IN THE COURT OF APPEAL AT NAIROBI
(CORAM: KIAGE, JAMILA MOHAMMED & ODUNGA, JJ.A.)

CIVIL APPEAL NO. E927 OF 2024
(CONSOLIDATED WITH

CIVIL APPEAL NOS. E928 OF 2024, E929 OF 2024, E930 OF 2024, E931 OF 2024, E932 OF 2024, E934 OF 2024 & E032 OF 2025)

BETWEEN

BENEDICTA MUKULU MUSEMBI & 24 OTHERS.....1ST APPELLANT CHARLES K. WAMBU & 6 OTHERS..... 2ND APPELLANT PAKAMU VENTURES LIMITED (NOW RUDIUM HOLDINGS LIMITED) & 8 OTHERS.....3RD APPELLANT EPHRAIM KARANGI..... .....4TH APPELLANT CYTONN INVESTMENTS PARTNERS FOUR LLP & 10 OTHERS.....5TH APPELLANT MAMELODI HOLDING COMPANY LIMITED & 7 OTHERS.....6TH APPELLANT GOAL ADVISORY AFRICA LIMITED (SUING AS THE TRUSTEE TO CYTONN HIGH YIELD FUND (CHYS))..... .....7TH APPELLANT VALERINA JIWA & 289 OTHERS.....8TH APPELLANT

AND

THE OFFICIAL RECEIVER.....1ST RESPONDENT CYTONN INTEGRATED PROJECT.....2ND RESPONDENT SBM BANK LIMITED.....3RD RESPONDENT

*(An Appeal from the Rulings and Orders of the High Court at Nairobi (**F. Mugambi, J.**) delivered on the 22nd November 2024 in*

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

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JUDGMENT OF THE COURT

1. On 22nd November 2024, the High Court (***F. Mugambi, J.***) delivered a composite ruling in Nairobi High Court Petition No. E063 of 2021 in respect of the following matters:

i. ***The application dated 15th April 2024 by creditors of CHYS and members of the Creditors Restructuring Committee;***
ii. ***The application dated 11th March 2024 by Cytonn Investments Partners Eleven LLP (Ridge);***
iii. ***The application dated 11th March 2024 by Epazec Company LLP (Applewood);***
iv. ***The application dated 20th December 2023 by Epazec Company LLP (Applewood);***
v. ***The application dated 20th November 2023 by Mystic Plains LLP;***
vi. ***The application dated 1st November 2023 by Cytonn Investment Partners Five LLP (Riverrun);***
vii. ***The application dated 17th November 2023 by Cytonn Investments Partners Eleven LLP (Ridge);***
viii. ***The application dated 3rd July 2023 by Cytonn Investments Partners Four LLP (Athi River);***
ix. ***The application dated 16th November 2023 by Cytonn Investments Partners Twenty LLP (Cysuites);***
x. ***The application dated 16th November 2023 by Cytonn Investments Partners Ten LLP; and***
xi. ***The application dated 18th August 2023 by Kevin Ochieng Macakiage***

2. In the learned Judge's view, the issues arising for determination in

the said applications were:

(i) Whether the Liquidator is in breach of the Insolvency Act, and consequently, whether his continuation in office is unlawful;
(ii) Whether the court should lift the preservation orders issued in the Ruling of 6th January 2023 in respect of the properties owned by the SPVs; Ridge, Applewood Miotoni, Taraji, Cysuites, Riverrun, Athi River, The Alma and Newtown;

(iii) Whether the Official Receiver should be allowed to enforce the preservation orders issued;

(iv) Whether a meeting should be convened to table and deliberate on the Debt Settlement Proposal by CHYS;

(v) Whether a caveat should be registered against the Athi River Properties;

(vi) Whether the liquidation orders issued should apply to the home owners/investors who already had good titles at the time the liquidation orders were issued;

(vii) Whether vesting orders should be issued in respect of Mystic Plains, Taraji, Ridge and Applewood properties; and

(viii) Whether Edwin Harold Dayan Dande should be enjoined as an Interested Party in these proceedings.

3. Regarding the issue whether the liquidator was in breach of the ***Insolvency Act*** (the Act), and consequently, whether his continuation in office is unlawful, the learned Judge found: that under ***section 438*** of the Act, the Official Receiver automatically assumes the role of a *de facto* liquidator when no other liquidator has been appointed, and, in this capacity, acts as the liquidator until another individual is appointed to the position; that whereas in such a scenario, ***section 438*** of the Act requires the Official Receiver to convene a meeting of creditors within three months for the purpose of appointing a substantive liquidator, this provision does not apply when the Official Receiver has been appointed as the substantive liquidator by the court; that in this case, the appointment of the Official Receiver as the liquidator, was not made under ***section 437*** of the Act, which governs the

appointment of provisional liquidators, hence the Official Receiver

was appointed as the substantive liquidator; that consequently, the Official Receiver was not obligated to convene a creditors' meeting to appoint another liquidator, as mandated by ***section 438*** of the Act***;*** that the Official Receiver provided evidence demonstrating compliance with the statutory requirements for the role as liquidator; that admission of proof of debts from creditors is a continuous process, depending on the varying types of creditors, the nature of their claims, and the different stages at which such claims may arise or be finalized during the insolvency proceedings; that there was no merit in the contention that the Official Receiver contravened the Act and that he was lawfully serving as liquidator.

4. On the issue whether the court should lift the preservation orders issued in the ruling of 6th January 2023 in respect of the properties owned by the SPVs; Ridge, Applewood Miotoni, Taraji, Cysuites, Riverrun, Athi River and Newtown, the learned Judge found: that no new arguments or evidence beyond those already raised in prior proceedings were presented by the Special Purpose Vehicles (SPVs) which arguments were carefully considered and formed the basis of the court's rulings; that while the SPVs are separate legal

entities from

Cytonn High Yield Solution (CHYS), they are undeniably connected

through shared control and directorship under Edwin Harold Dayan Dande, CHYS's Chief Executive Officer and it had been established that the funds utilized by the SPVs can be traced directly to deposits made by CHYS's creditors; that the SPVs were yet to demonstrate that the subject projects are independent of the funds received from CHYS's creditors and CHYS's influence over the SPVs, exercised through its CEO, Edwin Dande, remains unbroken; that with these unresolved issues, the SPVs cannot rely on the doctrines of corporate separateness or privity of contract to shield themselves from scrutiny, but must move beyond these protective legal constructs and provide transparent answers to the creditors' questions; that such accountability cannot be achieved if the preserved properties remain under the control of CHYS, the SPVs, or their managers; that lifting or varying the preservation orders, as well as exempting the properties in question from the liquidation process, which is intended to benefit the creditors as a whole, would significantly undermine the realization efforts being carried out by the Official Receiver and would further exacerbate an already precarious situation, potentially leaving creditors unable to recover their investments; and that the SPVs failed

to provide any valid or justifiable grounds for the court to lift, vary, or set aside the preservation orders issued on 6th January 2023.

5. On the claim by interested parties, on the ground that they are bona fide purchasers and investors in some of the properties under the various SPVs, the learned Judge found: that, pursuant to ***section 3(1)*** of the Act, only the assets that belong to a liquidated entity can be subject to administration and distribution among its creditors; 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 toward the discharge of its liabilities, a process that involves verifying ownership, tracing funds, and challenging claims to assets that are improperly or fraudulently withheld; that this framework reflects the dual purpose of insolvency law which is to maximize the recovery for creditors while respecting the legal rights of third parties; that whereas assets that have been purchased by *bona fide* purchasers for value, without notice of the company's insolvency or impending liquidation, do not form part of CHYS' or other such liquidated company's assets, the onus is on the applicants to demonstrate ownership and good title to such assets, and provide sufficient evidence to the liquidator to justify

their exemption from the liquidation estate; that pursuant to ***section***

498 of the Act, the liquidator retains the authority under insolvency law to challenge or avoid transactions where assets were transferred with knowledge of, or in anticipation of, the company's insolvency or liquidation; and that as such, the liquidator is empowered to scrutinize all transactions involving company assets, particularly those occurring in the period leading up to the insolvency, to determine whether such transfers were legitimate or designed to frustrate the rights of creditors.

6. Dealing with the issue whether a meeting should be convened to table and deliberate on the Debt Settlement Proposal by CHYS, the learned Judge found: that the debt settlement proposal was devoid of supporting documentation and substantive detail and amounted to little more than a colourful presentation of hope, rather than a practical and actionable plan; that the proposal to take over the sale and distribution of assets by the applicants was a clear encroachment on the statutory responsibilities vested in the Official Receiver as the liquidator, responsibilities that cannot be lawfully assumed by any other party; that as was emphasized in ***In re Tusker Mattresses Limited, [2021] KEHC 276 (KLR)***, restructuring plans must

include

sufficient detail; that the proposed settlement plan merely reiterated

what the court and the creditors already know, that CHYS is in severe financial distress; that the proposal advanced by the applicants was not open to re-litigation as the matter was fully canvassed during the administration process, and the court's decision to place CHYS under liquidation rendered any further discussion of the proposal moot; that the proper course of action lay in adhering to the liquidation framework already in place, rather than revisiting proposals that had been conclusively rejected; that the proposal was presented by a faction of creditors identifying themselves as the Creditors Restructuring Committee (CRC), which is not envisaged under the Act; that allowing the CRC, or any self-appointed group of creditors, to act independently of the liquidator risked undermining the orderly and impartial administration of the insolvency process by fragmenting creditor representation, delaying the liquidation process, and jeopardizing the efficient realization of assets for the benefit of all creditors; and that the applications were therefore subject to the scrutiny of the Official Receiver as liquidator.

7. Regarding the issue whether a caveat should be registered against the Athi River Properties, the learned Judge's position was that

having determined that the preservation orders against the other subject

properties should not be lifted for purposes of the liquidation process, no caveat can be registered against the Athi River properties as sought by Cytonn Investments Partners Four LLP. According to the learned Judge, allowing the registration of such a caveat would defeat the purpose and objectives of the liquidation process by restricting the liquidator's ability to manage and realize the assets of CHYS for the benefit of its creditors and would contradict the preservation orders already in place, which are designed to safeguard the subject properties from interference and to ensure they remain available for equitable distribution among creditors.

8. As to whether vesting orders should be issued in respect of the Ridge, Tarani, Miotoni/Apple Wood and Mystic Plain/Newtown properties the learned referred to ***section 444*** of the Act, which provides for vesting orders which have the effect of transferring the legal ownership of a liquidated entity's assets to the liquidator. It was her view that since the preservation orders in respect of the subject properties should remain in force, the logical and necessary consequence is for the properties to vest in the Official Receiver as liquidator as this will enable the liquidator, to

effectively realize 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.

9. In respect of the issue whether Edwin Harold Dayan Dande should be joined as an Interested Party in the proceedings, on the basis that he is the majority shareholder and a Director of Cytonn Investment Management PLC (CIMP), the learned Judge noted that he had already been joined in the proceedings by virtue of other applications where he, along with others, sought similar relief and that Mr. Dande had actively participated in the proceedings, including swearing affidavits on behalf of CHYS and attending meetings with the Official Receiver. She found that the acknowledgement of his involvement by both the Official Receiver and the creditors suggested that his inclusion as an interested party would formalize a role he is already performing. The learned Judge, therefore, found that Mr. Dande had a legitimate stake and interest in these proceedings by virtue of his position as a director and majority shareholder of CIMP, his role in promoting CHYS and CPN, and his personal investments in the SPVs. Joining him as an interested party, it was held, would not cause any prejudice to

the

Official Receiver or the creditors and is consistent with ensuring that all parties with a significant interest are included in the process.

10. The learned Judge, however, found that, in light of the finding that the debt settlement plan had been overtaken by events and deemed unviable, Mr. Dande's prayer to explain or advocate for the same could not be granted as the liquidation process had moved beyond the point of considering such proposals, and the focus must remain on the orderly realization of assets and distribution to creditors under the framework of the Insolvency Act. Accordingly, it was directed that while Mr. Dande could continue to participate in the proceedings as an interested party, his involvement must align with the objectives of the liquidation and cannot be used to reopen or relitigate settled matters.

