I&M Bank Kenya Limited & another v Synergy Industrial Credit Limited & 2 others (Civil Appeal E758 & E788 of 2021 (Consolidated)) [2024] KECA 855 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 855 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E758 & E788 OF 2021 (CONSOLIDATED)

PO KIAGE, LA ACHODE & PM GACHOKA, JJA

JULY 12, 2024

BETWEEN

I&M BANK KENYA LIMITED ..... APPELLANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED ..... 1ST RESPONDENT

CAPE HOLDINGS LIMITED (UNDER ADMINISTRATION) .... 2ND RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E788 OF 2021

BETWEEN

N CAPE HOLDINGS LIMITED (UNDER ADMINISTRATION) ..... APPELLANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED ..... 1ST RESPONDENT

I&M BANK KENYA LIMITED ..... 2ND RESPONDENT

(An appeal from the order of the High Court of Kenya at Nairobi Commercial and Tax Division (Mabeya, J.) dated 10{{^th}} December, 2021)

JUDGMENT

Judgment Of Kiage, JA

1. Rarely has a dispute engaged the superior courts of this land as intensely, as repeatedly and as intractably as the one involving Synergy Industrial Credit Limited (Synergy) and Cape Holdings Limited [now] Under Administration) ('Cape Holdings') the main protagonists in the consolidated appeals before us revolving around the aborted sale of a certain prime property on "14 Riverside," in Nairobi's Westlands locate being L.R. No. 209/19436 (IR 120877) (the suit property). That sale, initially conceived in the happy circumstance of friendly familiarity and trust between directors of Cape Holdings the seller and Synergy, the buyer, soon fell through and saw Synergy demanding payment of some Kshs. 750 million that it had paid to Cape Holdings in the year 2010. Thus was birthed a gigantic legal battle that has lasted for nearly a decade and a half.

2. The dispute was first referred to a sole arbitrator, Mr. Ochieng Oduol who, by an award made and published on 30th January, 2015 allowed Synergy's claim and awarded it Kshs.1,666.183,000 in full and final settlement of its claim against Cape Holdings, which sum was to attract compound interest at the rate of 18% per annum from 1st January 2015 until payment in full. Cape's counterclaim was dismissed with costs. The costs of the reference were to be on the High Court scale, and taxable by the Deputy Registrar of that court in accordance with the Order for Directions made by consent of the parties on 28th September 2011.

3. In its first show of discontent, Cape Holdings applied to the High Court to set aside the arbitral award in entirety. Kariuki, J. agreed with Cape Holdings and set aside the ward holding that the arbitral tribunal had determined issues that were beyond the scope of the of the arbitration. It was Synergy's turn to be aggrieved and it filed before this Court Civil Appeal No. 81 of 2016, which was, however, struck out with the Court (Kariuki, Mwilu & Azangalala, JJ.A) holding that there was no right of appeal hereto under section 35 of the *Arbitration Act*.

4. That was not to be the last word on the issue, however, as Synergy successfully moved the Supreme Court, which, by its majority judgment rendered on 19th December 2019, in SYNERGY INDUSTRIAL CREDIT LTD Vs. CAPE HOLDINGS LTD [2019]eKLR, declared that there does exist a residual right of appeal to this Court under section 35 of the *Arbitration Act* but under very narrow and circumscribed grounds, which must first be demonstrated to this Court's satisfaction in limine. The apex court then directed this Court to hear Synergy's stricken appeal against Kariuki, J's setting aside of the arbitral award.

5. The appeal was heard by M'inoti, Sichale and J. Mohammed, JJ.A who, by a judgment dated 6th November 2020 allowed it and set aside the ruling of Kariuki, J. effectively reinstating the arbitral award. In so doing, the Court found that the High Court had gone outside the terms of the arbitral agreement and imposed "its own strictures and restrictions" on it and had, furthermore, improperly gone into a merit review of the arbitral' award to reach a different finding, which he was not entitled to do.

