



**Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited & 2 others
(Civil Appeal (Application) E415 of 2023) [2024] KECA 165 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 165 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E415 OF 2023
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
FEBRUARY 23, 2024**

BETWEEN

CAPE HOLDINGS LIMITED (UNDER ADMINISTRATION) APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED 1ST RESPONDENT

I&M BANK LIMITED 2ND RESPONDENT

REGISTRAR OF COMPANIES 3RD RESPONDENT

(An application against the Ruling of the High Court of Kenya (Commercial and Tax Division) at Nairobi (Mabeya, J.) dated 9th June 2023 in IC Cause E049 of 2021)

RULING

1. This is an application filed against the ruling and order of the High Court Commercial and Tax Division in Nairobi by Mabeya, J. dated 9th June 2023 in IC Cause E049 of 2021. By the said ruling and order, the applications for extension of the administration and termination of administration were all dismissed for having not met the threshold for granting the orders sought therein.
2. The ruling was in respect of two applications which had been consolidated. The 1st application dated 19th April 2022 was by 1st respondent. The application sought to terminate and or revoke the appointment of Ms. Vruti Shantilal as an administrator of the applicant. It further sought to lift or set aside the administration of the applicant. The 2nd application filed on the same date was by the Administrator. It sought the extension of the term of the Administrator for a further period of 12 months or any sufficient time to allow completion of the administration of the applicant and the appeals pending in this Court. After considering the two applications, the learned Judge held that the threshold for extending the administrator's term had not been met and consequently declined



- the application. As a result, the application for the removal of the administrator did not fall for consideration.
3. Being aggrieved by the said ruling, the applicant expressed its desire to appeal the decision by filing a notice of appeal dated 14th June, 2023. On the basis of the notice aforesaid, it filed the instant application pursuant to Articles 10 (2) (b) and 159 of the Constitution, sections 3A and 3B of the Appellate Jurisdiction Act, rule 5(2)(b) of the Court of Appeal Rules and section 594 of the Insolvency Act seeking orders that pending the hearing and determination of the intended appeal, the status quo ante prior to the delivery of the ruling by Mabeya, J. be reinstated forthwith and that there be an order extending the administration of the applicant.
 4. The application was premised on the grounds on its face and the affidavit of the administrator, Ms. Vruti Shantilal. It is the applicants' case that the deponent had been appointed as an administrator of the applicant by way of a notice of appointment dated 12th October 2021. Through an application dated 19th September 2022, the administrator sought the extension of the administration. However, the application was dismissed thereby provoking the instant application. On the arguability of the intended appeal, the applicant states that there were several pending appeals before this Court yet to be determined which the High Court failed to consider. That some appeals seek to determine the priority of rights between a debenture holder and unsecured creditor. That the learned Judge erred when he failed to find that public interest and supremacy of the law depended on the extension of the administration for the just determination of the pending appeals, hence offending the sub-judice rule and impacting on the applicant's right to have its appeals heard and determined on merits. That the learned Judge erred in failing to find that the administrator had taken active steps in carrying out the administration in a manner to secure the interests of all the creditors.
 5. On the nugatory aspect, the applicant contends that the administration of justice will be in jeopardy as the stay orders issued by this Court in some of the pending appeals though in place, the 1st respondent will still be at liberty to execute the decree based on the ruling and order of the trial court, thus cause judicial embarrassment.
 6. The application was supported by the 2nd respondent through the affidavit of Peris Wairimu Chege, the assistant general manager dated 21st June 2023. Its case was that the decision of the High Court was made despite the pending appeals before this Court being Civil Appeal No. 758 of 2021 - *I & M Bank Limited vs. Synergy Industries Credit Limited & Another* and Civil Appeal No. 788 of 2021 - *Cape Holding Limited (Under Administration) vs. Synergy Industrial Credit Limited & Another*. That equally, this Court had issued stay orders on 1st April, 2022 in Civil Appeal (Application) No. E459 of 2021 - *I & M Bank Limited vs. Synergy Industries Credit Limited & Another* and Civil Appeal (Application) No. E788 of 2021 - *Cape Holding Limited (Under Administration) vs. Synergy Industrial Credit Limited & Another*. That the trial Judge disregarded and ignored the fact that this Court had found that the appeals were arguable. That the 2nd respondent stands to suffer irreparable loss if this application is not allowed as the pending appeals will be rendered moot and the 1st respondent will have been accorded unfair and unlawful priority over secured creditors.
 7. The application was however opposed by the 1st respondent through the affidavit of Jacob M. Meeme, the legal officer of the respondent dated 15th June 2023. He deposed that the applicant is no longer under administration since 9th June, 2023 when the court declined to extend the administrator's term, thus, the administrator's term expired by operation of law under section 593 of the Insolvency Act. That it is clear that it is not the applicant but the administrator who wants the applicant to remain under her administration so as to benefit from the legal moratorium under section 560 of the Insolvency Act. That