11. In conclusion, the learned Judge:

> ***i. Dismissed the applications dated 15th April 2024, 9th April 2024, 11th March 2024, 20th December 2023, 20th November 2023, 1st November 2023, 17th November 2023, 3rd July 2023, 16th November 2023 and 18th August 2023;***
> ***ii. Allowed the application dated 2nd October 2024 but only to the extent of joining Edwin***

Harold Dayan Dande as an interested party in the proceedings;

iii. ***Allowed the applications dated 4th October 2024 and permitted the Official Receiver to enforce the preservation orders issued on 6th January 2023 over the properties listed in the application; - Riverrun; Taraji; The Ridge; 12.5 % shares in Superior Homes Kenya Limited; Apple wood; Cysuites; Alma; Mystic Plain/Newtown (to the extent of Cytonn Investment Partners Four (CIP 4) per the sale agreement dated 18th December 2015;***

iv. ***Directed the Officer Commanding Station (OCS) for the areas where the respective properties above are situated to assist the Official Receiver enforce these orders;***

v. ***Vested the properties commonly known as the Ridge, Taraji, Miotoni/Applewoods and Mystic Plans/Newton with the Official Receiver for valuation and realization. The Official Receiver was directed to apply and be issued with provisional titles in respect of the said properties in the event that Cytonn Investments, Edwin Dande or any other Cytonn entity fails to surrender the same within 7 days of the issuance of the said orders;***

vi. ***Directed that the matter shall be mentioned to confirm compliance and issuance of further directions; and***

vii. ***Granted leave to appeal against the ruling to any party desirous of such appeal and directed that certified proceedings and copies of the composite ruling be availed to any party upon payment of the requisite fees.***

12. The 1st, 2nd, 3rd and 6th appellants, ***Benedicta Mukulu Musembi &***

24 Others, ***Charles K. Wambu & 6 Others, Pakamu Ventures Limited (Now Rudium Holdings Limited) & 8 Others*** and ***Mamelodi Holding Company Limited & 7 Others*** were

aggrieved by the decision on the grounds: that the learned Judge erred in both fact

and law by misapplying the doctrine of tracing; that the learned Judge erred in law and fact by failing to consider the rights of bona fide third- party investors and purchasers, who had lawfully entered into sale agreements, paid purchase prices, and/or acquired title to the properties help by the Special Purpose Vehicles (SPVs); that the learned Judge erred in both fact and law by issuing vesting orders in favour of the Official Receiver without first determining the rights of the affected *bona fide* purchasers for value; that the learned Judge erred by placing undue weight on the submissions of the Official Receiver while failing to consider the critical evidence and arguments presented by the homeowners/unit holders; that the learned Judge erred by issuing blanket orders, including enforcement of preservation and vesting orders, that prioritized the claims of CHYS creditors to the detriment of the appellants as *bona fide* purchases for value without notice; that the learned Judge erred in law and fact by determining that *bona fide* purchasers for value without notice were exempt from the liquidation process, but nevertheless directed that the bona fide purchasers seek verification of their claims with the Official Receiver who would scrutinize their

documentation and determine whether or not they are bona fide purchasers for value; and that the learned

Judge erred in fact and in law by contradicting the well-established principle of corporate autonomy as enunciated in *Salomon v Salomon & Co Ltd* [1897] AC 22, and unjustly attributes liability of an unrelated entity to separate legal entities without adequate justification.

13. Further grounds were: that the learned Judge erred in law and fact by allowing an application for blanket enforcement of the preservation orders despite there being no legal basis for either the application or the issuance of the said orders; that the learned Judge erred in law and fact by dismissing the appellants' applications seeking to lift preservation orders and exempt them from the liquidation process, without adequately considering the full range of evidence and arguments presented; that the learned Judge erred in law and fact by vesting the properties of the SPVs with the Official Receiver, despite compelling evidence that the funds advanced to the SPVs by CHYS were not the sole factor in the development of these properties as bona fide purchasers had duly contributed to the acquisition and development of these properties; and that the learned Judge erred in law and fact by determining that the vesting orders were issued solely on the

basis that preservation orders were maintained, without a clear legal or factual basis for such an action.

14. The 2nd appellants, ***Charles K. Wambu & 6 Others***, grounded their appeal on the contentions that the learned Judge erred: by unlawfully denying the creditors the right to a meeting to deliberate on the proposed debt settlement plan, thereby infringing their constitutional right to freedom of association under Article 36 of the Constitution; by denying the creditors a fair opportunity to participate in the decision-making process regarding the debt settlement plan thereby violating of their right to fair administrative action under Article 47 of the Constitution; by neglecting key evidence on debt settlement viability; by relying on the Official Receiver's view, which was not backed by any analysis or documentation, that the Restructuring Plan is not viable, while ignoring a detailed 60 page report from a licensed Insolvency Practitioner, Nairobi Forensics, which clearly indicated that the Restructuring Plan was viable; by stating that the Administrator had concluded that recovery was not possible, yet the Administrator had put in an application to extend administration; by stating that the Debt Settlement Plan lacks detail and was highly speculative, yet the plan laid step by step detail how the restructuring would be done and the amounts that would be

recovered; by assuming that the Debt Settlement Plan was proposing to do what the Official

Receiver was already doing, and yet the Official Receiver has never shared any Liquidation Plan that gives any estimate of recovery; by assuming that the Restructuring Plan was principally founded on a buyout investor, yet the Plan is founded on completing projects and selling the units in order to pay out creditors; by violating of the principle of creditor equality; by failing to uphold the objective of maximizing creditor recovery when she delivered a ruling that favoured liquidation without considering whether restructuring could provide a better outcome; and by failing to protect investor confidence and corporate stability.

15. The 4th appellants, **Ephraim Karangi's** dissatisfaction with the ruling was on the grounds that the learned Judge erred: by misinterpreting ***section 438(5)(b)*** of the Insolvency Act, 2015, and, as a result, wrongly upheld the position that the Official Receiver is rightfully vested with the mandate to liquidate CHYS; by speculating that Mabeya, J. had appointed the Official Receiver as the substantive liquidator, but failed to reference or cite the specific provision of the Act under which such an appointment was made; by finding that ***Section 438*** of the Act only applies "when

no other liquidator has

been appointed” without giving reason or basis for such conclusion

yet the provision is clear that it applies to the powers of the Official Receiver when it acts as Liquidator, given its dual role as a Regulator in such circumstance; by her misapplication of the Doctrine of Tracing and improperly upheld the tracing of creditor funds to the preserved properties without incontrovertible evidence of a direct financial link thereby ignoring the legal threshold required to invoke tracing as articulated in ***Banque Belge v Hambrouck*** **[1921] 1 KB 321**; by issuing the vesting orders of properties belonging to duly solvent entities without justification; when she failed to adequately address procedural breaches by the Official Receiver; and by disproportionately focusing on the Official Receiver's submissions and placing undue reliance on the Official Receiver's submissions while disregarding critical evidence and arguments presented by the appellant.

16. The 5th appellant's, ***Cytonn Investments Partners Four Llp & 10 Others***, grounds of appeal mirrored those of the 1st and 3rd appellants with the addition of the grounds that the learned Judge erred: by totally ignoring the legitimate expectations of over 16,000 investors with a higher ranking registered secured interest in some of the SPVs,

effectively disenfranchising these investors; by improperly piercing the

corporate veil and collapsing the liabilities of the SPVs into those of CHYS without sufficient evidence to justify such a decision; by assuming that Financing Agreements, which are commitments by CHYS to lend money to SPVs is evidence of amount lent; by ignoring the important fact that it is indeed CHYS that was in default of its financing commitments to the SPVs, which were still under development and that the SPVS had not yet fully drawn their loan commitments from the CHYS; by assuming that the SPVs were in default yet their loans were not due for payment; by placing undue weight on the submissions of the Official Receiver while failing to give adequate consideration to the critical evidence and arguments presented by the SPVs and their homeowners/unit holders; by issuing orders, including vesting orders, that prioritized the claims of CHYS creditors in the Appellants' duly solvent entities without a clear legal basis, in contravention of established principles of insolvency law; by determining that bona fide purchasers for value without notice were exempt from the liquidation process, but nevertheless directed that the bona fide purchasers seek verification of their claims with the Official Receiver who would scrutinize their documentation and determine

whether or not they are bona fide purchasers for value; by

dismissing the applications of the SPVs in a manner that undermined investor confidence; by allowing an application for the enforcement of preservation despite there being no legal basis for either the application or the issuance of the said orders as the assets were already preserved and there was nothing to legitimately enforce; by incorrectly interpreting the Insolvency court's ruling of 17 November 2024 when she incorrectly determined that the ruling established that money lent out by CHYS belongs to the SPVs; by asserting that the SPVs had merely reiterated previous arguments regarding the doctrine of separate legal entities and privity of contracts, thus denying the orders sought, despite the SPVs not having filed any applications to lift the preservation orders initially; by assuming that the SPVs were attempting to shield themselves from scrutiny through the doctrines of separation of entities and privity of contract, when, in fact, the SPVs had presented a clear and viable plan for the recovery of CHYS funds under the financing agreements, while safeguarding the interests of their investors and homeowners; by vesting the properties of the SPVs with the Official Receiver, despite compelling evidence that the funds advanced to the SPVs

by CHYS were not the sole factor in the development of these properties and that other

lenders, investors, joint venture partners, and bona fide purchasers had duly contributed to the acquisition and development of these properties; and by assuming that the SPVs were merely holders of property, ignoring the fact that some of the SPVs run business which have been operational for over a decade. It was contended that this assumption risks the collapse of these businesses if taken over by the Official Receiver.

17. Additional grounds were that the learned Judge erred: by assuming and then stating that Edwin Dande was the CEO of the lender, CHYS, when in fact CHYS has no CEO in its governance structure and was governed by a Board of Investors of CHYS; by assuming and then stating that Edwin Dande "appears to be in control of the SPVs" without any evidence, facts or basis to support the assumption; by determining that the SPVs had failed to provide valid or justifiable grounds for the court to lift, vary, or set aside the preservation orders, without adequately considering the full range of evidence and arguments presented; by usurping the role of the creditors in the Debt Settlement Proposal process, thus side-lining the wishes of the most significant party in the insolvency process; by concluding that the

court was compelled to order liquidation based on the failure of the

debt rescue plan proposed by the Administrator when in fact, the court *suo motu* ordered liquidation under ***Section 533*** of the Act, without any party seeking such an order; and by determining that the vesting orders were issued solely on the basis that preservation orders were maintained, without a clear legal or factual basis for such an action.

18. The 7th appellants, ***Goal Advisory Africa Limited*** (Suing as the Trustee to Cytonn High Yield Fund (CHYF)**,** based their appeal on the grounds that the learned Judge erred: by failing to recognize that, while Cytonn High Yields Solutions (CHYF) shares the Cytonn name, it is an independent, regulated Collective Investment Scheme that is licensed and approved by the Capital Markets Authority under the Capital Markets *(Collective Investments Schemes)* Regulations, 2023, and therefore neither under the control of Edwin Dande nor Cytonn Investment Management PLC, which owns only 25% of Cytonn Asset Managers Limited, the Fund Manager of CHYF; by failing to acknowledge the appellant's status as a secured creditor of the 1st to 4th Interested Parties, with enforceable security rights over the monetary value derived from their assets courtesy of the floating

charge created under the Moveable Property Security Rights, 2017 for

each of the 1st to 4th Interested Parties; by failing to find that the applicant's exercisable security rights, which are secured over the monetary value derived from the assets, rank higher in priority compared to the debt recovery rights of CHYS over the assets of the 1st to 4th Interested Parties; by permitting the Respondent to earmark assets for wholesale realization and distribution of sale proceeds without accounting for the applicant's claim of Kshs. 364,103,962.00, an amount that does not belong to the entity under liquidation, CHYS, and falls outside the liquidator's jurisdiction, thereby excluding it from the realization and distribution process; by denying the Applicant, as a secured creditor to the 1st to 4th Interested Parties, the right to exercise its security over the monetary value derived from the assets, despite the Judge's own acknowledgment in paragraphs 32 and 33 that assets not proven to belong to the liquidated company fall outside the liquidator's jurisdiction and cannot be included in the distribution process; by giving undue weight on the submissions of the Respondent while entirely disregarding the critical evidence and arguments presented by the Appellant, to the extent that the Ruling failed to mention the Appellant even once, despite its

significant involvement with the SPVs it had lent money, thereby undermining

the fairness of the decision; by effectively disenfranchising 16,000 investors in CHYF and its related entities of their Investment Property Rights, in violation of Article 40 of the Constitution; and by prematurely placing the Applicant's secured rights over the 1st to 4th Interested Parties' assets into a realization process, thereby shifting the burden of proof of interest in the liquidated entity's preserved assets from the Liquidator to bona fide purchasers for value, such as the applicant.