6. Aggrieved by that judgment, Cape filed Civil Application No. Sup. E006 of 2020 dated 16th November seeking, this Court's certification that it had an appeal from the aforesaid judgment that raised matters of general public importance. Unpersuaded, this Court dismissed the application. Undeterred, Cape approached the Supreme Court invoking Article 163(5) of *the Constitution* for that Court to review this Court's refusal of certification and itself certify the intended appeal thereto as one raising matter

of general public importance. By a ruling dated 8th December 2021 the apex court disallowed that application, denied certification and used the opportunity to clarify that once this Court assumes the limited and exceptional jurisdiction of entertaining an appeal under section 35 of the *Arbitration Act* as the Supreme Court had held in SYNERGY INDUSTRIAL CREDIT LTD Vs. CAPE HOLDINGS LTD (supra) and NYUTU AGROVET LTD Vs. AIRTEL NETWORKS KENYA LTD & ANOR [2019]eKLR, and in keeping with the need for expedition in arbitration matters, no appeal would lie from this Court's consequential judgment to the Supreme Court from such judgment, and the apex court was infact bereft of jurisdiction to entertain such appeal, as it had held in GEOCHEM MIDDLE EAST Vs. KENYA BUREAU OF STANDARDS [2020] eKLR.

7. The court of last resort having so pronounced itself, this Court's affirmation of the arbitral award crystalized and the said award was on 25th March 2021 adopted as a decree of the High Court in Misc. Application No. 114 of 2015, consolidated with Misc. Application No. 126 of 2015 stating the decretal sum to be Kshs. 4,497,776,260.35. As Cape Holdings did not pay the decretal sum Synergy instituted execution proceedings under Order 22 Rule 48 of the Civil Procedure Rules, in consequence of which a Notice to Show Cause issued. The execution sought to attach the suit property over which the arbitration dispute arose, as it was the only property in Cape Holding's name that was unencumbered. Synergy had earlier obtained an order on 1st September 2011 in Milimani ELC No. 4400 of 2011 (O.S), by which a caveat was registered on the property on 7th September 2011. It had also published a 'Caveat Emptor' in the 13th September 2011 issue of the Daily Nation Newspaper.

8. While the execution process was ongoing, it came to Synergy's attention, vide an advertisement carried in the 12th October 2021 issue of the Daily Nation, that Cape Holdings had been placed under Administration by I & M Bank ('the Bank') effective that date. This was on the claim that the Bank had on 15th December 2020 created a fixed and floating debenture over all the assets in the aggregate sum of 25 million US Dollars and registered it at the Companies registry on 8th January 2022. The Bank appointed Ms. Vruti Shantilal Shah, as Administrator over Cape Holdings.

9. This development meant that Synergy could not proceed and continue with the execution that was underway unless with leave to of the High Court, which it promptly sought vide a notice of motion filed under certificate of urgency on 22nd October 2021 in Insolvency Cause No. E049 of 2021. In the grounds on the face of the motion, as well as in the supporting affidavit of Jacob Mbae Meeme its legal officer sworn on 22nd October 2021, Synergy gave a narration of the dispute and litigation with Cape Holdings, and asserted that it had an effective decree in execution of which it sought to attach the suit property. It asserted that the debenture was created after this Court's ruling of 6th November 2020 with the intent to scuttle or frustrate the ongoing attachment by finding umbrage under the moratorium on legal proceedings afforded by section 560 of the *Insolvency Act*, 2015. The Bank did not claim or demonstrate that Cape was unable to pay its debts to justify the Insolvency. Far from being insolvent, Cape Holdings was utilizing rental income to finance construction over LR 5884/16 in the name of third parties. It was deposed that exceptional circumstances had been established to warrant leave to proceed.

10. Cape Holdings opposed the application through a replying affidavit sworn on 3rd November 2021 by the appointed administrator Vruti Shantilal Shah. She averred that the Bank extended various facilities to Cape Holdings which gave various securities, including a floating charge over its assets created on 15th December 2020 to secure 25 million US Dollars. Cape Holdings breached its obligations under the latter offer and the debenture, and the Bank had priority over Cape Holdings' unsecured creditors. It was asserted that under section 560 of the *Insolvency Act*, an automatic moratorium was triggered once it was placed under administration and no legal proceedings could be commenced or continued

against Cape Holdings absent the administrator's consent. She defended her appointment as valid, as Cape's assets were less than its liabilities.

11. The Bank took a similar position in the relying affidavit of Peris Wairimu Chege, its Assistant Manager. She swore that once the Bank was served with the Garnishee Order Nisi dated 7th April 2021, the floating charge crystallized into a fixed charge by dint of clause 13 of the Debenture. She swore that Synergy had not satisfied the statutory conditions for the lifting of the moratorium. Cape Holdings owed the Bank 25,075,404.29 USD as at 4th November 2021 which kept attracting interest and, if execution were to be allowed, the Bank and other creditors would suffer loss and Cape Holdings would be crippled, contrary to the objectives of administration.

