the opportunity to present its issues before the court during the administration and well before the liquidation order was made; that it was well within its

knowledge that the Administrator was following the funds of CHYS and when the proposals for the restructuring of the Company, that were rejected by the court, were being made, the applicant should have come forward and presented the issues it was raising now; that for the reasons set out above about the failure to exonerate or extricate the projects and/or the preserved properties from the funds of the creditors of the CHYS, no *prima facie* case had been established; that no irreparable damage was proved and the balance of convenience tilted in favour of allowing the process of liquidation to be completed as soon as practically possible. Accordingly, the prayer for an injunction was dismissed with costs.

- 21.** Regarding the applications by the Official Receiver dated 3rd May, 2023, the learned Judge cited **McTaggart v Boffo (1975) 64 D.L.R. (3d) 441 (Ont. H.C.J.), 10 O.R. (2d) 733**, at para **67**, and the British Columbia case **Tracy v Instalcons Financial Solutions Centres (B.C.) Ltd. 2010 BCCA 357.**

Based on the foregoing dicta, the learned Judge held that for an applicant to

rely on the doctrine of tracing, he must *prima facie* establish that the money or property can be located. He found that in the present case, there was evidence that money invested in CHYS was advanced to **Cytonn Integrated Project 16 LLP** and **Cytonn Integrated Project 15 LLP** who in turn used the same to acquire the Kilimani property and the subject shares, facts that were established to the court by the Administrator which persuaded the court to issue the preservation orders. According to the learned Judge, despite having the opportunity to prove otherwise, the SPVs did not provide any evidence to that end. He concluded that under the doctrine of tracing, the creditors of and the Company have the right to trace their monies into the Kilimani property and the subject shares in Superior Homes (K) PLC pursuant to **Section 443** of the **Insolvency Act** (the Act) and that the Official Receiver was at liberty to value the said property and shares with a view to realizing them. He allowed the two applications by the Official Receiver.

22. It is against the said decision that these consolidated appeals were filed.
23. We heard these consolidated appeals on 30th April 2025 when learned senior counsel, **Mr Paul Muite**, appeared with **Ms Selestine Koile**, for the 1st and 3rd appellants; learned counsel, **Mr Ernest Murungi**, appeared for the 2nd appellant; learned counsel, **Mr Emmanuel Bitta** appeared with **Ms Judy Mugo** for the respondent; learned counsel, **Mr Greg Karungo**, appeared with **Ms Naomi Mutisya** for the SBM Bank, learned counsel, **Mr Kavita Mwanzia** appeared for the Creditor's Committee; learned counsel, **Mr Steve Ogolla**, **Mr Awino** and **Mr Ndungu Gachiri** appeared for interested parties. Learned counsel relied entirely on their written submissions.
24. 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. In

summary:

- (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.**

25. Those principles apply to both cases where the trial was by way

of viva voce evidence as well as where the trial was by way of

affidavit, save that the caution as regards the advantage that the trial court has in seeing and hearing the witnesses testify does not apply where the evidence was by way of affidavit. Nonetheless, trial by affidavit is no less a trial merely because the witnesses are not called, as long as evidence is adduced.

26. 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.
27. Our own consideration of the grounds of appeal in these appeals leads us to the conclusion that the learned Judge's determination of the applications for stay pending intended

appeals stay is not the subject of challenge in these appeals.

We

say so, firstly, because the grounds of appeal and the submissions expounding them, do not dwell on that determination. Secondly, the procedure, where the High Court declines to grant an order for stay pending an appeal is to invoke this Court's original jurisdiction pursuant to Rule 5(2) (b) of the Rules of this Court instead of appealing against the decision of the High Court.

28. We however, have considered the decision of the learned Judge which was made in exercise of his discretion. In order to justify the grant of an order of stay pending an appeal, the High Court is guided by the text of Order 42 rule 6(2) of the **Civil Procedure Rules** which states that:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

29. The learned Judge, in dismissing the applications for stay pending appeal expressed himself as hereunder:

***“As already stated, when making the order of preservation, the Court quipped that those parties laying claim on the preserved properties may be given an opportunity to be heard before final appropriation orders are made. That opportunity was availed by way of the present applications. No evidence was presented by the applicants to prove otherwise than that those projects were founded, acquired and/or developed by the funds of the creditors invested in the Company. In this matter, there are two competing interests, the applicants on one hand, who want their interests in the properties preserved and the creditors on the other hand who await payment of their dues from the liquidation process. The applicants failed to particularize the loss they would suffer if the properties continue to be preserved. As already stated, the applicants failed to show that the billions given to them by the collapsed Company was not the funds used to acquire and develop the subject properties. In my view, once the liquidation order was made, it was no longer business as usual for the SPVs. The chicken had come to roast for their promoters who are also the promoters of the collapsed Company. The burden laid on them to disassociate the SPVs projects from the monies advanced to them by the Company for which they only issued paper money, which this Court rejected on 6/1/2023 as being any security at all for the billions of*”**

monies advanced by the Company to the SPVs. The greater prejudice in this matter would be to release the preserved properties or delay further the realization of the

assets of the Company for the benefit of the suffering public.”

