

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**IN NO. E106 OF 2025**

**IN THE MATTER OF MOUNT KENYA BREWERIES**

**LIMITED (IN ADMINISTRATION)**

**CAESAR NGIGE WANJAO.....**

**.....1<sup>ST</sup> APPLICANT**

**SALOMON WAHOME**

**MUTEITHIA.....2<sup>ND</sup> APPLICANT**

**MARY MUTHONI**

**NJOGU.....3<sup>RD</sup>**

**APPLICANT**

**VERSUS**

**OFFICIAL**

**RECEIVER.....1<sup>ST</sup>**

**RESPONDENT**

**KENYA DEPOSIT**

**CORPORATION.....2<sup>ND</sup> RESPONDENT**

## **RULING**

### **Directors' duty in insolvency**

1. There are two applications before the court.
2. The first application by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants is a notice of motion dated 5.12.2025. In essence, the applicants seek an order to set aside **Tender no. BRS/OR/OT/004/2025-2026** issued by the official receiver inviting bids for purchase of the company's assets.
3. The second application by the official receiver is a notice of motion dated 18.12.2025 seeking the setting aside or variation of the interim orders issued on 8.12.2025
4. The orders of 8.12.2025 read in part: -

**“2. THAT grave allegations of violation of statutory duties have been made against the administrator. Thus, on prima facie basis, and for the benefit of all creditors, the tender in question to sell the company's land, buildings, machinery and**

**equipments is temporarily stopped until the application is heard on 4.2.26.**

5. On 19.12.2025, the court directed that the second application be treated as a reply to the first application.

### **Applicants' case**

6. The first application is supported by the affidavits sworn by the 1<sup>st</sup> applicant on 5.12.2025 and 2.2.2026.

7. The applicants' gravamen is that the official receiver has advertised a tender and opened bids for sale of the company's assets at grossly undervalued reserve price without any professional valuation, transparency or notification to the company's directors, shareholders and directors.

8. The applicants contend that the official receiver was appointed as the administrator and is bound by **section 522 of the Insolvency Act** yet its acts show that it has convened into a liquidator

without issuing the required proposal nor convening a creditor's meeting.

9.The applicants contend that the official receiver has not prepared and circulated an administrative proposal to the company's members and creditors as required under **sections 588 and 566 of the Insolvency Act**. They also contend that no meetings have been convened to approve or discuss the intended sale of company assets as required under section **566 and 567 of the Act**.

10.The applicants state that the continued removal and disposal of the assets if not restrained, will cause irreparable harm, compromise the company's, shareholders, creditors and other stakeholders' interests.

### **Official Receiver's Response**

11.The second application is supported by the affidavit sworn by **Sylvia Githungo** on 18.12.2025.

12.The official receiver stated that: -

(1) The company was placed under administration on 7.6.2025 and it was appointed as administrator of the company.

(2)The appointment was made by the **Kenya Development Corporation**, the holder of a qualifying floating charge, upon default by the company to repay its obligations and pursuant to the provisions of **Section 534 of the Insolvency Act**.

(3)After the appointment, it issued the relevant notices in the *Daily Nation* Newspaper and the Kenya Gazette in accordance with the provisions of the Insolvency Act.

(4)The administrator undertook a site visit of the company on 24.7.2025 with the aim of assessing the status of the assets. It established that prior to its appointment, the company was vandalized and its assets stripped. There was a disparity in the value of the assets as of 28.6.2024 when the secured creditor commissioned a valuer to undertake a valuation of the premises and the value of the assets as of 25.8.2025 from the valuation conducted by the administrator's representative.

(5) It became apparent that it was no longer feasible to maintain the company as a going concern without significant capital injection. Therefore, in its opinion, there was no reason to convene an initial creditor's meeting.

(6) By dint of **section 587 of the Insolvency Act**, it resolved to dispose of the company's assets for the benefit of the creditors. It then floated the subject tender and advertised it in the Daily Nation Newspaper, the Government Procurement Portal and the Business Registration Service (BRS) website on 26.11.2025.

### **Submissions**

13. The applicants filed written submissions dated 26.2.2026.

14. The applicants relied on **sections 522, 585 and 590 of the Insolvency Act** to assert that the official receiver erred by not involving them in the valuation and conducting it unilaterally.

15. The applicants also relied on **sections 585 and 590 of the Insolvency Act** to assert that there is credible evidence that several assets forming part

of the charged and debentured property were removed and interfered with under the official receiver's watch.

16.The applicants submitted that they have met the threshold for the grant of an injunction.

17.The applicants relied on: -

**(1)Shah v Gadhoke; SMP Capital Limited (Creditor) (Insolvency Cause E017 of 2021) [2023] KEHC 25088 (KLR) (Commercial and Tax) (10 November 2023) (Ruling)**

**(2)In re Nakumatt Holdings Limited [2017] eKLR**

**(3)Giella v Cassman Brown & Co. Ltd [1973] EA 358**

**(4)Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**

**(5)Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 Others (Insolvency Petition E004) [2021] eKLR**

### **Analysis and Determination**

18.The issue is whether the application is merited.