19. For the 8th appellant, ***Valerina Jiwa & 289 Others***, the dissatisfaction was based on the grounds that the learned Judge erred: by failing to lift the preservation orders issued in the Ruling of 6th January, 2023, in respect of properties owned by the various Cytonn related SPVs; by failing to consider that the preservation orders negatively impacted the development of assets still under construction, thereby diminishing their value and reducing potential returns for creditors; by refusing to grant creditors the opportunity to convene a meeting of creditors to deliberate on the Debt Settlement Proposal (DSP); by overlooking the adverse impact of the preservation orders on creditors' interests thereby jeopardizing their ability to recover a substantial portion of their

investment; and by failing to

recognize the creditors' right to choose the recovery strategy that would yield the most favourable outcome in terms of maximizing their returns.

20. We heard these consolidated appeals on 30th April 2025 when learned senior counsel, ***Mr Paul Muite***, appeared with ***Ms Selestine Koile,*** for the 1st, 3rd, 5th and 6th appellants; learned counsel, ***Mr Olute***, appeared for the 2nd and 4th appellants; learned counsel, ***Mr Ernest Murungi***, appeared for the 7th respondent; learned counsel, ***Mr Brance Odhiambo***, appeared for the 8th respondent; learned counsel, ***Mr Emmanuel Bitta*** appeared with ***Ms Judy Mugo*** for the 1st respondent, the Official Receiver; learned counsel, ***Mr Greg Karungo***, appeared with ***Ms Naomi Mutisya*** for the 3rd respondent, SBM Bank; learned counsel, ***Ms Wanyonyi*** appeared for ***Mr Walubengo*** for the 5th appellant in Civil Appeal No. E931 of 2024.

21. 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 Lediidi & 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.***

22. In our own consideration of the submissions by the respective parties, we are of the view that the following issues fall for our

consideration and determination:

1) ***Whether the Rights of bona fide purchasers were violated.***
2) ***Whether tracing was misapplied and whether the doctrine of separate legal entity was violated.***
3) ***Whether privity of contract was disregarded.***
4) ***Whether appellants' right to fair hearing violated.***
5) ***Whether rights of creditors to convene a meeting was unfairly denied and whether key evidence on viability of DSP was improperly disregarded.***
6) ***Whether creditor equality principle was violated.***
7) ***Whether Learned Judge erred in stating that the Administrator concluded that recovery not possible***
8) ***Whether the Learned Judge wrongly speculated that the Official Receiver had been appointed the substantive liquidator.***
9) ***Whether the Learned Judge failed to address the procedural breaches by the Official Receiver.***
10) ***Whether the Learned Judge erred in assuming that the financing agreements committing CHYS to lend money to SPVs were evidence of the amount lent.***
11) ***Whether the learned Judge erred by vesting the properties of the SPVs with the Official Receiver***
12) ***Whether the liquidation order was improperly issued.***

Whether the Rights of bona fide purchasers were violated

23. Citing the definition of "*bona fide* purchaser" in Black's Law Dictionary (8th Edition), the cases of ***Samuel Kamere v Land Registrar (2015) eKLR*** and ***Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR***, it was submitted on behalf of the 1st, 2nd, 3rd and 6th appellants' that after paying due consideration and

entering into valid sale agreements, the appellants acquired a good

title protected under ***Section 25*** of the ***Land Registration Act, 2012***.

24. According to the appellants, the various SPVs are the registered owners of the land parcels, and as stipulated under ***Section 26*** of the ***Land Registration Act***, a certificate of title issued by the Registrar is considered by the courts to affirm that the proprietor is the absolute and indefeasible owner of the land. This title is immune to challenge except on grounds of fraud or misrepresentation, or if the title was acquired illegally, procedurally, or through a corrupt scheme. Exercising their constitutional rights under Article 40 to acquire and own property, it was submitted that the appellants legally entered into binding sale agreements, paid the necessary consideration to the SPVs, and obtained a good title for the off-plan units and plots. These rights, according to the appellants, can only be restricted in accordance to Article 24 of the Constitution, which, as held in ***Mtana***

Lewa v Kahindi Ngala Mwagandi ***[2015] eKLR***, mandates that any

limitation of rights must be based on legal grounds. Additionally, it

was submitted, citing the New Zealand case of the case of

Maginness

& Booth v Tiny Town Projects Ltd (in liquidation) [2023] NZHC, in

equity a purchaser who has paid part or all of the purchase price but

has not yet received the title to the property acquires an equitable lien over the property which lien protects the buyer's interests until the formal conveyance is completed and acts as security for the purchase price paid, in whole or in part.On the authority of the case of ***Katende***

V Haridar & Company Limited [2008] 2 EA 173, it was submitted

that the homeowners have identifiable units and plots within the various SPVs, and their rights should be protected as *bona fide* purchasers. The learned Judge was faulted for failing to acknowledge the appellants as *bona fide* purchasers for value without notice and overlooked their equitable lien over the project, despite their proper acquisition of off-plan units and plots despite having paid due consideration. Since under ***Sections 445(1)***, read with ***Section 448*** of the Act, only assets owned by the liquidated entity may be distributed among its creditors, it was urged that the appellants, who are purchasers for both off-plan units and plots and identifiable plots, should be excluded from insolvency proceedings. Since the learned Judge appreciated that only company-owned assets should be included in liquidation proceedings, it was argued that extending this to properties

lawfully acquired by third parties infringes on their constitutional right to property under Article 40 and economic rights

under Article 43 of the Constitution. According to the appellants, the decision of the learned Judge requiring the appellants to verify their claims with a biased party placed an undue burden on the appellants and contradicted the principles of fairness and subjected the purchasers to uncertainty and delays.

25. It was further argued that the trial court failed to recognize the interests of parties who converted their debt from CHYS (in liquidation) into off-plan units and plots in the various projects. Ian

F. Fletcher, in "***The Law of Insolvency***," Fourth Edition, pages 795- 796, was cited for the position that while creditors generally rank equal, exceptions arise in the form of the doctrine of set-off, where certain pre- and post-liquidation debts are given preferential payment entitlements to enhance the overall return to the general body of creditors. It was contended that when CHYS encountered liquidity issues, the SPVs invited CHYS investors to convert their investments into units and plots in the intended project, allowing their investments to be assigned to SPVs and set off against the loan upon repayment. This opportunity was extended to all investors, leading many to

convert their investments into units and plots.

They formalized the conversion through agreements and deeds of

exit, thereby acquiring off plan units and plots in the various projects. As a result, those converting acquired property interests in the units and plots, qualifying them as purchasers with an equitable purchaser's lien over the converted units and plots. Since at the trial these contracts were neither contested by the Official Receiver nor set aside, it was argued that the court should have recognized the agreements before issuing vesting orders against the appellants' properties. Therefore, the appellants argued that the trial court's blanket vesting orders infringe upon their property and socio-economic rights as *bona fide* purchasers and conversion investors who entered into valid binding sale agreements, conversion agreements, and deeds of exit, paid purchase prices, and were in the process of obtaining valid titles. These orders impose an undue burden despite the appellants' compliance with contract law and relevant legal frameworks.

26. Submitting on the same issue, the 5th appellant contended that in failing to consider the rights of *bona fide* third party investors and purchasers who had lawfully entered into sale agreements, paid purchase prices and/or acquired title to the properties held by the

SPVs, the learned Judge violated the proprietary rights of the said

parties under Article 40 of the Constitution and disregarded the principle that only assets legitimately owned by the insolvent company may form part of the liquidation estate.

27. The 1st respondent's position was: that on the authority of ***Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another [2017] KECA 24 (KLR)*** and ***Katende v Haridar & Company Limited [2008] 2 EA 173***, he who alleges to be a *bona fide* purchaser must prove, inter alia, that "he purchased the property in good faith"; that considering the intermingling of funds and shared management across the various Cytonn entities, every creditor must prove their claim; that being a neutral party and an officer of the court, the Official Receiver is the best person to carry out the verification and ranking of the claims; that since the rights under Article 40 of the Constitution are not absolute, the High Court did not undermine the *bona fide* purchasers' rights since the assets were acquired and/or developed using funds drawn from CHYS and CPN; that *bona fide* purchaser similarly have a claim over them but they must prove their claim with the liquidator; that by preserving the assets and inviting the creditors to prove their claims, the court

exercised commendable

prudence and equality in balancing the competing interests and did

not prejudice any class of claimants but instead placed all creditors and third party claimants on equal footing, ensuring a uniform and transparent verification process under the supervision of the liquidator; that any party aggrieved with the liquidator's determination retains the unfettered right to seek redress before the court; that the court's approach reflects the dual mandate of insolvency, the maximisation of returns for creditors while safeguarding the legitimate rights of third parties through due process.

28. We agree that the legal position is that only assets owned by the insolvent company may form part of the liquidation estate. The learned Judge was alive to this fact when she stated that:

> ***"It is a well-established principle of insolvency law that only the assets that belong to a liquidated entity can be subject to administration and distribution among its creditors...By implication, assets not proven to belong to the liquidated company fall outside the liquidator's jurisdiction and cannot be included in the distribution process."***

29. However, the issue of which assets are owned by the insolvent estate is a matter of fact which must be determined based on the evidence availed to the authority determining that fact. We,

therefore, agree

with the position adopted by this Court in ***Samuel Kamere v Land***

***Registrar* (2015) eKLR**, that to be considered a *bona fide* purchaser,

an individual must prove they acquired a valid legal title, performed necessary due diligence to confirm the lawful owner, and paid a valuable consideration for the property. This is our understanding of this Court's decision in ***Weston Gitonga & 10 Others v Peter Rugu***

Gikanga & Another [2017] KECA 24 (KLR), in which the Ugandan

case of ***Katende v. Haridar & Company Limited* [2008] 2 E.A. 173**,

was cited to elaborate on the meaning of a *bona fide* purchaser for value without notice as follows:

> ***"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that: he holds a certificate of title; he purchased the property in good faith; he had no knowledge of any fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; he was not party to any fraud. A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."***

30. The burden is upon a person who wishes to have a certain

property removed from the liquidation process to place before the liquidator evidence in support of that claim. We have not been told that any such

evidence was placed before the liquidator and that it was not acted

upon. Where it is not acted upon, the aggrieved party has recourse before the court as regards the particular claim as opposed to seeking to set aside the liquidation process. We cannot fault the learned Judge for finding that:

> ***"The onus is on the applicants to demonstrate ownership and good title to such assets, and provide sufficient evidence to the liquidator to justify their exemption from the liquidation estate. This requires the applicants to establish that their transactions were conducted in good faith, for valuable consideration, and without knowledge of the company's financial distress. It must be emphasized that the liquidator retains the authority under insolvency law to challenge or avoid transactions where assets were transferred with knowledge of, or in anticipation of, the company's insolvency or liquidation. Such transfers are considered attempts to defraud creditors and can be voided to preserve the integrity of the liquidation process. Section 498 of the Insolvency Act expressly criminalizes transactions designed to defeat creditor claims, including those executed with the intention of diminishing the pool of assets available for distribution. As such, the liquidator is empowered to scrutinize all transactions involving company assets, particularly those occurring in the period leading up to the insolvency, to determine whether such transfers were legitimate or designed to frustrate the rights of creditors. These applications are therefore subject to the scrutiny of the Official Receiver as liquidator."***

31. Accordingly, this ground fails.

<u>Whether tracing was misapplied and whether the doctrine of</u>

separate legal entity was violated

32. Submitting on the doctrine of tracing, the 1st, 2nd, 3rd and 6th cited the case of ***Foskett v McKeown [2001] 1 AC 102***, where Lord Millet

explained that tracing involves identifying a new asset as a substitute for the original asset and that in those circumstances, the claimant seeks to claim this new asset because it was obtained, either entirely or partially, using the original asset. ***Alastair Hudson***, in his book **"*Equity and Trusts*,"** 7th Edition, on page 891, paragraph 14-7, was cited for the definition of tracing as a legal process that allows the owner of property to recover it if taken from them involuntarily. Here, 'involuntarily' means that the owner did not agree to any transfer of title to the defendant. It was submitted that while the concept of tracing exists in both common law and equity, there is a distinction in its applicability between the two. Under equity, an aggrieved party can identify, trace, and recover property or its value when it has been wrongfully taken or misappropriated, even if the assets have been mingled with other funds. However, as applied by Mabeya, J. in preserving the assets of SPVs, the common law doctrine of tracing, while permitting the recovery of wrongfully taken or

misappropriated property or its value, has limitations. Specifically, tracing under

common law is ineffective if there is no clean substitution and the property has been mixed with other assets.