30. Under sections 1A and 1B of the ***Civil Procedure Act***, the learned Judge was enjoined, in the exercise of the powers under that Act or in the interpretation of any of its provisions (and that includes when considering an application for stay of execution pending an appeal), to seek to give effect to the overriding objective in the said provisions particularly the proportionality objective. As was appreciated by this Court in

PKA v MSA [2009] KLR 744:

“The pillars of the overriding objective are fairness, justice, proportionality and proper use of court’s resources. Proportionality entails giving the parties before the court equal footing and ensuring there is equality of arms as between the parties as far as is practicable. In my view according equal access does achieve the aims of fairness, justice and proportionality. Some of the principle aims of overriding objective include; acting justly in every situation before the court; placing the parties on equal footing as far as is practicable; reducing delay and cost of litigation; acting with the principle of proportionality in view; designing suitable procedures to suit speedy and efficient delivery of justice; allocating the resources of the court which include the right of equal hearing (equality of hearing) and finally

ensuring that the principle of equality of arms is adhered to.”

31. We agree with the learned Judge that the appellants failed to prove that, by issuing the preservatory order, the appellants were subjected to substantial loss. It is not mere loss that an applicant seeking stay of execution under the aforesaid provision ought to prove, but that the court must be satisfied that the loss to be suffered may be substantial.
32. It follows that the appeals are substantially against the decision of the learned Judge allowing the applications filed by the respondent and adopting the consent between the 1st respondent and SBM Bank Limited. These are issues broadly dealing with the allegation of the denial of the right to be heard, the vesting of the properties of the SPVs in the Official Liquidator, the enforcement of the guarantee given to the creditors by the 3rd appellant and the joinder in the proceedings of the 3rd respondent.
33. In this appeal, since there are several grounds taken by the appellants, some of which are similar while others specific to particular appellants, we will deal with the said grounds in no

particular order but shall deal with the submissions in respect of particular grounds as made by the parties and make our determination thereon.

34. As regards the application by the 4th appellant, the same was stillborn in so far as it sought substantive orders without an express prayer to be joined in the proceedings. It cannot therefore complain that it was not joined to the proceedings when it did not seek that relief. Without being joined to the proceedings, it had no business seeking substantive reliefs.
35. It was submitted by the appellants: that the learned Judge, whilst rightly conceding that the Special Purpose Vehicles, in this case Cytonn Investment Partners Sixteen LLP (the 1st appellant), was not part of the proceedings, erred in law and fact by making a determination that condemned it, without being accorded a fair chance to be heard, contrary to Article 50 of the Constitution; that the learned Judge, erred in failing to find that the 1st appellant, being duly registered and incorporated under the **Limited Liability Partnership Act**,

with a separate legal entity

from CHYS, the other SPVs and the Management Company, the 3rd appellant, (Cytonn Investments Management Plc or CIMP), had the capacity and right to own property in its own name and deal with the property as it pleases; that the 1st appellants' corporate legal entity ought to be upheld since it is a solvent entity, separate and legally distinct from CHYS and CPN, which are currently under liquidation and at no point has the corporate veil been lifted to justify subjecting the appellant to the same consequences as these liquidated entities.

36. In response, the respondent, the Official Receiver, took the view: that the learned Judge correctly found that all the SPVs were Cytonns since they were related, had no independent business activities, had common directors, offices and no actual management autonomy; that a search conducted at the Registrar of Companies revealed that the 3rd appellant is the mother company of all Cytonn entities and that while the Cytonn bodies are, at least on paper, separate legal entities, the business conduct demonstrated among them proves

clearly that in

practice, there is no separation among them; that the court is empowered to disregard the corporate persona when the same is used to shield fraud, wilful conduct or evade obligations as stated in **Ukwala Supermarket v Jaideep Shah & Another [2022] eKLR**, in cases where the company is a mere instrumentality or alter ego of its shareholders and where adherence to the fiction of separate legal entity would sanction a fraud or injustice; that the Cytonn SPVs which were registered for the sole purpose of holding the various subject assets would not exist without the monies channelled from the two Companies and were little more than conduits for the funds from them; that although the assets were registered under separate SPVs, they remained under the full control of the directors of the 3rd appellant and its related entities whom continued to deal with them in a manner prejudicial to the interests of the creditors; that to insist on the principle of separate legal entity to evade responsibility will cause grave injustice and unfairness to third party investors, whom without their funds, the assets held by these SPVs would be

non-

existent; that if the SPVs disposed of the assets and the Loan

Notes are later realised, there would be no asset to be realised later; that on the decision of ***Jiang Nan Xiang v Cok Fas-St Company Limited [2018] eKLR***, the protection under the corporate personality is not a carte blanche for the company's shareholder/directors.

