REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

INSOLVENCY PETITION NO. E068 OF 2025

BETWEEN

EQUITY BANK KENYA LTD .... APPLICANT

VERSUS

OFFICIAL RECEIVER .... 1ST RESPONDENT

NES POLY PACK LIMITED ...... 2ND RESPONDENT/APPLICANT

AND

PONANGIPALLI VENKATA RAMANA RAO

SWAROOP RAO PONANGIPALLI .... JOINT ADMINISTRATORS

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COMPOSITE RULING

Introduction and Background

1. It is regrettable that this matter is encumbered by no less than six (6) applications presently pending determination. Five of these, dated 6th November 2025, 26th November 2025, 28th November 2025,

10th December 2025, and 11th December 2025, have been filed by the 2nd Respondent (hereinafter referred to as "the Company"). The remaining application, dated 11th November 2025, has been brought by the Joint Administrators.

2. In response to the Joint Administrators' application, the Company filed its Grounds of Opposition dated 17th November 2025. The Joint Administrators filed a composite response to the Company's application through the affidavits sworn on 24th November 2025 and 18th December 2025. The Bank, for its part, responded specifically to the applications dated 26th November 2025 and 28th November 2025. The Company filed its composite submissions dated 14th January 2026, while the Joint Administrators' composite submissions are dated 6th February 2026.

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Analysis and Determination

3. Some of the prayers sought in the various applications appear to have been overtaken by events and are therefore spent. I have, however, distilled and identified the following issues as requiring determination by this Court:

i. Whether the suit herein is res subjudice to the suit filed in Nairobi HCCOMMMISC No. E854 of 2023

ii. Whether the Court order issued on 30th October 2025 authorizing the appointment of the Administrators over the Company should be set aside, reviewed and/or vacated;

iii. Whether the appointment of the said Administrators by the Respondent should be declared null and void for want of due process and violation of the Applicant's right to fair administrative action and for non-disclosure of material facts;

iv. Whether this Court should issue an order removing the Joint Administrators for being unqualified;

v. Whether the Bank should be ordered to deposit the sum of Kshs 5,000,000/= as security for the Company's Advocate's costs;

vi. Whether the Court should grant a restraining Order to protect the Joint Administrators against the directors of the Company and their agents from evicting

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the joint administrators, disrupting the operations of the Company, interfering with the functions of the joint administrators, carting away the goods and properties of the Company or in any other way interfering with the operations and business of the Company during the pendency of the Administration of the Company;

vii. *Whether this Court should review and set aside the ex-parte Court order issued on 7th November 2025 ex debitio justitiae;*

viii. *Whether this Court should grant leave to the Company to institute legal proceedings against the Bank and against the Joint Administrators through the Firm of Maosa & Company Advocates.*

4. The issues identified above are interrelated and bear a cross-cutting effect. I will therefore address them collectively.

5. The ***Insolvency Act, 2015*** (hereinafter "the Act"), sets out with commendable clarity the framework governing the role, scope, and appointment of

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Administrators, as well as the administration process itself. Central to this framework is the unfettered right of a holder of a floating charge to appoint an Administrator, under ***Section 534(1) of the Act***. It provides that:

> ***"The holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the Company."***

6. ***Section 534*** embodies a clear legislative intention that cannot be overlooked. It confers upon the holder of a qualifying floating charge the right to summarily appoint an Administrator without being subjected to the other procedural rigours ordinarily required under the Act. This provision in my view, reflects Parliament's deliberate intention to preserve the strength of the floating charge as a security instrument, and ensure that secured creditors can act swiftly and decisively in the event of default, while still operating within the broader framework and objectives of administration. This reasoning was affirmed in ***Re Arvind Engineering***

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Limited, [2019] eKLR *(*F. Tuiyott, J *as he then was)*.

7. The role of such an Administrator though appointed by a holder of a floating charge must be understood in light of the objectives of administration under the Act, which include rescuing the Company as a going concern, achieving a better result for creditors than immediate liquidation, and ensuring an orderly realization of assets.

8. Additionally, the right to appoint an Administrator under ***Section 534(1)*** is not contingent upon the borrower's consent, and the mere dissatisfaction of the borrower with the appointed Administrator is not a sufficient ground for removal. The court's inquiry is limited to confirming that there has been a default under the terms of the Debenture, that the Administrator appointed is a duly qualified Insolvency Practitioner, that the procedural requirements under ***Section 534*** have been complied with, and that the administration process is conducted within the statutory framework.

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9. In addition, as held in ***Re Arvind*** (supra), the court must satisfy itself that the character of the Debenture allows the appointment of an Administrator under ***Section 543(2) of the Act***.