12. She denied the claim by Synergy that her appointment was meant to scuttle any ongoing legal proceedings. She asserted that the purpose of administration is to secure a better outcome for all of Capes Holdings creditors, unlike the case in a liquidation. She denied any mala fides or fraud in the commencement of the administration. She averred that Synergy was an unsecured creditor whose debt did not rank in priority to Cape Holdings' other creditors, and the orders sought would give it "a preferential status" to the detriment of preferential and other unsecured creditors and also defeat the statutory purpose of administration. She besought the court to dismiss the application for leave.

13. Jacob Mbae Meeme aforesaid swore a further affidavit on 11th November 2021 in response to those replying affidavits. He rejected the administrator's claim that a first legal charge was created over a suit property in favour of the Bank. He dismissed as an 'outright falsehood' the averment that there was a fixed and floating debenture over Cape Holdings' immovable assets. The USD 25 million facility to Cape Holding was secured by a first legal charge over a property known as LR 209/11880 Parkside Towers Nairobi registered in the name of Nandlal & Company Ltd. The Bank could not have created or secured its facility by a charge over the suit property as there was in place a caveat by court order dated 1st September 2011 in Milimani ELC 440 of 2011 (O.S) and a Caveat Emptor published on 13th September 2011. If the Bank created further securities over the suit property regardless, then it would do so at its own peril, but such securities were over a separate property. He then listed some six reasons why the Bank could not have priority over Synergy;

> " a. The Bank did not create any security over the suit property
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> b. As at the time the facility was issued, the suit property was not available for securitization as it had a valid court order registered against the title as illustrated in paragraph 7 hereinabove
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> c. The company is not in default of any facility issued by the Bank and none has been alleged in any of the affidavits filed by the administrator and the Bank
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> d. The suit property was attached by the applicant vide a decree issued on 25th March 2021 in High Court Misc. Civil Application No. 114 of 2015 Consolidated with Misc. Application No. 126 of 2015; Cape Holdings Ltd vs. Synergy Industrial Credit Ltd prior to the crystallization of the debenture on 12th October 2021;
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> e. By the time the company was placed under administration on 12th October 2021, the applicant's right over the suit property had crystalized by virtue of the aforesaid decree which ordered inter alia as follows:
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> > 'That an order be is hereby issued prohibiting and restraining the respondent (the company in this case) or its agents, until the further

order of this honourable court from transferring or charging in any way its property known as Land Reference 209/19436 by sale or otherwise, and that all persons be restrained and prohibited from receiving the said property by purchase, gift or otherwise.' Emphasis mine.

f. Even prior to the issuance of the decree on 25th March 2021, the Court of Appeal through its Ruling in Civil Appeal No. 81 of 2016 which allowed the prayers sought by the Application in High Court Misc. Civil Application NO. 114 of 2015 Consolidated with Misc. Application No. 126 of 2015; Cape Holdings Ltd vs. Synergy Industrial Credit Ltd. The application sought the attachment of the suit property in satisfaction of the Arbitral Award.

g. In light of the above, it is evident that the applicant's right over the suit property came earlier and even crystalized earlier, by dint of the aforesaid orders of the Court, than the Bank's claim.'"

14. He asserted that as the Letter of Offer from the Bank to Cape Holdings showed that the 25 million USD was secured by a first legal charge over LR 209/11880, Parkside Towers in the name of Nandlal & Company, the suit property was in no way implicated or involved. The administrator did not show how Cape Holdings breached its obligations under the offer, lending credence to Synergy's claim that her appointment was a sham. She also did not furnish any proof of Cape's liabilities outstripping its assets, the reality being that it was a in fact solvent. Nor were there any other creditors of Cape Holdings besides the Bank and Synergy.

15. Specifically to the Bank's reply, the deponent swore that the Bank was unresponsive and uncooperative when written to several times on the status of its facility subject of the charge. Clause 9 of the Letter of Offer showed that the Debenture was, secured by:

"a. Joint and personal guarantees and indemnities for the sum of USD 25,000,000 by the Directors of the Company;

b. Corporate guarantee and indemnity of National Company Limited for the sum of USD 25,000,000;

c. Fixed and floating debenture over all the assets of the Company;

d. First legal charge of the property known as LR 209/11880, Parkside Towers Nairobi registered in the name of Nandial & Company Limited for an amount of USD 25,000,000."