from the ruling of the court, it was obvious that there was no explanation as to why the administration was not completed within the statutory period.

8. The 1st respondent further deposed that there was no link between the outcome of the Civil Appeals and the process of administration as the debt is recoverable from the applicant. That contrary to the applicant's allegations, this Court granted stay with regard to leave granted by the High Court to the 1st respondent to proceed with the legal action against the applicant, and by virtue of the termination of the administration on 9th June 2023, it follows that the pending appeals by the applicant have been rendered moot. That this Court has no jurisdiction to extend the terms of the administrator which expired on 12th October, 2022 and which the High Court declined to extend under the provisions of section 594 of the *Insolvency Act*. The 1st respondent further stated that the applicant having hit a dead end in the Supreme Court when it refused to certify its application for review of this Court's order for certification to appeal to that court, the applicant employed a different tactic of using the administrator as a tool to defeat the 1st respondent's quest of execution.
9. On the nugatory aspect, the 1st respondent deposed that there is no appeal that would be rendered nugatory as the purported appeals died when the ruling being appealed against was rendered and the appeal is therefore a mere academic exercise.
10. The application was heard by way of written submissions with limited oral highlights on a virtual platform. Mr. Kithinji, learned counsel appeared for the applicant, Mr. Ahmednasir, SC appeared for the 1st respondent while Mr. Kabaiku, learned counsel appeared for the 2nd respondent. The applicant's submissions merely reiterated the grounds in support of the application as well as the supporting affidavit in the motion, thus no need to rehash the same save that it relied on the case of *Hoggers Limited (In Administration) vs. John Lee Halamandres & 11 Others* (2821] eKLR, for the proposition that the principal purpose of administration is either to rescue the company as a going concern or to preserve its business or such parts of its business as may be viable. On the nugatory aspect, the applicant submitted that by virtue of section 522 of the *Insolvency Act*, the administration's objectives are to maintain the company as a going concern and achieve a better outcome for the company's creditors as a whole and as such had the administrator not obtained the stay orders, the company would have been liquidated on account of the debt that is in excess of Kshs. 5.4 Billion leaving nothing to the other creditors. It relied on the case of *Sicpa Securitts Sol. Sa vs. Okiya Omtatab Okoiti & 2 Others* [2018] eKLR, for the proposition that nugatory aspects entailed taking into consideration factors such as the expense and length of time it may take to reverse or recover what has changed hands.
11. The 2nd respondent while supporting the motion submitted that that this Court's hands are not tied where the orders sought do not squarely fall within the provisions of rule 5 (2) (b). Where in a situation such as one currently obtaining, the Court has inherent powers to issue such orders to meet the ends of justice pursuant to Rule 1 (2) of the *Court of Appeal Rules*. As to whether this Court can issue a status quo ante order as sought in the application, counsel relied on the case of *Shimmers Plaza Limited vs. National Bank of Kenya Limited*, [2015] eKLR, for the proposition that where there is no specific prayer for orders in the motion, the Court has powers to create a prayer not sought in the application and proceed to grant it. Further, counsel submitted that there were several appeals which were pending before this Court and in which Orders of stay execution were issued by this Court on the basis that the appeals were found arguable among them the priority of a debenture holder over a decree holder. Unless this position is maintained until those appeals are heard and determined the orders of stay of execution which were given will be rendered moot.
12. On his part, Mr. Ahmednasir, SC, submitted that what was before the court was a prayer in the nature of a mandatory injunction asking the court to re-appoint an administrator whose term had