33. In this case it was submitted that, first, the funds injected into the various project from CHYS were lawfully obtained through a loan notes agreement and were not wrongfully acquired or misappropriated, the loan's purpose being to enable the SPVs acquire land for the intended mixed real estate projects. Second, to support tracing at common law, a clear substitution of the funds must exist, and they must not have been commingled with other assets. It was submitted that while it is undisputed that CHYS financed the project by virtue of the loan extended to the SPVs, it is equally clear that these funds were mixed with those from third party purchasers, such as the appellants, who also contributed funds that were used to acquire the property for the projects by virtue of the substantial sums used to purchasing the off-plan units and plots. In support of further

limitation, the appellants cited the English case of ***McTaggart v***

Boffo (1975) 64 D.L.R. (3d) 441 (Ont. H.C.J.), 10 O.R. (2d) 733,

which further limits the application of tracing where there are *bona*

fide purchasers for value such as the appellants.

34. On the other hand, it was submitted that the equitable doctrine of tracing is similarly inapplicable. Although it allows tracing where funds have been mixed, it requires a fiduciary relationship between parties and proof of fraud, as demonstrated in the case of ***Joruth***

Enterprises Ltd v Barclays Bank of Kenya Ltd [2020] eKLR. In

this case, it was contended that the issue of fraud or misappropriation of funds was not raised by either party at the trial court, but instead, Mabeya, J. raised it in his ruling on 6th January 2023, and reiterated it during his recusal, without affording the litigants sufficient opportunity to litigate and present their arguments. Therefore, it was argued, the court addressed these matters on its own initiative without allowing the affected parties to fully argue and submit their case on these issues. To the appellants, the doctrine of tracing is a process and not a remedy and can only be initiated by the plaintiff (or claimant), not by the court of its own accord. The court lacks the authority to begin the tracing process; this is an entitlement and a right reserved exclusively for the plaintiff. In this scenario, it is not the court's role to act as a substitute for the plaintiff, like the Official Receiver,

in commencing the tracing process. Consequently, as to the issue of fraud as alluded to by the trial in its ruling in its ruling, was

erroneous as for a claim of fraud to be sustained when invoking the doctrine of tracing, it must be specifically pleaded for the court to adjudicate on the same as required by Order 2 Rule 4(1) of the ***Civil Procedure Rules***. In support of this submission, the appellants relied on ***MWK v SKK and 5 others NRB ELC No. 32 of 2017 [2018] eKLR***,

in which the court cited the Court of Appeal for Eastern Africa's decision in ***R. G. Patel v Lalji Makanji [1957] EA 314*** for the

position that fraud must be strictly proved on a standard higher than a mere balance of probabilities. According to the appellants, based on ***Galaxy Paints Company Ltd v Falcon Guards Ltd [2000] eKLR***

by deciding on the unpleaded issues and applying the equitable doctrine of tracing, the learned Judge erred and consequently, the determination on the issue of tracing traced should not stand.

35. The 5th appellant added their voice to this issue by submitting, on the authority of the case of ***Foskett v McKeon (2001) 1 AC*** that a party

who intends to invoke the process of tracing must prove that the

new asset is the substitute of the old. It was, however, submitted that the financial agreements do not suffice to demonstrate a clear chain of tracing without which, as held in ***Bishopgate Investment Management Limited v Human & Others (1994) EWCA Civ 33,*** a

clear substitution cannot be achieved due to the mixture of funds from other parties including secured creditors and home owners as is the case in the subject properties. In addition, it was submitted that the doctrine is applied in cases involving the recovery of misappropriated and wrongfully transferred assets as was seen in the case of ***Trustees of FC Jones v Anne Jones (1996) EWCA Civ 1324***, hence the application of the doctrine within the context of lender and borrower relationship represents an extension of the doctrine and is an anomaly in law that would substantially disadvantage future borrowers. According to the appellants, and as was stated in ***Maina and 87 Others v Kagiri (2014) eKLR***, equity and common law doctrines should not intervene to provide a remedy where there is one in law, such as in this case where there is a legally enforceable contract between the parties. It was submitted that the said doctrine must be conducted in accordance with statutory provisions and legal principles as established in ***Virginia Ciamati Murage & Elicason***

***Mutembi v Stanley Advane Murage* (2021) KLR** and to apply the

doctrine in the manner proposed would contravene ***Sections 7 and***

10 of the ***Limited Liability Partnership Act*** and the relevant

provisions of the ***Insolvency Act***.

36. It was therefore the appellants' view that the learned Judge misapplied the doctrine as enunciated in ***Middle East Bank Limited v Widad Hussein Badru & Hassan Salah Manswah*** ***[2020] KEHC 9755*** and that on the strength of the authority in ***Banque Belge v Hambrouck*** ***[1921] 1 KB 321***, the conclusion was speculative and unsubstantiated.

37. On its part, the 7th appellant contended: that the doctrine of tracing is an equitable remedy predicated on the existence of a trust relationship, whether express or constructive. It is not a freestanding principle but must be anchored in a fiduciary duty or a breach thereof; that as held in ***Foskett v McKeown*** **(supra);** that tracing is a proprietary claim that allows a claimant to follow misappropriated assets into the hands of a third-party, but only where the assets are identifiable as trust property or where the recipient has acted in a manner that unjustly enriches them at the expense of the claimant; that in the present case, the 1st respondent failed to demonstrate any trust relationship between CHYS LLP and the

appellant or the SPVs, absent which, the doctrine of tracing cannot be invoked to justify the preservation and vesting orders; that in the misapplication of the

doctrine of tracing, the High Court did not outline the wrongful act

and/or particulars of fraud that were committed by Edwin Dande who was the Chief Executive Officer of CHYS LLP, thus the 1st respondent failed to discharge the standard of proof required to demonstrate fraud as stated in ***Ndolo v. Ndolo*** ***[2008] 1 KLR (G&F) 742*** and

Mbuthia Macharia v Annah Mutua Ndwiga & another (2017)

eKLR. Consequently, the learned Judge erred by presuming the existence of such acts without requiring the necessary proof; that based on the decision in the case of ***Ng'ang'a v. National Bank of***

Kenya Limited ***[2020] eKLR***, the misapplication of legal doctrines

and failure to consider all relevant facts can lead to unjust outcomes; that the learned Judge's decision to apply the doctrine of tracing without evidence of a trust, breach, or fraudulent conduct justifying its application resulted in a biased decision that does not align with the standards of justice and equity required by law and which disproportionately prejudices the appellant's registered secured interests and the rights of innocent homeowners, violating Article 40 of the Constitution.

38. In response, the 1st respondent submitted: that although a company is in law, a separate person and distinct entity as established in

***Salomon v Salomon & Co. Ltd* (1897)**, there are exceptions to every

rule, where the law allows deviation from the general rule i.e. where there is fraud, malfeasance, evasion of legal obligation or improper conduct; that from the surrounding facts, the learned Judge did not err or improperly pierce the corporate veil as alleged but properly observed that it was prudent to "move beyond these protective legal constructs and provide transparent answers to the creditors"; that the SPVs cannot invoke the principle of separate legal entity and privity of contract to evade legal responsibility of paying their debts; that based on ***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 shareholders and/or creditors; that the courts are empowered to disregard the corporate persona when the same is used to shield fraud, wrongful conduct or evade obligations as enunciated in ***Ukwala Supermarket v Jaideep Shah & Another***

[2022] eKLR; that from the onset, it is deductible that the manner in which the SPVs were established was dubious as the entities and the SPVs are all undeniably connected through their shared control and promoters being the same people, and more

so, Edwin Dande's influence over the SPVs and CHYS; that the above actions fit the definition of "connected with" in section 2 of the Act; that the learned

Judge did not err in finding that there is a direct link between the two entities and the SPVs; that CHYS and CPN are also alter egos of these promoters and the SPVs; that adherence to the "fiction" of separate legal entity in this matter would sanction a fraud or injustice; that whereas the doctrine affords protection to individuals behind a corporation, the same can be subject to abuse and courts have the liberty to disregard this doctrine to prevent injustice or fraud when corporate structure is misused as was the case in ***Rossendale***

***Borough Council v Hurstwood Properties (A) Ltd* [2019] EWCA Civ**

364 and ***Prest (Appellant) v Petrodel Resources Limited and***

***Others (Respondents)* [2012] EWCA Civ 1395**; that noting the

breach of fiduciary duty to investors, and having demonstrated the nexus between the SPVs and the entities, and the commingling of funds the court should treat the SPVs, CHYS and CPN as one entity, 'Cytonn'.

39. Regarding the doctrine of traceability, it was submitted: that both Mabeya, J. and Mugambi, J. satisfied themselves that there was a

clear and uncontroverted chain linking the creditors' money and the preserved properties acquired by the SPVs; that the appellants failed

to present any evidence or facts before the High Court that

demonstrate that the monies used to purchase the assets were not drawn from CHYS and CPN; that CHYS and CPN are the beneficial owners of the assets owned by the SPVs and if not so have a beneficial interest over each asset purchased using money drawn from either funds; that the SPVs only existed as holding entities, without any resources of their own which they would have used to acquire any assets they purportedly own; that it is noteworthy that todate, the SPVs have not made any repayment or a valid proposal of repayment of the debt.