16. The suit property did not at all provide security for the USD 25 million facility to Cape Holdings. At the time the new facility was created, the suit property was not available for securitization having been reserved by this Court's orders of 6th November 2020. There was also an existing court order registered against the title on 7th September 2011. The Bank's security also came after this Court's judgment of 6th November 2020 and the attachment of the suit property in satisfaction of the decree. The Bank, which had been served with a Garnishee Order Nisi of 12th April 2021, "an act of default," did not exercise any of its right against Cape then, indeed allowing withdrawals of at least 2,891,477 USD between 9th April and 6th May 2021, which the deponent listed. The Bank then conspired to divert substantial Bank balances of nearly 2 million USD from rental income to Cape's other concerns including construction over some other property. Still Cape Holdings was able to meet all of its obligations. The Bank treated

Cape Holdings with velvet gloves despite alleging an event of default had occurred, underscoring the "obvious connivance" to place Cape Holdings under administration. He then concluded his affidavit as follows:

> " 38. That the applicant is a legitimate creditor of the company whose rights have been in litigation for the past decade and who is presently at the climax of exercising its lawful decree against the company.
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> 39. That the responses filed by the Bank and the administrator are a sham and a farce designated to protect the company from the pending execution. None of them has demonstrated that the suit property is part of the securities offered to the Bank, or a default on the part of the company as to warrant the placement under administration and even that the company is unable to pay the debts.
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> 40. That the bank is adequately securitized and will suffer no prejudice if the orders sought herein are granted.
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> 41. that the entire process of placement of the company under administration lacks the bona fides and this Court is urged to grant leave to the applicant to pursue its execution."

17. The application with those rival contentions was heard by Mabeya, J. who, by a ruling dated 10th December 2021, allowed it, provoking appeals by both Cape and the Bank.

18. We have set all this out is some length in obedience to our duty as a first appellate court to proceed by way of re-hearing and to subject all the material to a fresh and exhaustive re- appraisal and re-evaluation with a view to arriving at our own independence conclusions. We do pay due respect to the findings and conclusions of the first instance judge but will not hesitate to depart therefrom if they are based on no evidence, failed to consider relevant matters or considered irrelevant matters or, looking at the case as a whole, he was plainly wrong. The latitude for departure is wider where, as here, the first instance judge made his decision on the basis of affidavit evidence without oral evidence, therefore being is no better position to decide the matter than we, ourselves, as he did not have the advantage to live witness testimony. And where what the judge decided was a matter within his discretion, we would be slow to interfere, doing so only if his decision amounted to an abuse of discretion or was otherwise perverse. See Selle Vs. Associated Motor Boat Co. [1968] EA 123, Peters Vs. Sunday TIMES [1958] 424, MBOGO Vs. SHAH [1968] EA 93.

19. In allowing Synergy's application, the learned judge made a number of findings but I need not set them out at this point as they become apparent from the complaints by the two appellants. In its memorandum of appeal dated 16th December 2021, the Bank faulted the learned judge who it said erred by;Failing to appreciate that the Bank had a legal interest on the suit property by virtue of Debenture dated 15th December 2020, a continuing charge over all of Cape's property.Failing to appreciate that the execution of a final judgment on Capes property had to crystallization of the floating charge and the garnishee order nisi served on the Bank in respect of Capes Account on 12th April 2021 was such event as was Synergy's unexecuted decree.Failing to appreciate that the Bank had priority over Capes assets as Synergy's execution was not complete.Misinterpreting the conditions for the lifting of the statutory moratorium under Section 560A of the *Insolvency Act* and failing to consider the statutory purpose of administration to maintain the copy as a going concern.Failing to take into account the impact of approving the only asset of Cape to the detriment of its creditors including the Bank.Failing to consider that the strict timelines for responses to Synergy's application locked out other creditors from the proceedings.Legitimizing the appointment of the administrator but at the same time invalidating

the Bank's priority as a secured creditor thereby giving Synergy priority over all others.Finding there was no evidence Cape was collapsing financially yet it owed the Bank USD 15,075,404, 29 as at 4th November 2021.Approving the sale of Cape's only asset without giving the administrator opportunity to prepare a proposal for all creditor's consideration.

20. The Bank prays that this Court set aside the ruling of the High Court and order that Synergy submits its claim to the administrator in the Insolvency Cause. It also seeks costs.