expired for a new term. That the applicant was not the administrator but rather a company called Cape Holding Limited, which was now not under administration. Thus, the application seeks to put it under receivership without its presence in court and being heard. That this Court needs to hear the company itself and not through the administrator. On the arguability of the appeal, counsel submitted that looking at the grounds, the intended appeal will not be arguable at all. The fact that there are appeals in this Court does not make the intended appeal arguable. That the High Court in dealing with the issue correctly observed that it is not the function of an administrator to prosecute cases, thus, it cannot be an arguable issue on appeal. The argument that there will be a constitutional crisis in Kenya and chaos in the streets of Nairobi if the application is not granted, cannot be an arguable ground of appeal. On the nugatory aspect, the 1st respondent submitted that there were no reasonable grounds advanced to support the said claim. The issues raised, that there would be a crisis in the administration of justice, that the court would be embarrassed and that the 1st respondent will sabotage the administration of justice, cannot render the intended appeal nugatory. That sections 593 and 594 (1) (a) and (b) of the Insolvency Act prohibits any court from extending the administrator's term if it has expired. Whilst relying on this Court's decision in the case of Tbika School of Medical and Health Sciences Limited (Under Administration) & Another vs. Rao & 2 Others (Civil Application E004 of 2022) [2022] KECA 382 (KLR), SC submitted that what the applicant was seeking, was a mandatory injunction and rule 5 (2) (b) does not envisage or contemplate such a prayer.

13. We have considered the application, the grounds and affidavit in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The jurisdiction of this Court under rule 5(2) (b) of this Court's rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. Before going into the merits of the application, if it will be necessary, we wish to point out from the onset that the orders sought herein are wanting to the extent that they seek this Court to actually re-appoint an administrator whose term has expired by operation of the law. Secondly, an order of status quo ante is not one of the orders contemplated under our rule 5 (2) (b). Despite the applicant and the 2nd respondent submitting vehemently that we should be innovative and creative and grant orders not contemplated under our aforesaid rule we must resist the invitation as acceding to it will amount to breaching and subverting the law. We are least persuaded by the argument that this Court's hands are not tied where the orders sought do not fall squarely within the provisions of rule 5(2)(b) of this Court's rules nor can we do so under the rubric of the inherent powers of the court to meet the ends of justice. Rule 5(2)(b) of this Court's Rules only envisages the grant of orders of stay of execution, proceedings and injunction. There is no provision for the grant of an order of status quo ante.
14. We are further persuaded that the issue of not extending the term of an administrator whose term has expired is well taken care of by the law. We agree with the 1st respondent's submissions that the provision of sections 593 and 594 of the Insolvency Act do not allow such re-appointment or extension and yet, that is what we are being called upon to do. Those provisions are in terms:
 593. The appointment of an administrator automatically ends at the end of twelve months from and including the date on which it took effect.
 594.
 - (1) Despite section 593 -
 - a. on the application of an administrator, the Court may by order extend the administrator's term of office for a specified period; and



- b. an administrator's term of office may be extended by consent for a specified period not exceeding six months.
 - 2. An order of the Court made under subsection (1)(a)-
 - a. may be made in respect of an administrator whose term of office has already been extended; but
 - b. may not be made after the administrator's term of office has ended.
- 15. From the foregoing, it must be clear to all and sundry that this Court has no jurisdiction to extend or re-appoint an administrator whose term has expired, accordingly the prayer of status quo ante sought in the application cannot be granted for to do so will be tantamount to reinstating or re-appointing an administrator whose term has expired by operation of law which is not permissible. This conclusion suffices to dispose of the entire application.
- 16. Even if we consider the question whether the applicant has met the twin principles, it is now settled that for an applicant to be successful, it must satisfy the both principles. We have looked at the proposed grounds in the memorandum of appeal and consider them arguable, as an arguable appeal is one that need not succeed but one that deserves consideration. On the second principle, we are not persuaded that the intended appeal will be rendered nugatory as argued by the applicant. Accordingly, we find that this application is not merited and we dismiss it in its entirety with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA CIArb., FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