40. We have considered the above submissions. The law guiding corporate personality was set out in the oft cited case of ***Salomon v Salomon & Co (1897) AC 22*** where Lord Macnaghten affirmed the separation between the corporation and its members in the following words:

> ***"The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the***

***manner provided by the act*.**

41. Arising from this position, it was pronounced in ***Re: Southard Limited [1979]3 ALL ER 565*** that***:***

> ***"…a parent Company may spawn a number of subsidiary companies, all directly or indirectly controlled by the Shareholders of the parent Company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent Company and the subsidiary companies may prosper to the joy of the Shareholders without any liability for the debts of the insolvent subsidiary****."***

42. This Court in ***Hannah Maina T/A Taa Flower vs Rift Valley Bottlers Limited [2016] eKLR,*** reaffirmed the principle that corporate entities remain separate and distinct, even in cases where a related company is facing financial difficulties stating:

> *"**In the circumstances, the respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities."***

43. However, the doctrine of corporate personality is not absolute. It is a legal fiction whose veil may be pierced. The ***Halsbury's Laws of England, 4thEdn para. 90***; addresses the issue of piercing the veil of incorporation and states that;

> ***"Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but, in all cases,***

where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the

> ***mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted."***

44. That the corporate personality veil may be pierced was appreciated by this Court in ***Victor Mabachi & Another v Nurturn Bates Ltd*** ***[2013] eKLR*** where it was stated:

> ***"a body corporate, is a persona jurisdica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."***

45. The appellants' case is that the funds injected into the various projects from CHYS were lawfully obtained through a loan notes agreement and were not wrongfully acquired or misappropriated, the loan's purpose being to enable the SPVs acquire land for the intended mixed real estate projects. Secondly, to support tracing at common law, a clear substitution of the funds must exist, and they must not have been commingled with other assets. In those circumstances, the common law tracing was unavailable. What the appellants have not addressed is the finding by Mabeya, J. that the

actions of the promoters of CHYS and CPN who were the same promoters of the

majority of the SPVs were akin to fraud. Here is a situation where the promoters of CHYS and CPN draw up loan agreements to be executed by the SPVs, which they themselves form, and advance money to the said SPVs on the understanding the legal charges would be executed by the SPVs but for some reason the charges are not executed. The objective of executing the legal charges would have been to ensure that the interests of CHYS and CPN and by extension the investors were secured. Having failed to do that and being mindful of the relationship between CHYS, CPN, CIMP and Daniel Harold Dayan Dande and the SPVs, the presumption to be drawn would be that the assets and projects of the SPVs were financed by monies contributed by CHYS and CPN as collecting baskets on behalf of the investors/creditors. As no security was executed by the SPVs unless proved otherwise, one may well conclude that the whole scheme was conceived with the objective of defrauding the investors/creditors. It is upon the respective SPVs to adduce evidence showing that part, and if so which of the assets of projects were not in fact financed by the monies collected from the investors/creditors. That window was made open to the SPVs but they failed to make use of it. In those

circumstances, there was *prima facie* case of illegality and there was

no evidence of commingling of funds and tracing was properly applied with a view to preserving the assets in question.

46. It was contended that since fraud was not specifically pleaded, the court had no power to deal with it. In our view, insolvency matters ought not to be treated strictly in the same way as in normal civil suits. Insolvency proceedings require a balancing the interests of the debtor, creditors and all interested parties. Accordingly, where it appears to the court, particularly where the insolvency order is issued by the court on its own motion, as was in the instant case, that it is necessary to issue an order to meet the objective of the proceedings in question, such an order would not be set aside if it is shown that it was a necessary order. In this case, the central issue is the manner in which the SPVs were formed and whether in actual fact they can be said to have been delinked from their financiers and promoters. We are, therefore, disinclined to fault the learned Judge in dealing with that central issue merely because it was not expressly pleaded. Even if the rules of pleading were to apply, we would, in these circumstances be of the view that the rule in ***Odd Jobs Case*** is applicable. This Court's decision in ***Ann Wairimu Wanjohi v***

James

Wambiru Mukabi ***[2021] eKLR*** comes to mind where it observed that:

> ***"[27] In Odd Jobs vs Mubia (supra), the Eastern Africa Court of Appeal held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for determination. In Vyas Industries vs Diocese of Meru [1976] eKLR, the Eastern Africa Court of Appeal applied and approved Odd Jobs vs. Mubia (supra), holding that, as the advocate for the appellant had led evidence during the trial and addressed the court on the unpleaded issue, the trial court could base its decision on the unpleaded issue, as the issue had been left for the court's decision during the trial …."***

47. While it is contended that the doctrine of tracing does not apply in cases of lender and borrower, the instant case is not simply one of the lender and borrower. It is a case where monies were collected with a view to purchasing assets or developing projects which assets or developments would themselves act as securities for the sum advanced. In other words, the assets and the developments by the SPVs were intended to be traceable to the investors by way of the legal charge, the loan notes and agreements. Accordingly, the purely lender and borrower relationship was not suitable as a description of the relationship between CHYS, CPN and SPVs. This is our understanding

of the position in ***Re Pantmaenog Timber Co Ltd* (2004) A.C 158** at

Paragraph 52, wherein Lord Millet observed that: -

> ***"From the earliest days of the joint stock Company the liquidator has exercised functions which serve the public interest and not merely the financial interests of the Creditors and Contributories…insolvency proceedings have never been treated in English Law as an exclusively private matter between the debtor and his creditors, the Community itself has always been recognized as having an important interest in them."***

48. As we have noted in this judgment, linkage between CHYS, CPN and the SPVs and the failure by the SPVs to execute the legal charges in favour of CHYS and CPN were factors justifying the liquidator to deem the properties of the SPVs as having been acquired through resources collected by CHYS and CPN from the investors. Any third party who had a claim over the said assets and projects was at liberty to lay the same before the liquidator for consideration. Without such claims being properly laid before the liquidator, it was open to the liquidator to proceed on the premise that the assets and developments carried out by the SPVs were traceable to the money advanced to then by CHYS and CPN and therefore could vest in the liquidator. In other words, the

properties of the SPVs were prima facie traceable to CHYS and CPN unless there was evidence to the contrary. In our view the

tracing of property and vesting the same for the purposes of their preservation must be distinguished from the absolute tracing of property where the same is found to have been wrongfully acquired by funds received from the claimant. This, in our view, is why the learned Judge stated that:

> ***"Regarding the admission of proof of debts from creditors, my view is that the Insolvency Act envisions this as a continuous process. This reasoning accounts for the varying types of creditors, the nature of their claims, and the different stages at which such claims may arise or be finalized during the insolvency proceedings. The fact that not all the creditors have had their proof of debts responded to or admitted does not in itself justify the removal of the liquidator from office."***

49. We dismiss this ground of appeal.

<u>Whether privity of contract was disregarded</u>

50. On privity of contract, it was submitted on behalf of the 1st, 2nd, 3rd and 6th appellants that in the contested ruling, the learned Judge erroneously deviated from the fundamental principle of privity of contract concerning the Appellants' agreements with the various SPVs and their contracts with the entities in liquidation. Reference was made to the case of ***<u>Royal British Bank v Turquand</u> [1856] 6 E&B***

327, in which the court established the "indoor management rule" or

the "*Turquand Rule*" to protect the rights of *bona fide* third parties

entering into transactions with a company, allowing them to assume that internal company rules are followed, even if they are not. Therefore, the appellants were entitled to assume that the Special Purpose Vehicles had the authority to enter into the sale agreements and convey good title. The case of ***Lubulellah & Associates v Gilbi Construction Company Limited*** ***(Miscellaneous Application E156 of 2023) [2024] KEELC 4243 (KLR),*** was cited for the proposition that under the doctrine of privity of contract, a contract is only binding on the principal party thereto and not otherwise unless there is a clear provision of the contract that alludes to and seeks to provide a clear benefit to and in favour of a third party.

51. This issue is substantially dealt with in our findings above. We find no merit in it.

Whether the appellants' right to fair hearing were violated

52. In the appellants' submissions, the trial court did not fully uphold the right to a fair hearing, as it predominantly relied on the Official Receiver's submissions, to the detriment of the appellants, some

of whom who are *bona fide* purchasers with a vested interest in the property held by the Official Receiver, in violation of the principles of

natural justice. According to the appellants, despite acknowledging the rights of *bona fide* purchasers in its ruling, the trial court failed to independently determine their rights and, in breach of the respondents' right to an impartial hearing under Article 50(1) of the Constitution, the learned Judge transferred that responsibility to the Official Receiver. This imposed an undue burden by demanding that the appellant prove their claim with the Official Receiver, who is not impartial in the claim, even though the appellants are not required to file proof of debt with the Official Receiver, as CIP 11 is not insolvent. In their view, although the appellants presented substantial evidence demonstrating their competing interests in the various projects, the court erred by giving undue weight to the Official Receiver's submissions, prioritizing the Official Receiver's interests over those of the appellants, thus enforcing preservation orders that infringed their property rights under Article 40 of the Constitution. On the authority of ***Onyango Oloo v Attorney General [1986-1989] EA 456,*** it was

submitted that the trial court's failure to adequately consider the appellants' well-supported arguments undermined the principles

of natural justice and the right to a fair hearing under Article 50 of the Constitution, ultimately leading to a refusal to set aside the vesting

orders that should have rightfully excluded the appellants from the liquidation proceedings. Consequently, the learned Judge was faulted for making a legal error by issuing vesting orders over various projects, which are owned by the various separate legal entities from CHYS, without establishing a clear legal rationale for this decision.

53. Particularly in insolvency proceedings, where various parties have a substantial interest, it was submitted that it is imperative that due consideration is given to all arguments and evidence presented to court. The appellants cited the case of ***Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others*** ***[2021] KEHC 242 (KLR),*** in which the decision ***In Re Pantmaenog Timber Co Ltd*** ***(2004) A.C 158*** at Paragraph 52, was cited for the position that, as the supervisor of the liquidation process, the court must consider the views and evidence presented by all interested parties. The impartial examination of all submissions ensures that the liquidation process remains transparent, balancing the interests of the debtor, creditors and all interested parties.

54. In the instant case, it was submitted that the learned Judge erred by treating the Official Receiver's position as absolute truth without critically engaging with the appellants' submissions.

55. The 7th appellant, ***Goal Advisory Africa Limited***, submitted: that although the appellant, in its replying affidavit, demonstrated the appellant's registered secured interests over the subject properties, the learned Judge failed to consider the same; that the appellant is the Trustee of CHYS, a collective investment scheme regulated as a special fund by the Capital Markets Authority under the ***Capital Markets (Collective Investments Schemes) Regulations, 2023***; that CHYS is authorised to invest in debt securities issued for the purposes of real estate developments and it is in line with this mandate that it invested over Kshs 364,103,362.00 from its portfolio directly into the subject properties; that CHYS is a secured creditor with enforceable rights comprising qualifying floating charge over the subject properties in line with the provisions of the ***Moveable Property Securities Rights Act*** (MPSR). By dint of its registered secured interests, the appellant holds a priority charge security which ranks higher to that of CHYS whose interest over the subject

properties is unsecured; that the learned Judge erred in law by failing

to accord the appellant a fair hearing as provided for under the provisions of Article 25(c) and 50(1) of the Constitution; that, on the authority of ***Kenya Revenue Authority & another v Mutamba & 26***

others (Civil Appeal 124 of 2017) [2022] KECA 808 (KLR), the

failure by the High Court to consider the appellant's replying affidavit is a violation of the principles of natural justice, particularly the *audi alteram partem rule*, which requires that all parties be given a fair hearing before any orders affecting their rights are made; that the failure by the learned Judge to consider the appellant's replying affidavit, which sufficiently demonstrates the legitimate property rights over the subject properties, renders the impugned ruling null and void; and that the import of the impugned ruling is that it has permitted the Respondent to earmark the subject properties for wholesale realization and distribution of sale proceeds without accounting for the appellant's claim of Kshs. 364,103,962.00, an amount which does not belong to the entity under liquidation, CHYS, and falls outside the liquidator's jurisdiction.

56. The 7th appellant submitted: that the learned Judge failed to appreciate the evidence given by the appellant sufficiently demonstrating that the appellant separately invested funds in the

subject properties and had secured interests in the preserved assets; that this was contrary to the holding in ***Kenya Power & Lighting Company Limited v. Jossy Muthoni Nyaga*** ***[2019] eKLR***, where the court held that it is a grave error for a trial court to disregard a party's evidence without adequate reason, as it contravenes the statutory duty to consider all relevant facts before making a determination; that since the purpose of the orders made on 6th January 2023 initially preserving the subject properties was to prohibit the transfer or disposal of the assets pending the recovery of the debt owed to CHYS, the respondent as the liquidator of CHYS was expected to institute debt-recovery procedures against the SPVs before resorting to making an application for vesting of properties; that in vesting orders, the superior Court failed to acknowledge that there were in place Financing Agreements between the SPVs and CHYS which expressly provided for remedies to CHYS in the event that the SPVs failed to repay the monies advanced to them; that in granting the Respondent vesting orders over the subject properties without due consideration to the property rights and security interests of the appellant, the High

Court disregarded the appellants right to own property under Article 40 of the Constitution; that the effect of the vesting orders is that it

conferred legal title of the subject properties to the liquidator to the exclusion of any other parties; that the learned Judge therefore erred in law and in fact when she stated that the onus on demonstrating ownership and good title for an asset is to be made to a liquidator so as to justify the exemption of the asset from the liquidation estate, yet it is the jurisdiction of the Court to determine which assets form part of the liquidation based on the available evidence; that on the authority of ***Re Blue Shield Insurance Company Limited (In Liquidation) [2016] eKLR,*** the liquidator's role is to collect and realize the assets of the insolvent company for distribution to creditors; that where a third-party claims ownership of an asset, the burden of proof lies on that party to demonstrate their ownership and good title before the court, a determination which the liquidator cannot unilaterally make but which must be made by the court.