21. On its part, Cape Holdings by its memorandum of appeal blames the learned judge for falling into error by;Finding that there was no averment that it had defaulted in its obligations.Finding that the administrator did not deny that the adventures on which the debenture was based was created to defeat this Court's judgment.Finding that the administration was meant to allow Cape to evade its obligation under a default decree he erroneously stated to be 10 years old.Holding that Synergy acted in good faith in placing a caveat and publishing a caveat emptor on the suit property which was therefore unavailable to be offered as security.In holding that Cape and the Bank had acted mala fides connived and engaged in conduct the court could not countenance to circumvent execution of the decree.Finding that Synergy would suffer significant and irreparable loss unless leave to proceed were granting while failing to consider the impact of such leave on the interest of Cape's creditors.Failing to appreciate that as a debenture holder the Bank had the right of election in deciding to enforce its security thereaunder.

22. It was Cape Holdings prayer that the ruling of the High Court be set aside and Synergy's application for leave be dismissed with costs.

23. Synergy thereafter filed a supplementary record of appeal on 21st April 2002 as well as a notice of preliminary objection on a point of law dated 27th April 2022 which was in the following terms;

> " TAKE NOTICE that the 1st respondent herein, Synergy Industrial Credit Limited will at the hearing of the appeal by the appellant Cape Holdings (Under Administration) raise a preliminary objection on a point of law that the appeal herein is MOOT and a mere academic exercise on the following grounds:
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> 1. Following the impugned decision of the Hon. Justice Mr. Alfred Mabeya dated 10th December 2021, the appellant and 1st respondent on 5th January 2022 appeared before Hon. E. Nyakundi, Deputy Registrar in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2016 for hearing of notice to show cause against the appellant herein.
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> 2. On 5th January 2022 the Hon. Deputy Registrar after hearing the appellant and the 1st respondent pursuant to order 22 Rule 48 of the Civil Procedure Rules issued a prohibitory order and executed the decree of 25th March 2021 against L.R. No. 209/19436 (IR No. 120877) and further set out the execution process and the auction of the said property.
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> 3. That on 14th January 2022 the Registrar of Titles in the Ministry of Lands pursuant to the prohibitory order of 5th January 2022 registered the prohibition against the title of that piece of land known as L.R. No. 209/19436 (I.R. No. 120877) thus completing the execution of the court's decree of 25th March 2021.

4. The 1st respondent then instructed Moran Auctioneers to auction the said L.R. No. 209/19436 (I.R. No. 120887) who advertised the same for auction on 8th February 2022.

5. The appellant being dissatisfied with the decision and order to the Deputy Registrar Hon. E. Nyakundi lodged an appeal against the said decision and filed in the High Court a memorandum of appeal dated 11th January 2022. The same is pending before the High Court.

6. That in light of the decision of the Deputy Registrar dated 5th January 2022, and the subsequent execution of the decree of the court dated 25th March 2021, the 1st respondent respectfully submit that since the execution of the decree against L.R. No. 209/19436 (I.R. No. 120977) is complete, hearing this appeal, which in essence is whether or not Hon. Justice Mr. Alfred Mabeya was right or not in giving leave to the 1st respondent to proceed with Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2016 is now MOOT and mere academic exercise because the subsequent steps taken by the appellant and 1st respondent have gone too far and this Court is not competent to address the legal derivatives of the said actions for the same are before other courts of competent jurisdiction."

24. Synergy's supplementary record of appeal and notice of preliminary objection attracted from the Bank a motion dated 6th June 2022 praying that both be struck out with costs. In both the grounds on its face and the supporting affidavit of Peris Wairimu Chege, it was contended, in summary, that;The supplementary record of appeal violated Rule 87(1)(c) and (f) of the Rules of Court of containing documents not filed in the Insolvency Cause and related to events post the impugned ruling of 10th December 2021 and other matters in which the Bank was not a party therefore irrelevant to the appeal and amounting to abuse of process.The record and the preliminary objections were filed instead of the directed submissions and without leave.

25. It is worth noting that the Bank's aforesaid motion echoed in material terms the motion filed by Cape Holdings but a couple of days earlier on 3rd June 2022. It sought the striking out of Synergy's supplementary record and notice of preliminary objection aforesaid, as well as its submissions dated 18th May 2022. Its grounds, elaborated on in the supporting affidavit of Vruti Shantilal Shah sworn on 3rd June 2022, are to the same effect as those by the Bank and I need not rehash them.

Submissions

26. In preparation for the appeal, respective parties filed written submissions together with their case digests which were orally highlighted before us by counsel.