10. Turning to the specific issues raised by the parties, it is imperative that the question of *res sub judice* be addressed at the outset, since the Court's finding on this point will inevitably bear upon the determination of the other issues. The doctrine of *sub judice* is codified under ***Section 6 of the Civil Procedure Act*** and has been the subject of extensive judicial pronouncement. Mativo J. *(as he then was)* examined the concept in ***Republic V Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya, [2020] eKLR***, where he observed as follows:

> ***"…. There exists the concept of subjudice which in latin means "under judgment." It denotes that a matter is being considered by a court or judge. The concept of subjudice that where an issue is pending in a court of law for adjudication between the same***

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> ***parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage."***

11. The Company contends that there exists another suit between the parties touching on the same disputed debt. It is nonetheless troubling that the only pleading placed before this Court in respect of the alleged pending matter, being **HCCOMMISC E843 of 2023**, is a Notice to Produce. That pleading adds little, if anything, towards establishing the Company's averment that the present proceedings are barred, particularly since the assertion has been expressly denied by the Bank.

12. The burden lay squarely upon the Company to demonstrate that the dispute in **HCCOMMISC E843 of 2023** involves the same parties or their privies and relates to the same subject matter. In

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the absence of such proof, the assertion cannot stand and must fail.

13. The Company also seeks to have an order allegedly issued on 30th October 2025, which authorized the appointment of the Joint Administrators, set aside, reviewed, and/or vacated. It further prays that the said orders be nullified on grounds of want of due process and alleged non-disclosure of material facts by the Bank. In addition, the Company contends that the appointment of the Joint Administrators was contrary to statute and in breach of ***Sections 534, 537, and 538 of the Insolvency Act***.

14. In response to the claims advanced by the Company, the Joint Administrators maintain that the Bank is the holder of a Debenture dated 6th March 2019 for the sum of Kshs. 100,000,000/= over all the assets of the Company, as well as a Further Debenture dated 8th June 2021 for the sum of Kshs. 93,000,000/=, equally secured over all the assets of the Company. They contend that their appointment was pursuant to **Clause 18.1.1** of

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the said Debentures, following the Company's default in meeting its loan obligations.

15. The Joint Administrators deny that their appointment was contrary to statute. On the contrary, they assert that no Administration Order was ever sought from this Court, nor was any such order issued on 30th October 2025 that could be stayed, given that these proceedings had not yet been instituted at that time.

16. The Joint Administrators further argue that neither the Insolvency Act nor the Debentures impose any obligation upon the Bank to notify the Company of its intention to appoint an Administrator under ***Section 537 of the Insolvency Act***. They also contend that they are complete strangers to **HCCOMMISC E843 of 2023** and, to the best of their knowledge, no Orders were issued in that matter restraining or otherwise prohibiting the appointment of Administrators.

17. The record confirms that this matter was commenced by the Bank on 5th November 2025 pursuant to ***Section 537 of the Insolvency Act***,

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wherein the Bank duly notified this Court of the appointment of the Joint Administrators as required by the Act. Contemporaneously with that notification, the Bank filed the application dated 6th November 2025, in which this Court (Mongare, J.) allowed prayer 2, thereby restraining the directors of the Company from evicting the Joint Administrators or otherwise interfering with the administration pending the hearing and determination of the application.

18. These orders, being the very first issued in this cause, make it abundantly clear that the assertion of an Administration Order having been issued by this Court on 30th October 2025 is unfounded and cannot be true.

19. On the contrary, from my reading of the pleadings, it is evident that the administration process in this matter was not court-sanctioned. The Joint Administrators have placed before this Court the Debenture dated 6th March 2019 and the Further Debenture dated 8th June 2021, both duly executed by the Bank and the Company.

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20. Jurisprudence is well settled that parties are bound by the bargains into which they freely enter, and it is not the province of the Court to rewrite or interfere with such contractual arrangements. This principle was aptly stated in ***National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] eKLR***, where the Court of Appeal emphasized that the role of the Court is to enforce contracts as made, save where vitiating factors are established. Accordingly, the two Debentures are binding upon the parties.

21. The Bank's right to appoint an Administrator(s) is expressly conferred by **Clause 18** of the Debentures. For the avoidance of doubt, the clause provides, in part, as follows:

> ***"Appointment of an Administrator***
>
> ***18.1 At any time after the moneys secured by this Deed become payable either as a result of lawful demand made by the Bank or under the provisions of Clause 17 of this Deed or if requested by***

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the Company and so that no delay or waiver of its rights to exercise the powers conferred by this Deed shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law, the Bank may, in writing under the hand of any of its officers or attorneys or under its common seal:-

18.1.1. ***Appoint or apply for the appointment of any person who is appropriately qualified as Administrator of the Company pursuant to the provisions of the Insolvency Act. Where more than one Administrator is appointed, the Administrators shall have power to act severally***