57. The 8th appellant contended: that by refusing the vary, set aside, or lift the preservation orders issued without their input, the superior court affirmed their condemnation without a hearing; that since ***Section 425*** of the Act, provides that creditors are among

the select parties allowed to present a liquidation petition against a company,

they were necessary parties before the superior court, and are also

entitled to appeal to this Court under the Act; that to the extent that the appellants sought to have the preservation orders varied, stayed or set aside due to being condemned unheard, the superior court infringed upon their right by affirming the preservation orders which were issued without their participation as necessary parties; that pursuant to ***Section 3(1)(c)*** of the Act, and considering the preservation orders were issued without the input of the appellants, it was in the best interest of all creditors to lift the preservation orders in order to preserve the value of the assets for the benefit of the creditors.

58. The 1st respondent in response submitted: that the appellants' claim that their rights under Article 50 of the Constitution were violated is unfounded; that the insolvency proceedings in question were initiated by CIMP and all parties claiming violation of their rights were at all material times aware and actively participated in the insolvency proceedings which they cannot seek to disown; that Article 50 of the Constitution is not violated merely because a litigant disagrees with a court's decision; that a fair hearing was granted before the liquidation orders were made and that a court's obligation was to ensure

procedural fairness which it did; that what the appellants seek is not

the vindication of their constitutional rights but a reversal of lawful judicial and statutory actions under the guise of constitutionalism.

59. We have elsewhere in the judgment dealt with the grounds dealing with the rights of the purchasers and Debt Settlement Proposal. We emphasise that in his decision placing CHYS and CPN in liquidation, the learned Judge (Mabeya, J.) expressly stated 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."***

60. This position applies with equal force to any person disputing the inclusion of its property in the liquidation process. The option, we reiterate, is not to challenge the liquidation process but to lay the claim before the liquidator. To decline to do so on the ground that the liquidator is not impartial is clearly unreasonable since any person dissatisfied with the manner in which the liquidation process is being conducted may move the court for appropriate orders.

61. The same position applies to the complaint by ***Goal Advisory***

Africa Limited that it was never afforded an opportunity of being heard and

that its replying affidavit was never considered. The learned Judge was clear in her decision that:

> ***"The SPVs have yet to demonstrate that the subject projects are independent of the funds received from CHYS's creditors. Furthermore, CHYS's influence over the SPVs, exercised through its CEO, Edwin Dande, remains unbroken. Significant concerns persist regarding whether the SPVs were deliberately structured as part of a broader scheme to obscure the location of creditor funds and frustrate recovery efforts. With these unresolved issues, the SPVs cannot rely on the doctrines of corporate separateness or privity of contract to shield themselves from scrutiny. They must move beyond these protective legal constructs and provide transparent answers to the creditors' questions. Such accountability cannot be achieved if the preserved properties remain under the control of CHYS, the SPVs, or their managers."***

62. What we hear the learned Judge saying is that the appellants had the opportunity of proving their claims before the Official Receiver but instead of doing so, they chose to challenge the liquidation process. We find that the learned Judge cannot be faulted in arriving at the said decision. The appellants were informed right from the decision of 6th January 2023 that they had the opportunity to prove their claims before the Official Receiver but instead of doing so deemed it fit to challenge the liquidation process, a process that was initiated when their promoters moved the court

for administration orders and proposed their own administrator who returned the verdict that CHYS

and CPN could not be salvaged as going concerns due partly to the failures on the part of the SPVs to meet their sides of the bargain. In our view, it is mischievous for the same SPVs to now claim violation of their rights when they chose not to take an option that was availed to them.

63. We find no merit in this ground of appeal and dismiss it.

Whether rights of creditors to convene a meeting was unfairly

denied and whether key evidence on viability of DSP were

disregarded

64. Submitting on the issue whether the Learned Judge erred in law and fact by unlawfully denying creditors their right to convene a meeting, the 2nd appellant contended that it satisfied the threshold under ***Section 465(2)*** of the Act by collectively holding more than one-tenth of the total outstanding debt of CHYS and CPN, amounting to Kshs. 4,849,390,798.25 the creditors exercised their constitutional right to be heard under Article 50. In line with the provisions of ***Section 491*** of the Act, which empowers the court to order for a meeting to be held to ascertain the wishes of a creditor, the appellants approached the Trial Court vide an

application dated 19th April 2023, seeking an

order directing that a meeting be convened, where all creditors and investors of CHYS would be presented with the Debt Settlement Proposal (DSP) in detail and thereafter be given the opportunity to vote on it. Despite the Appellants' exhaustive submissions highlighting their concerns and their desire to subject the Debt Restructuring Plan to a vote, the Learned Judge acted contrary to the requirements of Article 47 of the Constitution and the principles of the ***Fair Administrative Action Act***, which mandate that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. By declining to grant this prayer, the learned Judge acted contrary to these principles. Denying the creditors' request effectively silenced one group of creditors in favour of another, despite the fact that all creditors of the entities under liquidation should be accorded an equal opportunity to express their concerns regarding the settlement of their outstanding debts. According to the appellants, the learned Judge erred in law and contrary to ***Section 464(4)*** of the Act by asserting that, in her view, the proposal, having been brought forth by a faction of creditors rather than the Creditors' Liquidation Committee working with the Official

Receiver, lacked the necessary authority.

65. Submitting on the same issue, the 8th appellants' views were: that all matters relating to liquidation of companies, the court is required to have regards to the wishes of creditors and that to ascertain those wishes, the court may direct a meeting of creditors to be convened, held and conducted in such a manner as it directs to ascertain those wishes; that if the meeting is sought for by the creditors, the court must consider the value of each creditor's debt; that ***Section 491*** of the Act gives the insolvency court the powers to direct a meeting of creditors to be held, convened and conducted in such a manner as it directs for purposes of ascertaining the wishes of the creditors in relation to the liquidation of a company; that the power to request for a meeting under ***Section 491*** is not reserved for the official receiver or any particular party, but any creditor, with good reason can make an application asking the court to convene such a meeting. In the instant case, the appellants applied to court to convene a meeting for purposes of having the Debt Settlement Proposal (DSP) tabled before the creditors for consideration; that by determining that the creditors could only act through the creditors' committee, the superior court curtailed the appellants' freedom of association

protected under ***Article 36*** of the ***Constitution*;** that it was erroneous and prejudicial

for the superior court to tarnish the DSP without affording the creditors the opportunities to interrogate it and make their decision whether to allow or reject it; and that the High Court therefore denied the creditors an opportunity to ascertain their wishes in relation to the liquidation.

66. On the issue whether the learned Judge erred in fact and law by disregarding key evidence on the viability of the debt settlement plan, it was submitted that despite the clear merits and potential benefits of this proposal, the learned Judge dismissed it, instead relying disproportionately on the submissions of the Official Receiver, who vehemently opposed the plan without presenting any supporting analysis or documentation. It was contended that the trial court erred in adopting the Official Receiver's position that the Debt Settlement Proposal lacked detail, was highly speculative, and was therefore not viable. This conclusion was reached despite the existence of a detailed 60-page proposal from the licensed Insolvency Practitioner, Nairobi Forensics, which meticulously demonstrated the feasibility of the settlement proposal and outlined how it could achieve significantly better outcomes for all creditors,

potentially enabling a full 100% recovery of the principal amounts

owed. To the appellants, had the court conducted an independent evaluation of the Debt Settlement Plan, separate from the Official Receiver's unsubstantiated claims, it would have found that the plan met the necessary legal and evidentiary requirements. Rather than fulfilling its supervisory role in insolvency proceedings, the trial court overreached its mandate by making a unilateral decision on behalf of the creditors.

67. In response, the 1st respondent contended: that CHYS and CPN were in administration for a period of one year, during which the administrator rendered his professional opinion that the entities could not be structured and liquidation was the only viable option; that the court's refusal to convene a creditors' meeting at the behest of an amorphous group, the Creditors' Restructuring Committee (CRC), to table a Debt Settlement Proposal (DSP) was merited since the DSP was reviewed during administration and liquidation; that the court rightly found that the DSP was procedurally irregular, legally untenable and not viable due to lack of viable funding, credible projections and supporting documentation; that reliance on ***Section 36*** of the Act was

misplaced as the Act, in ***Section 409***, provides a structured mechanism for creditor representation specifically through

liquidation committees; that in this case two creditors' committees exist following their appointment at the First Creditors' Meeting, representing the collective interests of the creditor body in accordance with the law; that the CRC, constituted outside this statutory process, is void and has no legal status and cannot override or duplicate the mandate of the legally recognised committee; that the DSP put forward sought to achieve its objective through the sale of assets, the same course of action that the liquidator is mandated to undertake; that since the DSP by CRC is similar to the proposal made by the Cytonn promoter to the former administrator and liquidator, the promoters and the faction of the creditors are colluding to frustrate the insolvency process.

68. We agree with the view expressed in ***Re Founder Information (Hong Kong) Ltd (HCCW 350/2020) [2021] HKCFI 311***, that:

> ***"[The court] is duty-bound, based on the material before it, to make orders that could breathe life into an ailing company."***

69. As rightly noted ***In re Tusker Mattresses Limited (Insolvency Cause***

E018 of 2020) [2021] KEHC 276 (KLR) (Commercial and Tax) (26 November 2021), when considering the viability of a debt

restructuring plan, it must be supported by sufficient details and the court must weigh the views of the supporting creditors against the practical reality of whether a proposed restructuring is viable.

70. However, such proposals must be made within the law and must be plausible and viable proposals. In the ruling, the learned Judge found that she had carefully reviewed the proposals. In her view:

> ***"Having carefully reviewed the debt settlement proposal, I am inclined to agree with the Official Receiver that it is devoid of supporting documentation and substantive detail. It amounts to little more than a colourful presentation of hope, rather than a practical and actionable plan. The proposal is purportedly designed to achieve a 100% recovery of the principal debt through the sale of CHYS's assets; ironically, the very course of action the Official Receiver is already undertaking. Yet, the applicants oppose the Official Receiver's efforts and instead propose to take over the sale and distribution of assets themselves. This is a clear encroachment on the statutory responsibilities vested in the Official Receiver as the liquidator, responsibilities that cannot be lawfully assumed by any other party."***

71. The learned Judge concluded that:

> ***"the proposal is built on speculative assumptions, particularly regarding the appreciation of the subject properties' value over time and the eventual recovery of creditors' funds upon their sale. The plan also references the procurement of an investor who could purportedly buy out most of the creditors' investments, but it provides no specifics about***

who these potential investors might be or the feasibility of

> ***securing such investment. As was emphasized in In re Tusker Mattresses Limited, [2021] KEHC 276 (KLR), restructuring plans must include sufficient detail. The applicants' proposal falls far short of these requirements, rendering it impractical and incapable of providing a clear path forward."***

72. The above conclusion was based on the learned Judge's scrutiny of the DSP and on the findings of fact made thereafter. While we are cognisant of our role in a first appeal, this Court in ***Mohammed***

Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] KLR

661; [1986-1989] EA 183 held that:

> ***"The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."***

73. We are not satisfied that the learned Judge was guilty of any of the transgressions alluded to in the above case. Accordingly, this ground fails.

Whether creditor equality principle was violated.