37. It is important to emphasise that these proceedings were commenced when the 3rd appellant and Edwin Harold Dayan Dande, the promoters of the two companies approached the court for an administrative order following their inability to meet their due financial obligations. After the issuance of the Administration Order, the Administrator found 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, the Administrator recommended for orderly wind-down which would include appointing a Fund Manager and Fund Administrator as well as Trustee. It is also clear that the SPVs, including the 1st appellant, benefited immensely from the funds collected by the two

Companies from the investing public and that the SPVs were the brain child of the 3rd appellant and Edwin Dande. The latter remained as a director of most of the SPVs. In these circumstances, we cannot fault the learned Judge's finding, based on the affidavit evidence placed before him by the 3rd appellant and Dande, that the SPVs were all Cytonns. It was still open to the SPVs including the 1st appellant to place material before the liquidator, with a view to proving that their assets were not connected to the sum of money collected by CHYS and CPN from the public, such evidence as would satisfy the liquidator to release those assets. However, that was a matter for another forum. For avoidance of doubt, the preservation order that was issued by the learned Judge was not the same thing as lifting of the corporate veil, as contended by the appellants. Accordingly, we cannot fault the learned Judge in his findings.

38. The learned Judge was faulted for issuing a blanket preservative and vesting order against the assets of the 1st appellant, without first determining the extent of the

amounts of money advanced

to it from the investments made in CHYS and CPN. The appellant lamented that lack of clarity regarding the financial relationships and transactions between these entities has led to the unjust treatment of the 1st appellant, which has been subjected to asset vesting without a comprehensive assessment of its financial obligations or entitlements. The cases of **Re HCCC No. 111 of 2014 - Muthithi Investments Limited & 3 Others v. Swara Plains Holdings Limited & 6 Others [2017] eKLR** and **Kinyanjui & Another v. New KCC Ltd & 3 Others [2014] eKLR** were cited to highlight this submission.

- 39.** It was submitted that the learned trial Judge erred in law and fact by whimsically, and without evidence, concluding that the Special Purpose Vehicles are “all Cytonns” and additionally, that the Special Purpose Vehicles were solely utilized for fraudulent activities. On the authority of the cases of **Jepkemoi v Zaburi Enterprises Company Ltd & 2 Others (KLR), Re African Safari Club Limited [2014] eKLR**, and **Geminia Insurance Company Limited v**

Joseph Kinyanjui Mwaniki & Another

[2018] eKLR, it was contended that mere existence of related entities or common ownership without clear and cogent evidence of fraud or improper conduct, cannot justify the lifting of the corporate veil. To the appellants, a detailed examination of the specific roles and actions of each entity is necessary before making such determinations and conclusions.

40. Further, the decision ignored the statutory safeguards provided under the Act, which require fair and equitable treatment of all parties involved in insolvency proceedings as expounded in **Re Ekesons & Sons Holdings Ltd [2020] eKLR**. According to the appellants, preservation orders must be tailored to the specific entities or assets involved as stated in **Ngugi v. National Bank of Kenya [2019] eKLR**, where the court emphasized the necessity for specificity in such orders. Further, that the failure to hear the SPVs deprived them of the opportunity to defend their interests and participate in the process, as highlighted **In re Estate of**

George W. Kariuki (Deceased) [2018] eKLR and

Ndirangu v. National Bank of Kenya Ltd [2019] eKLR.

41. In response, the Official Receiver contended that when the liquidator received documents from the Administrator of CHYS and CPN, the promoters had the opportunity to prove that the properties of the SPVs were not bought using the investors' money in CHYS and CPN, but they did not; that the SPVs did not oppose the liquidator's application that sought the vesting of the properties with it; that the legal basis for vesting the properties purchased through the funds drawn from CHYS and CPN in the Official Receiver is firmly rooted in **section 444** of the Act (which states that the liquidator assumes control of all the property to which the company is or appears to be entitled) and **section 445** of the Act; that through the documents submitted by the appellant, there is clear link of the Companies' entitlement to the properties registered under the SPVs; that pursuant to **section 445** of the Act, the court made an order that all or any part of the property belonging to the company held by trustees on its behalf were to be vested with the Official Receiver as the liquidator of the Companies; that there is nothing these

supposed legal entities can lay true claim to as the properties

were bought through the funds lent to them by the Companies; that the underpinning rationale of having the properties vested in the liquidator is to enable the liquidator to effectively realise the properties and apply the proceeds for the benefit of the creditors in accordance with the objectives of the liquidation process, to collect, manage and dispose of the assets of the insolvent company for equitable distribution among creditors; and that in allowing the vesting of the properties with the Official Receiver, the court applied the principle of tracing.

42. Section 444 of the ***Insolvency Act*** provides that:

When—

(a) a liquidation order has been made; or

(b) a provisional liquidator has been appointed, in respect of a company, the liquidator or the provisional liquidator shall assume control of all the property to which the company is or appears to be entitled.