27. At the hearing, Mr. Kabaiku, learned counsel, appeared for "the Bank", Mr. Ahmednassir, SC, and learned counsel Ms. Asli Osman appeared for Synergy, while Mr. Allen Gichuhi, SC appeared for "Cape Holdings".

28. By consent of the parties, Civil Appeal (Application) No. E758 of 2021 and Civil Appeal No. E788 of 2021 were consolidated with the former designated the lead file. It was also agreed that counsel would argue the matter globally covering the preliminary objection by Synergy, the motion by the Bank seeking to strike out both it and the supplementary record of appeal, and the two consolidated appeals. They did so and this judgment decided all those matters.

29. Going first, Mr. Kabaiku, submitted that the supplementary record of appeal does not relate to the proceedings from which the appeals herein arise but contains proceedings in respect of another matter which the Bank was not party to being, High Court Miscellaneous Application No. 114 of 2015 as consolidated with High Court Miscellaneous Application No. 126 of 2016. Counsel contended that the record was introduced after the applicant had filed its submissions on the substantive appeal. Moreover, the supplementary record raises the issue of mootness of the appeal based on a prohibitory order that was issued on 5th January 2022, in a matter the Bank was not party to.

30. Counsel submitted that the Court issued a stay of execution of the ruling of 10th December 2021 which is the subject of these appeals hence the appeals cannot be moot. To counsel, if Synergy found a deficiency in the record of appeal, or if it required to support its case through additional documents which were not arising from the proceedings in the insolvency suit, it ought to have sought leave from the court to adduce additional evidence. For this submission, counsel relied on ORINA Vs. KENYA SCHOOL OF LAW & 5 OTHERS; MIGIRO & 31 OTHERS (Interested Party) (Civil Appeal E472 of 2021) [2022] KECA 101 (KLR) where this Court expressed itself as follows;

> "14. ...Nothing stands in the way of an application by any party interested to introduce new evidence with leave of the Court before hearing and determination of the appeal. If such an application is made, the appellant will have an opportunity to either concede or oppose it. The same applies to the allegation that the same does not include material documents which could, at any time before hearing and determination of the appeal, be introduced by way of a supplementary record with leave of the Court."

31. Counsel further cited Rule 87(1) of the Court of Appeal Rules, now Rule 89, which enumerates the contents of the record of appeal. He referred to Rule 88 now Rule 90, which allows an appellant who may have omitted a document in the record of appeal, to within 15 days after lodging the record of appeal, and without leave, include it in a supplementary record of appeal. The Rule further provides that after the 15 days, the appellant should obtain leave from the deputy registrar before filing the supplementary record. Rule 92(1) now Rule 94(1) was also cited. The Rule permits a respondent who finds a record of appeal to be defective or insufficient for purposes of his case to lodge a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are in his/her opinion required for the determination of the appeal. To Counsel, the defect that is cured by Rule 94(1) is one occasioned by an appellant's failure to include all the crucial or primary documents in the record of appeal or supplementary record of appeal as per Rule 90, and the primary documents are those documents that were relied upon at the trial and which relate to the appeal in contest. Mr. Kabaiku, maintained that the impugned supplementary record of appeal contained documents that were not filed in the insolvency suit and did not relate to the impugned ruling. He urged that the application be allowed.

32. Counsel sought to distinguish the case law cited by Synergy from this matter. He stated that in OMEGA ENTERPRISES (KENYA) LTD Vs. KENYA TOURIST DEVELOPMENT CORPORATION & 2 OTHERS [1994] eKLR, the court found that a ruling arising in the same matter was relevant evidence and allowed it to be considered as such. Further, in ZACHARIA OKOTH OBADO Vs. EDWARD AKONG'O OYUGI & 2 OTHERS [2014] eKLR, the court noted that there was no application to strike out the record of appeal for introducing documents which were not relevant, while in the present matter there is an application to strike out the supplementary record of appeal. In SACCO SOCIETIES REGULATORY AUTHORITY V BIASHARA SACCO SOCIETY LTD [2013] eKLR, the court found that the affidavit that had been omitted was a document that had been filed in the same court and not another court. Mr. Kabaiku thus urged that the authorities were supportive of the Bank's position. Turning to the appeals, Mr. Kabaiku, began

by giving a brief context of the dispute which I need not repeat having dealt with the same at length earlier in this judgment. He referred us to page 405 of the record which has the credit facility letter dated 23rd September 2020, that resulted in the debenture on the strength of which the Bank placed Cape Holdings under administration. He drew our attention to the securities that were provided by Cape Holdings at page 416 and in particular part II clause 8 of the credit facility that provided; "The Bank would continue to hold a First Legal Charge over the property known as L.R 209/19346." He also drew our attention to pages 421 to 457 of the record exhibiting a debenture dated 15th December 2020, as a floating charge over all the assets of Cape Holdings. Counsel indicated that the debenture was duly registered at the Companies' Registry on 8th January 2021.