74. On the issue of whether the learned Judge erred in fact and law by

violating the principle of creditor equality, the 1st, 2nd, 3rd and 6th relied on ***In re Tusker Mattresses Limited (Insolvency Cause E018 of***

2020) [2021] KEHC 276 (KLR), the court acknowledged that when balancing the wishes of creditors, the decision is often more commercial than legal. It was submitted that where creditors present conflicting views, Harris J, in ***Re Founder Information (Hong Kong)***

(Supra), referencing ***Re Chase on Development Ltd***, outlined key

considerations.

75. The 5th appellant's position on the matter was: that, as held in ***Re***

Tusker Mattresses Limited (2020) eKLR, a liquidation process must

adhere to the protections and due processes to ensure equitable treatment for all creditors and to safeguard the interests of the business; that a liquidation order without prior insolvency proceedings is done in contravention of the Act that since CHYS has a registered floating charge on Taraji, Applewood and the Ridge, the right of a holder of a floating charge created by debenture ranks in priority to creditors as held in ***Lochab Brothers v Kenya Furtural***

Co. Ltd (1983) EA; that if the vesting orderis allowed, it will

undermine the rights of preferential creditors by violating the statutory priority of charges, leading to inequitable treatment of creditors; that an equitable lien held by the homeowners who have

acquired the properties, ranks over the unsecured creditors as

indicated in ***Hewett v Court (1983) 149 CLR 639***; that the learned

Judge erred by improperly piercing the corporate veil and collapsing the liabilities of the SPVs into those of CHYS without sufficient evidence to justify such decision and contradicted the principle of corporate autonomy enunciated in ***Salomon v Salomon & Co. Ltd***

[1897] AC 22.

76. The Official Receiver's response was: that contrary to the appellants' claim, the learned Judge balanced interests of the parties and fostered Creditor Equality in her findings and was satisfied that the assets of the SPVs form part of the assets of CHYS and CPN as provided under ***Section 444*** of the Act; that there were conversions proposed and undertaken where some Creditors who had invested in CHYS or CPN were offered apartments/assets in the Alma and Riverrun which actions were contra-statute and prohibited as they confer a fraudulent and undue preference over some creditors yet all being unsecured, rank equally; that CIMP partners had no locus as their powers had ceased and their actions were not sanctioned by the court, the administrator or the creditor. In support of this position, the 1st respondent cited the case of ***Andrew Gregory (suing as Liquidator of and on behalf***

of East African Road Services Ltd (in liquidation) v Amerally

Rahemtulla Kassim-Lakha & 3 Others [2011] KLR and ***Re Modern***

***Retreading Company Ltd* [1967] EA 182** at 190 for the meaning and test

of fraudulent preference.

77. In our view, in determining Creditor Equality, the court must consider the matter holistically. The Court will therefore take into account all the circumstances including a qualitative assessment of the number of creditors for and against the liquidation, the reasons proffered by the supporting and opposing creditors and the feasibility of the proposed restructuring. In this case there were allegations that some Creditors who had invested in CHYS or CPN were offered apartments/assets in the Alma and Riverrun during the administration. In those circumstances and in order to protect all the creditors, it was only fair that the liquidator, pursuant to ***Section 444*** of the Act moves with speed to preserve the assets which in his view formed part of the properties that belonged to or in which CHYS and CPN had an interest. If it turned out during liquidation that the said properties or some of them were not properties CHYS and CPN were entitled to, then they would of course be released. However, the liquidator's action cannot be said to have amounted to violation of Creditor Equality principle. Elsewhere in this judgment, we have

found that the Act gives the court the power to issue a liquidation

order instead of an administration order and that this power is exercisable even where the court issued an administration order which has lapsed. We agree with the learned Judge that:

> ***"section 448(1)(b) of the Insolvency Act imposes a duty on the liquidator to collect, preserve, and apply the assets of the insolvent company toward the discharge of its liabilities. This process involves verifying ownership, tracing funds, and challenging claims to assets that are improperly or fraudulently withheld. By implication, assets not proven to belong to the liquidated company fall outside the liquidator's jurisdiction and cannot be included in the distribution process. This framework reflects the dual purpose of insolvency law: to maximize the recovery for creditors while respecting the legal rights of third parties."***

78. We find no merit in this ground.

Whether Learned Judge erred in stating that the administrator

concluded that recovery not possible

79. On whether the learned Judge erred by stating that the administrator had concluded that recovery was not possible, yet the administrator had put in an application to extend administration, it was submitted that the learned Judge's conclusion that the administrator had determined recovery was impossible, as alleged by the Official Receiver, is highly

exaggerated and misrepresents the administrator’s actual position.

80. According to the appellants, a careful reading of the administrator's report indicates that he proposed various recommendations in line with ***Section 522(1)*** of the Act, outlining alternative approaches to secure the best possible outcome for creditors. Furthermore, the learned Judge erred in stating that the administrator had reviewed and rejected the viability of the proposal. The only proposals presented to the administrator were those from the promoters of the distressed entities, not the creditors. Even then, the administrator did not conclude that the proposals were unviable, as suggested in the court's ruling.

81. In light of this background, the appellants submitted that the learned Judge's conclusion that the administrator deemed the proposal unviable is erroneous and based on a misrepresentation of facts.

82. We have considered the submissions made herein. In his detailed affidavit sworn on 5th October 2022 in the administrator, Kereto Marima deposed as follows:

> ***"I also developed a detailed Administrator's Statement of Proposals (the ASOPS) as required by the ISA, the same of which was circulated to all the known creditors. The ASOP set out the***

limitations that CHYS faced that would not allow for the rescue as a going concern to be met and why the orderly wind

down was the only objective…The reasons why rescue as a going concern was not a viable option are set out in the ASOP and FAQs. For the benefit of this Honourable Court, I summarise below: (i) No credible model was available at the time of the ASOP to be able to deal with the funding gaps as well as funding requirements going forward. This has not changed. (ii) CIM has passed a resolution to wind down the fund.
(iii) Clear and demonstrated lack of support from the creditors' body for CHYS to carry on. (iv) Business model of CHYS has been overtaken by events in the market and is no longer viable."

83. It was this opinion by the administrator that informed the court's decision to place CHYS and CPN under liquidations. The appellants have not adduced any credible evidence to show that the circumstances of CHYS have since changed. In the premises, we find no merit in this ground of appeal.

Whether the Learned Judge wrongly speculated that the

Official Receiver had been appointed the substantive liquidator

84. It was contended: that the learned Judge wrongly speculated that Mabeya, J. had appointed the Official Receiver as the substantive liquidator, yet failed to cite the specific statutory provision underpinning such an appointment; that the Act sets out a clear statutory basis for the appointment of a liquidator by the court;

that the absence of such a foundation in this case renders the purported

appointment of the Official Receiver void; that creditors should have

a say on who should deal with their investment property and how the insolvency process should be carried out; that denying them this opportunity is a grave legal omission that contravenes the broader insolvency framework which prioritizes creditor participation in the liquidation process.

85. According to the 4th appellant, ***Section 438*** of the Act dictates the functions and powers of the Official Receiver in relation to liquidation as stated in the case of ***Northern Rangelands Trading Limited v Alpha Fine Food Limited (2022) KEHC.*** According to ***Section 438***,

the Official Receiver, upon appointment as a liquidator, is required to either convene a meeting of creditors to facilitate the appointment of a liquidator in place of the Official Receiver or to formally gazette himself as the liquidator of the Insolvent entity. The Act provides for a mandatory timeline of 3 months within which the Official Receiver, being the interim court-appointed liquidator, shall notify the court and creditors of their decision to act as liquidator. The learned Judge failed to correctly interpret ***Section 438(5)(b)*** of the Act, which only empowers the Official

Receiver to act as a liquidator when no other liquidator has been appointed. This provision does not grant the

Official Receiver exclusive authority over all liquidation matters

because to do so would take away from all other private and public insolvency practitioners. Further, this interpretation effectively disregards the possibility of an independent liquidator, contrary to the broader framework of the Act, which envisages appointment of liquidators by the creditors. The appellants therefore submitted that the learned Judge's decision was based on a flawed interpretation of the statutory provisions governing liquidation.

86. In her ruling on the matter, the learned Judge expressed herself as hereunder:

> ***"In the present case, through the ruling of 6th January 2023, this court explicitly stated: "I hereby appoint the Official Receiver as the Liquidator of the Company." This appointment by the court was not made under section 437 of the Insolvency Act, which governs the appointment of provisional liquidators. This distinction reinforces the position that the Official Receiver was appointed as the substantive liquidator. Consequently, the Official Receiver was not obligated to convene a creditors' meeting to appoint another liquidator, as mandated by section 438 of the Insolvency Act."***

87. ***Section 441(1)*** of the Act provides that:

> ***If a liquidation order is made immediately on the appointment of an administrator ceasing to have effect, the Court may appoint as liquidator of the company the person whose appointment as administrator has ceased to have effect.***

88. In this case the learned Judge (Mabeya, J.) did not appoint the administrator as the liquidator of the company. Instead, he stated that:

> ***"Since the current Administrator has shown to be very accommodative to the promoters of CHYS to the detriment of the Creditors, I hereby appoint the Official Receiver as the Liquidator of the Company. The Administrator to forthwith surrender to the Official Receiver all the properties and belongings of CHYS as well as the documents relating to the Administration. The properties set out in the Motion dated 19/5/2022 are hereby ordered to be preserved until the Liquidation is concluded."***

89. The learned Judge was well aware that he had the power to appoint the Official Receiver as a provisional liquidator. He did not do so. Instead, he not only appointed the Official Receiver the liquidator but directed that all properties belonging to CHYS be surrendered to the Official Receiver and that the said properties be preserved until the liquidation is concluded. In our view, liquidation that is ordered by the Court on own motion is different from that pursuant to an application. Where it is ordered by the Court on own motion the orders must be taken on their face value and where one is in doubt the approach is not to give the order a party's own interpretation, but to approach the court for clarity. In

our view the order was clear that the

Official Receiver was the liquidator and must be treated as such.

90. Accordingly, this ground of appeal fails.

Whether the Learned Judge failed to address the procedural breaches by the Official Receiver

91. The procedural errors committed by the Official Receiver, according to the appellants were: the failure to give notice and explanation to both the creditors and the court of its decision before the end of three months on whether it decided to exercise its power to convene a meeting contrary to ***Section 723(2)*** of the Act which mandates the liquidator to notify all the creditors of key steps taken in the liquidation process; the failure to hold a duly convened creditors' meeting to seek their views on the conduct of the insolvency, contrary to the holding in ***Re Kenyon Limited (Under Liquidation) [2022] KEHC 13753 (KLR);*** entering into consent agreements without the knowledge or approval of the creditor body, with terms that were detrimental to the creditors; and obtaining vesting orders over the assets owned by the SPVs without consulting either the Creditors Committee or the Creditor body at large.

92. The High Court was faulted for its failure to undertake its mandate pursuant to ***Section 432*** of the Act, to supervise liquidation of companies to ensure adherence to the Act.

93. As regards the consent and vesting order, the Official Receiver cannot be faulted since the consent and the vesting order were effected after court gave its seal of approval. Unless the approval by the court is successfully challenged, they cannot be faulted. The learned Judge considered the alleged procedural shortcomings on the part of the Official Receiver and found that:

> ***"I note that the Official Receiver has provided evidence demonstrating compliance with the statutory requirements for the role as liquidator. Specifically, it has been shown that a notice of appointment as liquidator was published in the Kenya Gazette; that a notice for the first creditors' meeting held on 7th March 2023 was issued; and that the Official Receiver has been regularly updating the creditors on the progress of the liquidation process."***

94. These were sound findings of fact and we have not been given any justification to interfere therewith.

Whether the Learned Judge erred in assuming that the financing agreements committing CHYS to lend money to SPVs were evidence of the amount lent.