43. The liquidator, in identifying which assets to place under liquidation relied on the affidavits sworn in support of the application to administration in which the assets of the

SPVs

acquired by the funds collected from the investors were

identified. From the said affidavits, it appeared that the properties set out therein were properties to which the Companies were entitled. As to whether that was the correct position, could only be determined within the liquidation proceedings or in proceedings in which the SPVs instituted by the SPVs with a view to proving otherwise. However, once a determination is made pursuant to **section 444** of the Act, **section 445** of the Act kicks in. That section provides that:

(1) When a company is being liquidated by the Court, the Court may, on the application of the liquidator, by order direct all or any part of the property belonging to the company or held by trustees on its behalf to vest in the liquidator in that capacity.

(2) On the making of such an order, the property to which the order relates vests in the liquidator.

44. If it was intended that by the application made by the appellants before the learned Judge, and it was sought to prove that the properties mentioned were not those of the Companies, then we agree with the learned Judge that the appellants failed to prove that fact. No evidence was placed before the learned Judge that proved the source of the

funds pursuant to which the SPVs

acquired their properties. We accordingly find no merit in this ground of appeal.

45. According to the appellants, since the relationship between CHYS and the 1st appellant, was that of a debtor and creditor, the Official Receiver should have followed the recovery process against any debts due to be satisfied by the 1st appellant as provided for in law, hence the learned Judge erred in issuing the vesting orders in the 1st appellant's properties, a move which was tantamount to inadvertently making an insolvency order against the appellant without any insolvency proceedings having being commenced against it. On the authority of **Re Nakumatt Holdings Limited (In Liquidation) [2017] eKLR** and **Re Trans National Bank Limited [2007] eKLR**, it was submitted that liquidation process must respect established creditor-debtor relationships and adhere to the statutory hierarchy of claims and the procedural requirements for debt recovery. The appellants cited the cases of **Kenya Airways Limited v.**

Kenya Airline Pilots Association [2017] eKLR and **Re**

Matter of

Tusker Mattresses Limited [2022] eKLR and submitted that bypassing formal insolvency procedures undermines the statutory protections provided under the Act and denies the company a fair chance to respond to insolvency claims and that the decision to wind up a company or place it under receivership must be made through formal insolvency proceedings, ensuring that all legal requirements, including notice, hearing, and evidence of insolvency, are met.

46. It was submitted that the learned Judge erred in law and fact, in failing to acknowledge that the 1st appellant had a number of underlying interests and concerns, such as the existence of an informal charge over it, management fees owed by it, and that it was not funded solely by the investments of creditors in the Companies, but other investors as well - all of whom deserved a far much more cautious approach, and have now been adversely prejudiced. The cases of **Richard Owuor & 2 Others (Suing on Behalf of Busia Sugarcane Importers Association) v. Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries &**

Cooperatives & 7 Others [2021] eKLR and **Hydro Water Well (K) Limited v. Sechere & 2 Others (Sued in Their Representative Capacity as the Officers of Chae Kenya Society) (Civil Suit E212 of 2019)** were cited to stress the importance of considering the interests of all parties, including those with informal charges or claims, before making any orders affecting the company's assets, hence a proper hearing and fair adjudication of all claims was necessary to ensure that no party was unfairly prejudiced.

47. According to the appellants, there was no liquidation application before the High Court regarding the 1st appellant. The transformation of a vesting order application into what effectively became a liquidation process raises serious procedural concerns. The vesting order was intended to preserve assets, not to initiate a liquidation process.
48. It was contended that the learned Judge's determination that the liquidation order binds all Special Purpose Vehicles in rem is inconsistent with the principles governing the treatment of

distinct legal entities since liquidation orders are typically applied to individual entities rather than universally binding all related entities. By incorrectly applying the liquidation order to all SPVs, the judge has potentially prejudiced the interests of individual entities that may not share the same financial or legal circumstances and failed to consider the distinct legal status of each SPV, as highlighted in **Victor Makau Wambua v. Equity Bank Ltd [2018] eKLR**.

49. Responding to these submissions, the Official Receiver contended that that all creditors in a liquidation process have certain rights that the liquidator is bound to protect and that they only become creditors after filing their claim forms; that the insolvency process should be just, fair and equitable, allowing for equal treatment of creditors and providing opportunities for debtors to seek resolutions and recoveries; that creditors have the right to participate in creditor's meetings to protect their interests and potentially influence the outcome of the liquidation process as well as to join or form creditor's committee to oversee

the process; that secured creditors have the right to be paid according to the order of priority established under the second schedule to the Act; and that all these rights are available to all Cytonn creditors, and the official receiver has a duty to ensure that they are protected.