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> ***unless the Bank shall specify otherwise in their appointment; …***
>
> *18.2.* ***Any appointment under this Clause 18 shall take effect, in accordance with Sections 537 and 538 of the Insolvency Act.***
>
> *18.3.* ***The Bank may, pursuant to Section 608 of the Insolvency Act, replace an Administrator appointed pursuant to Clause 18.1 above."***

22. Having already set out the law governing the appointment of Administrators by holders of a floating charge, it is clear from the statutory notices produced by the Bank and the Joint Administrators that demands were issued to the Company in respect of an outstanding debt amounting to Kshs. 210,864,777.97 as at 2nd August 2024. No evidence has been tendered to demonstrate that this debt has been settled. In those circumstances, the default triggered the

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operation of **Clause 18** of the Debentures, thereby entitling the Bank to appoint the Joint Administrators.

23. The Company has sought to argue that the debt is disputed. However, such a bare assertion, without cogent evidence, cannot of itself forestall the administration process. Even if it were ultimately established that the debt owed to the Bank was less than the amount claimed, that finding would not invalidate the appointment of the Administrators. My view is that the right to appoint arises upon default, not upon the precise quantification of the debt.

24. The Company further contends that the Joint Administrators were unqualified Insolvency Practitioners at the time of their appointment and therefore ought not to have been appointed, and should consequently be removed. It further alleges that the Joint Administrators lack any demonstrable track record in reviving companies and possess no expertise in the Company's line of business. These assertions are, however, vehemently denied by the Joint Administrators.

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25. In support of its position, the Company annexed the license of Swaroop Rao Ponangipalli, one of the Joint Administrators, effective from 1st November 2025. In response, the Joint Administrators produced the Insolvency Practitioner's license issued to Mr. Ponangipalli on 29th October 2024, valid for the 12-month period commencing 1st November 2024 and expiring on 31st October 2025. The subsequent license relied upon by the Company took effect from 1st November 2025, which is a clear indication that there was no gap in the Administrator's license. Similarly, the license of Ponnangipalli Venkata Ramana Rao covering the period in question was also produced.

26. With respect to the Company's contention regarding the alleged lack of competence of the Joint Administrators, the averment that they have no track record or expertise is wholly unsubstantiated. The qualifications for appointment as an Insolvency Practitioner are clearly set out under ***Section 6 of the Insolvency Act*** and ***Regulation 11 of the Insolvency Regulations***. The fact that the Joint

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Administrators hold valid licenses to practice as Insolvency Practitioners creates, on the face of it, a presumption of competence and qualification. No evidence has been placed before this Court to rebut that presumption, nor has any complaint been shown to have been lodged with the Official Receiver regarding their alleged lack of expertise.

27. In any event, I am mindful of the statutory power vested in an Administrator to retain the services of professionals whenever necessary, so as to ensure that the business is managed optimally and in the best interests of creditors and stakeholders. Consequently, the Company's justification that it stands to lose potential business opportunities on account of the Administrators' lack of expertise cannot be sustained. That contention falls by the wayside.

28. The Company seeks leave to sue the Bank as well as the Joint Administrators. Having already determined the reasons in that application for which the Company seeks leave to sue, I do find that the application is spent. The aspect of security for costs to the Company's Advocates equally falls

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short of the threshold established in ***Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others, [2014] eKLR*.**

29. The Supreme Court laid down the principle that:

> ***"In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful."***

30. For the sake of finality on this aspect, I have not been told or shown that the Bank, which is the responsible for the appointment of the Joint Administrators is impecunious and unable to pay the costs in the event that the Court were to determine the matter in favour of the Company.

Disposition

31. Accordingly, and for the reasons stated hereinbefore:

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i. ***The applications dated 6th November 2025, 26th November 2025, 28th November 2025, 10th December 2025, and 11th December 2025 all filed by NES POLY PACK LIMITED, the 2nd Respondent, are hereby dismissed with costs.***

ii. ***The application dated 11th November 2025 filed by the Joint Administrators is hereby allowed.***

iii. ***Consequently, a restraining order is hereby issued to the effect that, during the pendency of the administration of the Company, the directors of Nes Poly Pack Limited (hereinafter "the Company"), together with their agents, employees, associates, or any other persons acting under their instructions, are restrained from evicting the Joint Administrators, disrupting the operations of the Company, interfering with the functions of the Joint Administrators, carting away the goods and property***

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of the Company, or in any other manner interfering with the operations and business of the Company.

iv. ***The Joint Administrators shall have the costs of their application.***

v. ***Any interim orders previously issued are hereby vacated.***

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *11TH* DAY OF *MAY 2026*.

F. MUGAMBI
JUDGE

Delivered in presence of:
Mbaji for the petitioner
Muhati for the respondent
Kithome for the joint administrators
Court Assistant: Lillian

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