95. It was submitted by the 5th appellants: that, based on ***National Bank***

of Kenya Ltd v Pipeplastic Samkolit (K) & Samson Ongeri (2001)

eKLR, ***Fidelity Commercial Bank v Kenya Grange Vehicles***

Limited (2013) eKLR and ***Pinnacle Projects Limited v PCEA Ngong***

(2017) eKLR, in a borrowing transaction, each party must comply with the conditions of the contract and that financing agreements are limited to the four corners of the contract; that however, a contract must be read as an integral whole and not as a series of isolated parts; that the amount indicated in the financing agreement was a draw down amount to be deposited into the project, subject to availability of funds; that the amounts have yet to become available and that pursuant to the agreement, the repayment was to be only upon the completion of the project; that the total amounts indicated in the financing agreements were never fully drawn as per the contract placing CHYS in breach of contract.

96. In our view, this issue was not expressly canvased before the learned Judge and no determination was made thereon. It cannot

be canvassed for the first time on appeal.

Whether the learned Judge erred by vesting the properties of

the SPVs with the Official Receiver

97. It was submitted on behalf of the 5th appellants: that the learned Judge erred by vesting the properties of the SPVs with the Official Receiver, despite compelling evidence that the funds advanced to the SPVs by CHYS were not the sole factor in the development of the properties and that other lenders, investors, joint venture partners and *bona fide* purchasers contributed to their acquisition and development; that the assumption that the SPVs are merely holders of the properties expose the businesses run by the SPVs to the risk of collapsing if taken over by the Official Receiver .

98. The 5th appellants contended: that the overarching objective of preservation orders, as defined in ***Waithaka & 2 Others v Waithaka: Kariti (interested party) (2023) eKLR***, is to ensure that

at the time of execution of a current or future judgment, the asset that is subject of the suit has not been dissipated but, as stated in ***Cheparwasi Ibrahim & 8 Others v Christopher Laptia & Another***

(2021) eKLR, do not confer any rights or privileges with regard to

the property; that in case of highly liquid asset such as land and motor

vehicles, the preservation orders are issued only to preclude the

transfer of the assets as stated in ***Republic v Asset Recovery Agency and Land Registrar Thika [2021] eKLR***; that in this case the preservation orders are injunctive in nature preventing the respondent from transferring the property as was stated in ***Rose Njeri Ndegwa v Samuel Sobi Misingu [2019] eKLR***; that in that case, the respondent retains all residual proprietary right and continues dealing with the property and deriving earnings from it since the order is meant to maintain the *status quo* was established in ***CMC Holdings Limited & Another v Jaguar Land Rover Exports Limited [2013] eKLR*** and ***Embrose Academy Limited v Catholic Arch-Diocese of Nairobi (Trustees Registered) & 4 Others (2013) eKLR***.; that the learned Judge erroneously construed the preservation orders to grant proprietary rights to the 1st respondent without any legal basis as that was not the intention of Mabeya, J. who appointed the 1st respondent as the liquidator for CHYS; that accordingly, the

powers and duties of the 1st respondent were limited to the assets of CHYS in accordance with ***section 444*** of the Act; that the assets included in the 1st respondent's application seeking enforcement of preservation orders belong to solvent entities which were not the subject of any liquidation proceedings; and that the enforcement of the orders in their current

form would not only contravene the intent of the court, common law jurisprudence and statutory provisions, but also irretrievably undermine the rights of the parties involved.

99. Linked to this ground was the submission by the 7th appellant: that the preservation orders issued on 6th January 2023 were premised on the erroneous assumption that all assets linked to the SPVs automatically form part of CHYS LLP's liquidation estate, thus ignoring the separate legal identities of the SPVs as well as the appellant's registered secured interests; and that the High Court's reliance on the doctrine of tracing without concrete evidence of fraud or commingling of funds (as required under ***Middle East Bank Kenya Ltd v Widad Hussein Badru [2020] KEHC 9755***) renders the preservation orders speculative and unjust since preservation orders must be narrowly tailored to specific assets proven to belong to the insolvent entity, not blanket directives covering third-party properties.

100. In responding to this ground, the 1st respondent submitted: that although funds were advanced to the SPVs via agreements

entered into between them and Cytonn High Yields Solutions LLP (CHYS) and Cytonn Real Estate Project Notes LLP (CPN), no security was provided

to CHYS and CPN as required by the financing agreements; that there was frustration owing to non-repayment of funds, despite issuance of demand notices; that had the court not ordered the preservation of the assets held by the SPVs, it would have been tantamount to abetting fraud upon the investors, as the financing agreements were merely conduits for the SPVs to siphon money from CHYS and CPN; that the High Court relied on the direct correlation between the SPVs, CHYS and CPN towards the purchase of the properties and the common law doctrine of tracing to find that the assets held in the names of the SPVs shall form part of the assets claimed by CHYS and CPN; and that the SPVs as borrowers were obligated under the Financing Agreements to create legal charges against their assets for the benefit of CHYC and the Creditors, which was not done.

101. According to the 1st respondent: the right to own property is not absolute. In this case, since all assets in the names of the SPVs were acquired through proceeds obtained from CHYS and CPN, the two entities are entitled to those assets, as it is admitted by the promoters that money was channelled to the various SPVs: in those circumstances, the appellants' rights under Article 40 of

the

Constitution was not undermined by the court since the rights of the

appellants do not supersede the rights of the creditors whose funds were utilised to purchase the projects/assets; 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 and vesting the assets with the Official Receiver for the benefit of the creditors during liquidation process in compliance with Sections 444 and 445 of the Act; that directing the preservation of the assets was rational as the Official Receiver is a neutral party that acts for the company on behalf of the entire body of creditors; that in ***Re***

***HLC Environmental Projects Ltd* [2007] EWCA**, the court found that

the issuance of preservation and vesting orders was not only lawful but indispensable, serving to prevent assets dissipation; that such orders ate squarely aligned with the liquidator's statutory duty to gather, manage and distribute the insolvent estate in a manner that ensures equitable treatment of all creditors; that the High Court, having considered all evidence, was justified in issuing the vesting, preservation and enforcement orders to protect the assets for the benefit of all Creditors.

102. We have considered the submissions made in respect of this ground

of appeal.

103. ***Section 444*** of the 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 <u>or appears to be entitled</u>***. [Underlining ours]

104. Our understanding of the above provision is that upon appointment, the liquidator is mandated to take control of, not only the property to which the company is entitled but also those properties to which the company appears to be entitled. In the latter case, of course, those who claim that the property in question does not belong to the company are at liberty to place their objections. Such objections are to be placed with the liquidator, with the claimant adducing evidence on the basis of which the claim is made.

105. In this case, the history of these proceedings reveals that on 6th January 2023, the court placed CHYS and CPN under liquidation. Before then, the said entities were, on an application made by their promoters, Cytonn Investments Management Plc (CIMP) and Edwin Harold Dayan Dande, placed under administration. The administration did not yield any positive results and hence the

liquidation. In the application for administration the SPVs were

identified as the ones to whom the two entities had advanced the money collected from the investing public. Whereas the said sum was lent out to the SPVs, registered by CIMP and Dande, on the understanding that the SPVs would register legal charges on their properties in favour of CHYS and CPN, that was not done.

106. In the foregoing circumstances, we find that the Official Receiver was entitled to take the view that the properties of SPVs were acquired with the sum advanced to them by CHYS and CPN. While it may well be true that the SPVs relied on finances received from elsewhere, that is an issue that can be dealt with in the process of liquidation. It was upon the SPVs and their financiers to prove that part of the assets acquired by them were as a result of contributions by third parties, either wholly or in part. It cannot be a ground for faulting the decision to vest the properties of the SPVs in the 1st respondent for the purposes of their preservation, pending either distribution to the creditors or release of whatever portion is found not to belong to the two entities, based on the evidence adduced. The learned Judge was alive to this fact when she expressed herself as hereunder:

"The SPVs have yet to demonstrate that the subject

projects are independent of the funds received from

CHYS's creditors. Furthermore, CHYS's influence over the SPVs, exercised through its CEO, Edwin Dande, remains unbroken. Significant concerns persist regarding whether the SPVs were deliberately structured as part of a broader scheme to obscure the location of creditor funds and frustrate recovery efforts. With these unresolved issues, the SPVs cannot rely on the doctrines of corporate separateness or privity of contract to shield themselves from scrutiny. They must move beyond these protective legal constructs and provide transparent answers to the creditors' questions. Such accountability cannot be achieved if the preserved properties remain under the control of CHYS, the SPVs, or their managers. It is therefore my finding that lifting or varying the preservation orders, as well as exempting the properties in question from the liquidation process, which is intended to benefit the creditors as a whole, would significantly undermine the realization efforts being carried out by the Official Receiver. Such actions would further exacerbate an already precarious situation, potentially leaving creditors unable to recover their investments. For these reasons, I find that the SPVs have failed to provide any valid or justifiable grounds for the court to lift, vary, or set aside the preservation orders issued on 6th January 2023."

107. We agree that the issuance of preservation and vesting orders are aligned with the liquidator's statutory duty to gather, manage and distribute the insolvent estate in a manner that ensures equitable treatment of all creditors. The management of assets necessarily requires that the liquidators take over the activities of the property in question so as to ensure that it is managed in the best interest

of all the creditors. We do not agree that the liquidator's duty is to simply

preserve the legal status of the property but that he cannot take over the management of the business being undertaken therein. To do so would mean that the assets under liquidation would not be fully under the control and management of the liquidator. This is in line with section 444 of the Act. Section 445, gives power to the court to vest property on the liquidator and provides that:

> ***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.***

108. We find no reason to disturb the said finding and find this ground unmerited.

<u>Whether the liquidation order was improperly issued</u>

109. The 8th appellant's challenge to the ruling was based on the fact: that the learned Judge failed to appreciate that the orders of liquidation could not be issued under ***Section 533*** as read with ***Section 426*** of the Act as the grounds enumerated under ***Section 426 (1) (a), (b), (c), and (d)*** of the Act were not met. Therefore, the liquidation order could not have been made in the public interest, as was purportedly done; that the trial court failed

to acknowledge that a commercial dispute

between debtors and creditors is not a matter of public interest and

that insolvency proceedings confer rights *in personam,* enforceable through legal action under the Act; that since the dispute does not affect all members of the public, but only creditors who lent money to CHYS, there was no justification for the superior court to issue a liquidation order in the public interest; that liquidation order issued improperly on the grounds of public interest did not conform to the constitution, as the same was issued by judicial craft. To that extent, the superior court erred in failing to lift, vary or set it aside.

110. The 1st respondent reiterated the fact that the two entities were placed under administration on the application of their promoters and that upon the appointment of the administrator and based on his report that they could not be rescued as going concerns as there was no credible funding model available, they were placed under liquidation, the official liquidator being appointed as the liquidator. According to the 1st respondent, these actions were done pursuant to Sections 426 and 533 of the Act. It was noted that since the two entities were still financially distressed and unable to pay their liabilities, it would be imprudent to set aside the liquidation order.

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

1. On hearing an application for an administration order in respect of a company, the Court may—

(a) make the administration order sought;

(b) dismiss the application;

(c) adjourn the hearing conditionally or unconditionally;

(d) make an interim order;

(e) treat the application as a liquidation application and make any order that the Court could make under section 426;

(f) make any other order that the Court considers appropriate.

2. An appointment of an administrator by an administration order takes effect—

(a) at a time specified in the order; or

(b) if no time is specified, when the order is made.

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

(a) restrict the exercise of a power of the directors or the company;

(b) make provision conferring a discretion on the Court or on a person qualified to act as an insolvency; or

(c) do either of those things.

112. It is clear to us that the court's power, when an application is made for the termination of the administration, as was made in this case, include the powers to make appropriate orders in the circumstances. Such powers must include the power to direct that instead of continuing with administration, where it is clear as was the case in this matter, that the administration would not achieve its intended purpose, to treat the application for administration as that of liquidation. Where the prescribed period for administration has lapsed and it is intended to extend the same, as was the

position, the court

will consider it as a fresh application in which event, it could, properly, issue a liquidation order instead.

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

114. It is our finding that the liquidation order was made under section

533 and not under section 426 as contended by the appellants.

Accordingly, this ground of appeal fails.

115. 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.

116. 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.