50. The 1st appellant, from the above submissions, seem to have taken the position that vesting order cannot be issued in the process of a liquidation process. However, that is not the position as **section 445** cited above clearly shows. The said section states that a vesting order may be made in the process of liquidation in respect of the properties that appear to belong to the company being liquidated. It is however open to those claiming those properties to lay claim to them by producing evidence in support of their claims. We find no such evidence, apart from bare assertions.
51. The 1st appellant also faulted the learned Judge for adopting the 'consent' dated 1st August 2023 in respect of the property known as L.R. No. Kiambaa/Ruaka/6667 without considering

that the

1st appellant was not party to the consent and had a registered security against L.R. No. Kiambaa/Ruaka/6667. In addition, the learned Judge did not consider the twelve (12) pending applications before him, by key stakeholders including homeowners of L.R. No. Kiambaa/Ruaka/6667 thereby condemning them unheard, contrary to the decision in **Re Estate of P.C. (Deceased) [2020] eKLR**, as underscored in **Wanjiku v. Nyeri Water & Sewerage Company [2018] eKLR**.

52. In response, the Official Receiver submitted: that the consent entered between the Official Receiver and SBM Bank was meant to cushion the unsecured creditors whereby the Bank would realise its collateral, that is a mixed use commercial and residential development erected on LR No. Kiambaa/Ruaka/667 under the project name “Alma” registered under the 1st appellant; that the purpose of the consent was to settle the outstanding loan obligation under the charge dated 23rd August 2019 and the further charge dated 19th August 2022 and thereafter, the surplus realised

would be remitted to the Official Receiver for

the benefit of the unsecured creditors; that the consent was entered into with approval of the creditor's committee and the appellant did not demonstrate any prejudice suffered as a result of the adopting of the consent; that the interests of the appellant cannot override those of SBM Bank, a secured creditor.

53. It is true that the effect of the said consent was to settle the liability which the 1st appellant admittedly owed to SBM Bank Ltd after which the balance would be available for the distribution to the unsecured creditors. Apart from that **section 67(2)** of the **Civil Procedure Act** provides that:

No appeal shall lie from a decree passed by the court with the consent of parties.

54. Our understanding of the above provision is that it is not a bar to any challenge being taken against a consent order. However, a direct appeal therefrom is expressly barred. What is contemplated, in our view, is an application seeking to set aside the consent from which order an appeal may then be preferred. There is no evidence that this procedure was

followed.

Accordingly, this ground similarly fails.

55. It was further submitted that the learned Judge misdirected himself when he failed to consider pre-insolvency entitlements and the legitimate expectations of the 1st appellant and property buyers of the Special Purpose Vehicles and their rights of entitlement that accrued prior to issuing the preservation orders. And in so doing, the learned Judge overlooked the legitimate expectations of the appellant and property buyers, contrary to the decision in **Patrick Kariuki v. National Industrial Credit Bank [2017] eKLR.**
56. The 1st appellant took issue with the fact that the learned Judge termed the Special Purpose Vehicles as fraudulent entities without interrogating or outlining the elements of fraud contrary to the decision in **Vidyarthi v. Ram Rakha [1957] EA 527** and **Vohora Brothers Ltd & Another v Kenya Revenue Authority [2015] eKLR** where the court held that fraud must be specifically pleaded and strictly proved and that allegations of fraud must not be vague or general but must be particularized.

57. In response, the Official Receiver took the position that trial the court only stated that the activities and structures employed by the Cytonn entities were “a scheme akin to fraud” meaning similar to or resembling fraud but not necessarily constituting the legal act of fraud itself; that based on **Republic & 6 Others v Chief Magistrate’s Court, Nairobi & 4 Others; Chudasama on his own behalf and on behalf of the Estate of Pooja Hinesh Kantilal Chudasama & Others [2007] HECH 2940** and **Kiriri Cotton Co. v Ranchoddas K Dewani [1958] EA 239**, the issue raised by the appellant was obiter hence does not form part of the ruling; and that in this case, the liquidator will conduct forensic audit for purposes of determining why the company went into insolvency at which point if there are inferences of fraud, misappropriation, siphoning and diversion of company funds, the liquidator will make recommendations for recovery and/or prosecution of anyone found culpable.

58. The learned Judge expressed himself as hereunder:

“In its decision of 6/1/2023, the Court found that the two Companies were involved in a scheme

which was akin to a fraud, such that, their promoters, who were the same promoters or were closely related to the SPVs, intended to keep the investors away from their monies by pumping the investors' money into SPVs in which the promoters were in control of. They would, in the event the Companies collapsed, as they eventually did, claim, that the SPVs were separate entities from the Companies and therefore laugh all the way to the bank and leave the investors of the Company languishing in the perpetrated poverty!"