33. Mr. Kabaiku, submitted that from the duly registered debenture, the Bank acquired a legal interest in the subject property. Further, the events of default that would trigger automatic crystallization of the floating charge to a fixed charge in accordance with clause 13 were stipulated at clause 12 of the debenture. Counsel argued that the Bank already had interest over the suit property way before the credit facility pursuant to a charge dated 12th July 2010 and registered on 16th September 2010. It was urged that following the issuance of a garnishee order nisi dated 9th April 2021, against Cape Holdings, an event of default occurred which triggered clause 13 of the debenture and crystallized the floating charge to a fixed charge over the said assets of Cape Holdings. Consequently, a first priority right was created in favor of the Bank over those assets, overriding any other party's rights, including those of Synergy. Counsel stated that as a result of the foregoing events, the Bank lawfully placed Cape Holdings under administration on 12th October 2021.

34. He contended that in view of the fact that when the debenture crystallized the subject property had not been sold by Synergy in execution of the decree, then the Bank had priority over the said property and was entitled to prevent it from being sold. To buttress this submission, counsel cited MACKENZIE (KENYA) LTD Vs. PHARMICO LTD 1976 eKLR where the court held;

> " That the rights of execution creditors only have priority over those of the debenture-holders where execution has been completed by sale of the attached property before the charge crystallizes.'

35. Mr. Kabaiku, asserted that the trial court's granting of leave to Synergy to continue with execution proceedings defeated the essence of administration and, distracted the administrator's attention from his statutory duties under section 522 of the Act with the end result being that Cape Holdings together with all its creditors, will suffer substantial loss. He contended that under section 560(1) of the Act, once Cape Holdings was placed under administration, a statutory moratorium of all proceedings arose and no proceedings could be validly undertaken against it prior to obtaining leave of the court or with consent of the administrator. Citing section 560A of the Act which sets out conditions to be considered by courts when deciding whether or not to grant such leave, counsel argued that Synergy did not meet those conditions. The learned judge was faulted for allegedly failing to analyze evidence that was produced by the Bank demonstrating Cape Holdings indebtedness' and the risk to be borne by execution on its only known asset. He cited MIDLAND ENERGY LIMITED Vs. GEORGE MUIRU T/A LEAKEYS AUCTIONEERS & ANOTHER [2009] eKLR, where the High Court was of the view that, for administrators to achieve their objectives as contained in section 522 of the Act, such a company must be insulated from aggressive creditors by way of a moratorium from other legal processes.

36. Mr. Kabaiku, insisted that as the Act ranks settlement of debts owed to secured creditors in priority over other creditors, the Bank ranked in priority and exercised first the lien over the charged property before other creditors, having derived its rights from the registered debenture. Counsel cited

this Court's decision in KENYA NATIONAL CAPITAL CORPORATION LTD Vs. ALBERT MARIO CORDEIRO & ANOTHER [2014] eKLR and the High Court decision in MICHAEL OYUGI & 181 OTHERS Vs. INDUSTRIAL PLANT (EA) LIMITED (IN RECEIVERSHIP) & ANOTHER [2006] eKLR which emphasized the privileged position of a secured creditor over and above the unsecured creditor. He also cited the South African case of WALKER V. SYFRET No. 1911 AD 141, where De Villiers CJ was of the view that as a general rule no creditor should obtain any undue advantage over other creditors.

37. Countering Synergy's assertion that the debenture was not specific to the subject property, Mr. Kabaiku contended that where the debenture does not specifically attach to an identifiable asset, it becomes a floating charge which circulates on all the assets of a company, and urged that we allow the appeal.