19. On 5.12.2025, the court gave the following directions: -

**“3. THAT the application be served and the administrator to file and serve replies within 21 days of service. The replies to provide detailed account of execution of the administrator's mandate including meetings convened, assets sold with full details thereof, circumstances of the tender and its foundation, reports made to the court, amongst other things.”**

20. The administrator produced the following: -

- (1) Notice of Appointment of Administrator issued in the Daily Nation and the Kenya Gazette.
- (2) A copy of the takeover report following the site visit of 24.7.2025.
- (3) Valuation reports dated 28.7.2024 and 25.8.2025.
- (4) Administrator's report and proposal
- (5) Copy of Tender Notice
- (6) Copies of correspondence requesting the statement of financial position.

21.The company was placed under administration on 7.6.2026 by **Kenya Development Corporation**, holder of a qualifying floating charge for Kshs. 90,100,000/-. The administrator exhibited a copy of the certificate of mortgage. The reason for placing the company under administration is its default in repayment obligations which ceased sometime in 2019.

### **Notice of Appointment**

22.After appointment, the administrator issued notice dated 9.7.2025 of its appointment as the administrator of the company published on 28.7.2025 in the Daily Nation and on 19.9.2025 in the Kenya Gazette.

### **Site visit 24.7.2025**

23.The site visit of 24.7.2025 marked the administrator's assumption of control of the company's premises and property. The official receiver exhibited the takeover report dated 28.7.2025.

24.The official receiver indicated that during the site visit, its representatives were accompanied by two officers from the 2<sup>nd</sup> respondent, two police officers from Nanyuki Police Station. Upon arrival, they found two guards manning the property. They informed the guards that the administrator had taken charge of the company following administration. They discharged them from duty and installed their security team consisting of 4 guards, a guard dog and a dog handler.

25.The takeover report indicates that the buildings including the office, staff quarters, ablution block and three go-downs which housed the factory were vandalized.

26.The takeover report contains a list of inventories. It also contains pictures of the buildings on the premises. Some of the buildings have been destructed.

27.The takeover report indicates that the status of machines was not ascertained since they were not tested as there was no power on site.

28.The official receiver indicated that it deduced that the vandalism happened between 24.7.2025 when

it took over and 28.6.2024 when the 2<sup>nd</sup> respondent commissioned a valuer to undertake a valuation of the premises.

### **Valuation inspection of 1.8.2025**

29.The official receiver exhibited a valuation report dated 25.8.2025 by **Opti Real Consultants Limited** showing an open market value of Kshs. 50,000,000/-.

30.The applicants complained that the administrator conducted the valuation unilaterally without their involvement.

### **Valuation inspection of 27.6.2026**

31.**Fahari Valuers Limited** conducted a valuation inspection of the premises on 27.6.2026 following instructions by the 2<sup>nd</sup> respondent issued on 25.6.2024. According to the firm, the open market value of the property was Kshs. 69,000,000/-.

### **Notice of Appointment and Statement of Financial Position 19.8.2025**

32.The applicants contended that neither the administrator or the 2<sup>nd</sup> respondent served a

statutory notice of appointment upon them and that they never demanded a statement of affairs within 14 days or engaged them at all contrary to **sections 534, 536, 560 (1) and 589 of the Insolvency Act.**

33.The administrator indicated that the applicants failed to comply with its request for the company's statement of financial position.

34.It exhibited a letter dated 19.8.2025 to the company's directors indicating that it had been appointed as administrator and asking for a statement of financial position. It also exhibited email correspondence following up the statement.

35.**Section 563** requires notice to be given as soon as practicable after appointment, not within a rigid prescribed number of days. The evidence of the notification letter and subsequent correspondence requesting the company's financial position demonstrates substantial compliance with the statutory requirement, and the applicants have not shown prejudice arising from any alleged delay.

### **Vandalism and Asset Stripping**

36.The administrator claimed that it deduced that the vandalism and asset stripping occurred between 28.6.2024 when the secured creditor commissioned a valuer to undertake a valuation of the premises and 24.7.2025 when it took over. It relied on the valuation reports from valuations conducted on 28.6.2024 and 25.8.2025.

37.On the other hand, the applicants contended that the vandalism and asset stripping occurred during the administrator's watch over the company's properties.

38.The applicants did not avail any evidence such as police reports to show that the vandalism and asset stripping occurred after the administrator had taken over the premises.

39.The evidence from the takeover report is that the buildings had been destroyed prior to the takeover date.

40.Therefore, the applicants have failed to establish their claim in this regard.

### **Initial creditors meeting**

41.The applicants faulted the administrator for not calling an initial creditors meeting.

42. The administrator relied on **Section 569 (2) of the Insolvency Act** to assert that it was not required to call for initial creditors meeting as it became apparent after its appointment that it was no longer feasible to maintain the company as a going concern without significant capital injection. Its findings were that as of 18.12.2025, the company's known liabilities are Kshs. 5,371,097,850.51/- against a valuation of the company's assets of Kshs. 50,000,000/-. It stated that it had already incurred costs of administration and continues to incur monthly expenses of Kshs. 200,000/- to cover costs of preserving and safeguarding the company's premises.