59. We agree with the respondent that the learned Judge chose his words carefully. He stated that the two Companies were involved in a scheme which was akin to a fraud. Looked at wholistically, the learned Judge cannot be faulted for arriving at that conclusion which was not the same thing as saying that they two entities were involved in fraud. In this case, the Companies were collecting baskets into which the investing public was invited to pool their finances. The prime movers of the two entities were the 3rd appellant and Edward Dande. Once the amount was collected, it would be "loaned" to SPVs, themselves established by the 3rd respondent. The SPVs were supposed to identify projects into which the money collected was to be invested. The

“loan” was supposed to be secured by legal charges on the

projects. This was not done. In the meantime, the 3rd respondent executed a guarantee in favour of the investors. When the two entities ran into financial difficulties, the 3rd appellant and Dande sought protection from the court by way of an Administration Order proposing an Administrator to take over the administration of the two entities. It turned out that the Administrator had been retained by the two entities prior to his appointment, but this fact was never disclosed. The Administrator himself concluded that the two entities could not be sustained as going concerns and recommended their winding up. In these circumstances, surely the learned Judge cannot be faulted for concluding that the manner in which CHYS, CPN and the SPVs were conducting themselves was akin to fraud. Since there was no express finding of fraud the stringent standard of proof required in findings of fraud was not applicable. This ground fails.

60. According to the appellant, the learned Judge erred in law and fact when he wrongfully applied the doctrine of tracing which

requires a clear demonstration of the connection between misappropriated funds or property and the asset currently in dispute. It took issue with the fact that the decision failed to consider that the funds advanced to the appellant were used to improve real property, specifically tied to real estate projects. The funds, according to it, were directly invested in enhancing the value of the property, thereby creating a significant link between the funds and the property improvements. As a result, the funds became intertwined with the property enhancements, making them no longer traceable in their original form. Tracing, it was submitted, cannot be applied in the absence of clear evidence demonstrating the commingling of funds or fraudulent actions.

61. The Official Receiver was, however, of the view that the High Court while invoking the common law doctrine of tracing, relied on the direct contribution of the Companies and found that even though the assets were held in the names of the SPVs, they ought to form part of the assets being claimed by the Companies; that the High Court having satisfied itself that

there was a direct link

between CHYS/CPN and the assets registered under the names of the SPVs, made an order preserving the assets for the benefit of the creditors during the liquidation process; that the preservation order protects the interests of all creditors with a claim to the assets and that lifting or setting aside the order reverts the control of the assets to the appellants to the detriment of the creditors; that **section 356** of the Act relates to insolvency of individual persons and not to incorporated bodies; that section 448(1)(b) of the Act imposes a duty on the liquidator to collect, preserve and apply the assets of the insolvent company towards the discharge of its liabilities, a process that involves verifying ownership, tracing funds, and challenging claims to assets that are improperly or fraudulently withheld; and that in issuing the preservation orders, the court did not lift the corporate veil but made the order based on the circumstances surrounding the case.

62. According to the Official Receiver, the High Court correctly applied the doctrine which allows one to identify and follow

the

flow of property/assets, particularly in cases of misappropriation or wrongful conversion; that this Court should follow the decisions in **Lennox Industries (Canada) Ltd v Canada 1987 Can LII 5321 (FC), [1987] 3 FC 338, McTaggart v Boffo (1975) 64 DLR (3d) 441 (Ont. HCJ) 10 O.R. (2d) 733, ar para 67.**

63. We agree with the decision in **McTaggart v Boffo (supra)**, where it was held that: -

“Tracing is only possible so long as the funds can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:

- a. If, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;***
- b. the chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value***

without notice.”

64. The British Columbia case of **Tracy v Instaloes Financial Solutions Centres (supra)**, is similarly on point when it states that: -

“The process by which the plaintiffs may ‘follow’ the Charges up the chain is tracing - the “process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received...can properly be regarded as representing his property”. (Per Millett L.J. (as he then was) in Boscawen v. Bajwa [1995] 4 All E.R. 769 (C.A.) at 776.) Although tracing is available both at law and in Equity (see Maddaugh and McCamus, supra, at chapters 6 and 7), the right which the plaintiffs are entitled to trace in this case is the constructive trust, an equitable property right. I agree with Professor Lionel Smith (The Law of Tracing (1997)) that the establishment of this proprietary right, which he refers to as the “proprietary base”, is sufficient to establish an entitlement to trace. It is not necessary, as was once argued, to demonstrate a pre-existing fiduciary relationship”

65. It bears repeating that CHYS and CPN advanced funds to SPVs including the 1st appellant. Although the 1st appellant contends that those funds became intertwined with the property enhancements, making them no longer traceable in their

original form, it is clear from the authorities cited that, so long as the

property can be located and identified, whether mixed or unmixed, tracing may still be invoked, and it is not necessary to demonstrate a pre-existing fiduciary relationship. In this case the funds disbursed to the 1st appellant, based on the affidavit in support of the application of the Administration Order, could be traced. Whether it was mixed with the enhancements, was a matter that could only be determined in the liquidation proceedings. The tracing in this regard was for the purposes of preservation of the subject property as opposed to confiscation and disposal of the same. The learned Judge was categorical in his ruling of 6th January 2023 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.”

