IN THE COURT OF

APPEAL AT

NAIROBI

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

CIVIL APPEAL NO. E102 OF 2024

(CONSOLIDATED WITH

CIVIL APPEAL NOS. E103, E104 & E105 OF

2024) BETWEEN

VALERINA JIWA & 289 OTHERS.....1ST APPELLANTS BIRGUY LAMIZANA & 81 OTHERS.....2ND APPELLANTS BENEDICTA MUKULU MUSEMBI &
24 OTHERS.....3RD APPELLANTS

AND

THE OFFICIAL RECEIVER.....1ST RESPONDENT CYTONN HIGH YIELDS SOLUTIONS LLP..... 2ND RESPONDENT SBM BANK (KENYA) LIMITED.....3RD RESPONDENT

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

in

Insolvency Petition No. E063 of 2021)

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JUDGMENT OF THE

COURT

1. The appellants in these consolidated appeals are challenging the ruling of the High Court (Mabeya, J.) in Nairobi High Court Petition No. E063 of 2021 delivered on 30th November 2023.

2. To place these appeals in context, ***Cytonn Investments Management PLC***, (also referred to as CIMP) and ***Edwin Harold Dayan Dande***, were the promoters of the 2nd respondent, ***Cytonn High Yields Solution*** (also referred to as CHYS) and ***Cytonn Real Estate Project Notes*** (also referred to as CPN). The said promoters filed Petition Nos. E063 and E064 of 2021, seeking administrative orders in respect of CHYS and CPN following the inability of the two 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.), dismissed the application for extension of the administration but terminated the Administration of the Companies and placed them under liquidation by the Official Receiver (the 1st respondent) and directed the Administrator to, forthwith, surrender to the 1st 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. Subsequently, the 1st appellants filed an application dated 27th October 2023 in which they sought orders for their joinder to the proceedings as interested parties; that pending the hearing and determination of the insolvency petition, there be a stay of the liquidation orders issued on 6th January 2023; that the court issues an order mandating the convening of a meeting of creditors for purposes of thorough examination and scrutiny of the Debt Settlement Proposal, DSP, as presented by the promoters of the fund, Cytonn Investment Management, PLC, and subsequent voting on adoption of the same either as presented or with amendments and that liquidation only be considered should the DSP not be adopted by majority of those present and by value; that subsequent to the aforesaid prayer,

the court issues an order mandating the appointment of an

Insolvency Practitioner of the Creditors' choice, to oversee the execution of the processes in the foregoing prayer and the DSP as voted upon by the creditors.

5. The 2nd appellant in their application dated 17th February 2023 sought orders for the joinder of the 3rd respondent to the proceedings as an interested party; stay of the preservation orders issued on 6th January 2023 to the extent that they affected LR No. Kiambaa/Ruaka/6667 (The Alma); and variation of the said orders and/or their discharge to the extent that they affected the said Alma.

6. The 3rd appellants had two applications dated 8th October 2023 and 1st November 2023. The two applications sought the joinder of the 3rd appellants as interested parties as well as stay of the preservation orders affecting the Alma pending the hearing and determination of the intended appeal. They also sought orders rescinding or varying part of the preservation orders to the extent that it affected the Alma which was owned by the interested parties.

7. Apart from the applications filed by the appellants herein there were other applications 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 Cytonn Integrated Projects LLP and two applications dated 3rd May 2023 by the 1st 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. Save for the application by the 1st respondent, the other applications were dismissed. It is clear that the said ruling did not expressly dispose of the applications by the appellants herein.

8. In these appeals, the appellants broadly complain: that the learned Judge ignored the applications filed by the appellants who are creditors of CHYS yet the said applications raised pertinent issues; that the learned Judge erred by granting the reliefs that went against the weight of evidence; that the learned Judge erred in adopting as an order of the court

the consent

dated 1st August 2023 between SBM Bank (Kenya) Limited and

the Official Receiver; that the learned Judge misdirected himself when he failed to consider the pre-insolvency entitlements and the proprietary rights of the bona fide purchasers that were acquired prior to issuance of the preservatory orders; that the learned Judge erred in applying the common law doctrine of tracing without satisfying himself as to the ingredients required for applying the same.

9. We heard these consolidated appeals on 30th April 2025 when learned counsel, ***Mr Brance Odhiambo***, appeared for the 1st appellants; learned senior counsel, ***Mr Paul Muite***, appeared with ***Ms Selestine Koile*** for the 2nd and 3rd appellants; learned counsel, ***Mr Emmanuel Bitta*** appeared with ***Ms Judy Mugo*** for the 1st respondent; learned counsel, ***Mr Greg Karungo***, appeared with ***Ms Naomi Mutisya*** for the 3rd respondent. Learned counsel relied entirely on their written submissions which we have considered. For the reasons that will become apparent, we do not need to rehash the said submissions.

10. 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.

11. 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.

12. 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.

13. 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 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.

14. 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.

15. 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."

16. 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."

17. 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.

18. 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.

19. In these appeals, since there are several grounds taken by the appellants, some of which are similar while others specific to particular appellants, we shall, while dealing with the submissions in respect of particular grounds, not necessarily deal with them in no particular order and make our determination thereon.

20. 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.

21. In response, the respondent, the Official Receiver, took the view: that the learned Judge correctly found that all the SPVs were related by the name "Cytonns", 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 who 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, who 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.

22. 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. 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 its 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.

23. The learned Judge was faulted for issuing a blanket preservatory 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.

24. 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.

25. Further, the decision ignored the statutory safeguards provided under the Act, which requires 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***.

26. 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 a 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 entitles 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.

27. 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.***

28. 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 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.***

29. If it was intended that by the application made by the appellants before the learned Judge, 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.

30. 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 lliquidation 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.

31. 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.

32. 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.

33. 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***.

34. Responding to these submissions, the Official Receiver contended 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 a 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.

35. The 1st appellant, from the above submissions, seem to have taken the position that a 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.

36. 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.***

37. 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.

38. 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.***

39. 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.

40. 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***.

41. 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***.***

42. In response, the Official Receiver took the position that at the 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.

43. 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!"***

44. 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 Edward 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. Sine there was no express finding of fraud the stringent standard of proof required in findings of fraud was not applicable. This ground fails.

45. 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.

46. 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.

47. 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, at para 67***.

48. 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."

49. The British Columbia case of ***Tracy v Instaloans 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"

50. 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."

51. 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***.

52. Addressing itself to the principle of equality of creditors, the appellant cited **Ian Flectcher**, ***"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.

53. 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 guaranteeing 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.

54. 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 application 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***

<u>others</u> [2021] KECA 144 and ***<u>Bhaijee & another v Nondi & another</u> [2022] KECA 119*** are to the effect that anything founded on nullity is also null and void and of no consequence.

55. 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 not 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 between the ruling dated 6th January, 2023 and that dated 30th November, 2023.

56. 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 no contradiction between the decisions of 6th January, 2023 and 30th November, 2023.

57. As regards the liability of the 3rd appellant to those who 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.

58. 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.

59. 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.

60. 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*** are met.

61. 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 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: (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.'"***

62. 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.

63. 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.

64. 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.

65. Having considered these appeals, we find no merit in them and consequently, we dismiss them with costs to the 1st respondent and the Creditor's Committee.

66. It is so ordered.

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

P. O. KIAGE

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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.