43. **Section 569 of the Insolvency Act** provides for the instances when the administrator is not required to call for an initial creditors meeting. This includes (b) where the company has insufficient property to enable a distribution to be made to unsecured creditors otherwise than in accordance with section 474(2)(a).

### **Administrator's Proposal**

44.The applicants complained that the administrator has not prepared and circulated an administrative proposal to the company's members and creditors as required under **sections 588 and 566 of the Insolvency Act.**

45.The administrator produced a report and proposal dated 5.8.2025.

46.Sections 566(4)-(5) require sending the proposals to every known creditor, and every member of the company. Compliance is required as soon as is reasonably practicable after the company enters administration, in any case, not later than 60 days.

47.The administrator was appointed on 7.6.2025. The proposal is dated 5.8.2025, within the 60 days statutory window.

48.However, there is no evidence that the proposal was circulated to the creditors and members as required. The Act allows the administrator to decide whether an initial creditor's meeting is necessary. However, the circulation of the proposal is still necessary where it elects that an initial creditor's meeting is not necessary.

49. Under **section 522 of the Act**, the administrator has to carry out its functions in the interests of the company's creditors as a whole.

### **Power to dispose of charged property**

50. The applicants faulted the administrator for advertising a tender and opened bids for sale of the company's assets at grossly undervalued reserve price without any professional valuation, transparency or notification to the company's directors, shareholders and directors.

51. The applicants further faulted the administrator for allowing the removal of company's assets from the premises without lawful justification, authority and without compliance with mandatory procedures.

52. The administrator retorted that since it was no longer feasible to maintain the company as a going concern, it resolved to dispose the company's assets for the benefit of creditors. It relied on **section 587 of the Insolvency Act** which states: -

***“587. Power of administrator to dispose of, and deal with, charged property:***

***floating charge***

***(1) The administrator of a company may dispose of, or take action relating to, property that is subject to a floating charge as if it were not subject to the charge.***

***(2) If property is disposed of in reliance on subsection (1), the holder of the floating charge has the same priority in respect of acquired property as that holder had in respect of the property disposed of.***

***(3) In subsection (2), “acquired property” means property of the company that directly or indirectly represents the property disposed of.”***

**522. The objectives of administration**

**(1) The objectives of the administration of a company are the following—**

**(a) to maintain the company as a going concern;**

**(b) to achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);**

**(c) to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.**

**(2) Subject to subsection (4), the administrator of a company shall perform the administrator's functions in the interests of the company's creditors as a whole.**

**(3) The administrator shall perform the administrator's functions with the objective specified in subsection (1)(a) unless the administrator believes either—**

**(a) that it is not reasonably practicable to achieve that objective; or**

**(b) that the objective specified in subsection (1)(b) would achieve a**

**better result for the company's creditors as a whole.**

**(4) The administrator may perform the administrator's functions with the objective specified in subsection (1)(c) only if—**

**(a) the administrator believes that it is not reasonably practicable to achieve either of the objectives specified in subsection (1)(a) and (b); and**

**(b) the administrator does not unnecessarily harm the interests of the creditors of the company as a whole.**

53. In **Pine Care Limited & 2 others v Rao & 2 others [2024] KEHC 8192 (KLR)** the court affirmed that **Sections 580 to 587** quoted above expressly provides such power, and the power to deal with property which is the subject of a charge as if it were not subject to a charge.

54. Deference is given to a secured creditor.

55. However, the administrator's power to sell assets ought to be done in a manner that is transparent

hence the requirement to circulate the proposal to the creditors and the members.

## **Conclusion**

56. In conclusion, the court finds that the administrator has prepared proposals and valuations but failed to circulate proposals to creditors and members as required.

57. The court also finds that the applicants have not provided the administrator with the statement of financial position as required. The directors and shareholders should know that the company is in a mess during their watch. Thus, they bear the greatest duty to support measures that ensure the creditors are paid and the company gets out of the mess. They have no right to take a posture that prejudices the creditors or derives benefits to them at the expense of or before the creditors.

58. The court makes the following orders: -

**(1) The applicants are required to provide the administrator the statement of financial position verified by a statutory declaration within 14 days from the date of this ruling. The statement of financial**

**position should contain particulars of the company's assets, debts and liabilities, names and addresses of the company's creditors, securities held and dates when securities were given.**

**(2) The administrator is required to circulate the proposal to all the creditors and members of the company within 30 days from the date of this ruling.**

**(3) Time is of the essence.**

**(4) Directions on the proposed sale of the company assets shall be given on the next appointed date.**

**(5) Interim orders are extended until the next mention date. However, the applicants are also restrained from interfering with the working of the administrator or the company assets whatsoever. The administrator to secure the assets of the company.**

**Dated, signed and delivered at Nairobi through Microsoft Teams online application this 9<sup>th</sup> day of April, 2026**

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**F. Gikonyo M**

**Judge**

**In the presence of: -**

Kengere for Mwangi for Applicant

Ms. Githungo for Official Receiver

CA - Ivan/Aggrey