66. The 3rd appellant lamented that the deed of guarantee could only be invoked if at least 75% of the investors passed a

resolution instructing the appellant to realize the projects.
However, on 19th

May 2022, Charles Munyua moved the Insolvency Court by way of Notice of Motion supported by an affidavit seeking that the creditors be allowed to enforce the corporate guarantee. By issuing the preservation order, the 3rd appellant argued, the trial Court effectively rendered the deed of guarantee dated 21st April 2020 unenforceable as it prevented the guarantor from fulfilling their obligations. It was further submitted that the trial Judge erred by making a determination that was not consistent with his previous decision and has consequently led to an abuse of court process. Noting that in the ruling of 6th January 2023, the learned Judge arrested all other legal proceedings pending liquidation, it was submitted that the learned Judge erred when in his ruling of 30th November 2023, he found that the deed of guarantee was not part of the proceedings before it. Stressing on the need for coherency and consistency, the appellant cited the decision in **Dodhia v National Grindlays Bank Limited and Another (1970) EA 195.**

67. Addressing itself to the principle of equality of creditors, the appellant cited **Ian Fletcher, "The Law of Insolvency"** (4th Edition, Sweet and Maxwell), in highlighting that the cornerstone of insolvency practice is the principle of equality of creditors, commonly known as the *pari passu* principle which dictates that creditors of the same class should receive payments simultaneously and proportionally from the available assets of the insolvent entity. In this regard the appellant cited **British Eagle International Airlines Ltd v Cie Nationale Air France [1975] 2 All E.R.** In the appellant's view, the continued execution of separate claims by creditors in CHYS would prejudice and circumvent the rights of creditors who complied with the direction of 6th January 2023 and filed their proof of debt with the Official Receiver.

68. In its response, the Official Receiver stated that a valid guarantee requires the guarantor to undertake a binding commitment to cover the obligations of the debtor in case of default and since in this case CIMP issued a corporate

guarantee, knowing that the

guarantying entity had no assets or ability to pay, this infers that it was not a genuine financial commitment but a tactic to lure investors into a false sense of security; that ideally, liability under a deed of guarantee ought to attach immediately after default by the principal debtor as was held in **Fidelity Commercial Bank Limited v Kenya Vehicle Industries Limited [2017] eKLR** and **Kenindia Assurance Company Ltd v First National Finance Bank Ltd Civil Appeal No. 328 of 2002**; that when CHYS and CPN defaulted in making payments to the investors, liability accrued immediately to Cytonn Investment Management PLC as the guarantor to the two funds; that the appellant, by issuing a corporate guarantee ought to have been aware of the fact that the obligations under the guarantee could be invoked immediately upon default; that it is in bad faith that upon filing insolvency proceedings themselves, CIMP would seek further protection in the same insolvency proceedings they had instituted; that the 3rd appellant knew or ought to have known that it was guaranteeing the investors using

the very same assets that had been purchased using investor

funds; that in essence, CIMP was seeking to have the investors guarantee themselves by accepting to be offered assets that were bought using their funds which they already had rights over; that the High Court rightly pointed out that the issue of the enforcement of the deed of guarantee ought to be canvassed in separate proceedings and not in the liquidation proceedings; that the deed of guarantee was not designed to protect investors but to hoodwink them into believing their investment was secure through misrepresentations and misuse of corporate structures and processes aimed at frustrating any recovery efforts.

69. On its part, the Creditor's Committee submitted that the 3rd appellant's dismissed application was predicated upon the strength of a document dated 21st April, 2020 and christened by that appellant as an "*Asset Backed Guarantee*"; that any issuer of an Asset Backed Security document, whether to the public or to restricted investors, within the Republic of Kenya must make requisite disclosures to, and seek prior approval from, the Capital Markets Authority prior to such

arrangement/issuance;

that the issuer must comply with Part IVB (s.30H to s.30Z) of the **Capital Markets Act** and as guided by the **CMA's Policy Guidance Note on Asset Backed Securities, 2017**; that the appellant failed to comply with mandatory provisions of the law as confirmed by the C.E.O of the Capital Markets Authority (CMA); that sans CMA approval, the purported arrangement/document is thus a nullity in law, is of no consequence and in fact, is conclusive proof of an (active and ongoing) offence committed by the appellant; that framed differently, the applicant dated 18th April, 2023 was (and remains) singularly predicated upon a brazen illegality and the import of this appeal is yet another brazen attempt to mislead this Court into effectively sanctioning and shielding a live and ongoing offence contrary to and in active breach of the mandatory provisions of Part IVB of the **Capital Markets Act**; and that the authority of the cases of **Wambui v Mwangi & 3 others [2021] KECA 144** and **Bhaijee & another v Nondi & another [2022] KECA 119** are to the effect that anything

founded on nullity is also null and void and of no consequence.

70. According to the Creditor's Committee, as from the 6th October, 2021, **Section 560** of the Act was triggered and a moratorium on all other legal processes on CHYS and CPN was activated and any legal process touching on **CHYS** and **CPN** would consequently, only be permissible with the approval/leave of the Court; that no such approval or leave was required for CIMP which was not under court-appointed administration; that in the ruling dated 6th January 2023, the learned Judge, in arresting executions or other legal proceedings, was addressing the parties concerned or affected in the context of the provisions of **Section 560** as read with **Section 560A** of the Act; and that there is no inconsistency whatsoever with the ruling dated 6th January, 2023 with that dated 30th November, 2023.

71. It is true that the learned Judge in his ruling of 6th January 2023 held that all pending applications for leave to proceed with executions and/or other legal proceedings be arrested to await the process of liquidation and directed that all those claims be lodged with and be proved before the Liquidator.

However, those

orders were issued in the context of the proceedings that were before the learned Judge. Those were the proceedings with regard to the liquidation of CHYS and CPN. Having set aside the Administration Order and directed that the liquidation of the two companies proceed, the learned Judge then preserved the properties that were indicated to have been acquired through the funds availed by the two companies. The said order could not apply to the 3rd appellant which was not under liquidation and against which no administration Order had been sought. Accordingly, we find not contradiction between the decisions of 6th January, 2023 and 30th November, 2023.

72. As regards the liability of the 3rd appellant to those whom it guaranteed, the relationship between the principal borrower, the lender and the guarantor was restated in **Moschi v Lep Air**

Services Ltd [1972] ALL ER 393, where it was held that by its very nature, a guarantee is distinct from the agreement

which gives rise to the obligation guaranteed. The principal

debtor is neither a party to the guarantee nor considered as one with the

guarantor. Consequently, the rights and/or obligations of a guarantor as against the creditor accrue to him/her from the relationship created by the guarantee. The same position was adopted by this Court in **Robert Njoka Muthara & another**

v

Barclays Bank of Kenya Limited & another [2017] eKLR.

73. In this case the 3rd appellant's guarantee to the creditors must be delinked from the obligation placed on the SPVs to meet their obligations to the 3rd appellant. Upon the default by the SPVs to meet their obligations, the guarantee immediately becomes enforceable and is not affected by the preservation orders made on the properties of the SPVs. Accordingly, we find no merit in this ground.
74. According to the appellant, as a guarantor, it had a legitimate and substantial interest in the insolvency proceedings of the principal debtor hence the trial judge erred in denying the appellant's joinder on the basis of time which was not a recognized consideration. The case of **Cotts & Co Stock**

(199) (EWHC) 191 was cited as the basis for this submission.

75. Responding to this submission, the Official Receiver contended: that the 3rd appellant initiated the administration proceedings for both CHYS and CPN based on the affidavits sworn by Edwin Harold Dayan Dande in his capacity as the CEO of the 3rd appellant and as the principal partner of both CPN and CHYS; that the 3rd appellant was always a party to the proceedings and was afforded an opportunity to be heard and hence there was no need for the High Court to join it as a party; that the 3rd appellant failed to place the deed of guarantee before the administrator and the court for consideration in a timely manner; that having exercised its discretion in declining to join the appellant, this Court can only interfere with that discretion if the conditions set out in **Mark William Trevor Price & Caroline Elsa Anne Sturdy v John Greaves Hilder [1984] eKLR** and **Mbogo v Shah [1968] EA 93**.

76. A decision whether or not to join a party to proceedings is, undoubtedly, an exercise of judicial discretion. In deciding these appeals, we are guided by the decision of the

Supreme Court

authority of **Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others** (2019)

eKLR in which it was reiterated 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: (1) 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.'

77. It was therefore held by this Court in **Price & Another v Hilder [1986] KLR 95** that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the court's decision would have been different. The Supreme Court of Uganda, in **Kiriisa v**

Attorney-General and Another

[1990-1994] EA 258 held that it is settled law that the discretion

must be exercised judiciously and that an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously.

78. We have found above that the issue of the 3rd appellant's liability, on the guarantee, must be delinked from the liability of the SPVs. We find that to the extent that the 3rd appellant intended to be joined to the proceedings on the basis of the said guarantee, its application was misconceived. Its interests as a guarantor could not properly be ventilated in the liquidation proceedings in which it was not the subject. Accordingly, we have no justification to interfere with the learned Judge's exercise of discretion.
79. Regarding the challenge on the dismissal of the application for injunction, the learned Judge found that no irreparable damage was proved and the balance of convenience tilted in favour of allowing the process of liquidation to be completed as soon as practically possible. We agree with the learned Judge that based on the failure by CIMP to prove its interest in

the projects, a *prima facie* case was not established and taking into account the

reasons for the preservation order, CIMP failed to prove that it stood to suffer any loss, leave alone, loss that cannot be compensated in damages.

80. Having considered these appeals, we find no merit in them and consequently, we dismiss them all with costs to the respondent and the Creditor's Committee.

81. 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.