38. When we probed counsel on whether the question of whether or not to grant leave for execution under the Act is a matter that fell within the discretion of the learned judge, Mr. Kabaiku, SC agreed that indeed that was an issue that fell within the discretion of the learned judge, as he had to. He, however contended that the learned judge did not take into account the conditions stipulated under section 560A and therefore, he did not judiciously exercise that discretion. We next referred counsel to paragraph *40* of this Court's ruling dated 8th December 2023, where M'Inoti, Sichale & J. Mohammed, JJ.A held that execution of the impugned decree was complete and sought his opinion whether, in the circumstances, it was open to us to interrogate whether the leave to execute was properly or improperly granted. His response was that the learned judge's impugned ruling was stayed by this Court in Civil Appeal (Application) No. E459 of 2021, thus execution could not possibly proceed. He reiterated the decision in LOCHAB BROTHERS VS. KENYA FURFURAL CO. LTD (supra) that execution can only be complete where the subject property is sold. The Court observed;

> At para 17/1/10 of the Supreme Court Practice (1982) it is stated as follows:
>
> "A debenture usually creates a floating charge on a company's assets, and only where the charge has been crystallised - eg by appointment of a receiver by seizure and sale do the rights of the debenture holder have priority over those of the execution creditor.
>
> Since in the present case the respondent's goods had only been seized and were not yet sold execution was not complete. The appointment of the receivers crystallised the floating charge by making it a fixed charge which took priority over the execution creditors' interest."

39. We drew counsel's attention to paragraph 46 of the ruling in issue and sought to know whether in light of the learned judge's finding therein, he improperly exercised his discretion, to which he replied that the judge ignored the terms and conditions of the facility letter. He submitted that at the point when the debenture was being created and the facility advanced, there already existed a first legal charge, referring us to pages 415 and 416 of the record, specifically clause 8 and 9, where he submitted, the two sets of securities were offered.

40. Mr. Gichuhi, also challenged the lodging of the supplementary record of appeal by Synergy. He submitted that in the ruling of 1st April 2022, where stay of execution was granted, the Court addressed itself to whether there was an appeal arising from a decision of the Deputy Registrar, which decision is the subject of the supplementary record. Counsel asserted that the learned judges found that there was no notice of appeal arising from that decision. He thus urged that the supplementary record of appeal should not have been placed before this Court. As to whether the appeal herein is moot, counsel submitted that the same ruling of 1st April 2022 determined that the appeal was arguable particularly on the issue of priorities between a debenture holder and a decree holder. Citing this Court's decision

in OMEGA ENTERPRISES (KENYA) LTD (supra) counsel was emphatic that there is no discretion to bring before court additional documents that were never before the trial court.

41. On the appeal proper, Mr. Gichuhi, SC largely supported the Bank's position. He reiterated that as a secured creditor by virtue of the debenture, the Bank had a superseding legal interest in Cape Holdings properties, including the suit property. He submitted that the learned judge failed to consider that clauses 4 and 7 of the debenture provided that Cape Holdings had charged, as a continuing security, all freehold and leasehold properties in favour of the Bank, including the properties specified in the first schedule of the debenture and all future property. Counsel added that following the issuance of the garnishee order nisi, the debenture crystallized and the Bank as a debenture holder obtained priority over the assets of Cape Holdings as no execution proceedings had been completed against it by Synergy. Counsel cited various authorities including the decision in LOCHAB BROTHERS (supra) and MACKENZIE (KENYA) LTD (supra) for the argument that a debenture usually creates a floating charge on a company's assets where the charge has been crystallized. Further, rights of execution creditors such as Synergy, only have priority over those of the debenture holders like the Bank, where execution has been completed by sale of the attached property before the charge crystallizes.

42. Mr. Gichuhi, explained the history of the debenture as illustrated in the supplementary record of appeal dated 24th February 2024. He did so while pointing out that at all material times since the year 2009, there has always been a debenture in place for the development of Cape Holdings' property. Counsel referred us to the caveat dated 11th July 2011, and published by Synergy, by which it stated that the caveat was in respect of the properties that it had purchased. To counsel, that meant that every other asset of Cape Holdings was in contemplation of the debenture. It was submitted that in granting Synergy leave under section 560 (1) (d) of the Act, the learned judge failed to consider that the entire body of creditors would suffer significant and irreparable loss as compared to a sole creditor. Counsel urged that the entire body of creditors was condemned unheard given the strict timelines that were given for the hearing of the application and the failure of the Insolvency court to give directions on service of the application upon the creditors of Cape Holdings. He cited this Court's decision in NAKUMATT HOLDINGS LIMITED & ANOTHER Vs. IDEAL LOCATIONS LIMITED [2019] eKLR where the Court observed;

> "The administration of an insolvent company is for the benefit all creditors of such company and a situation where creditors separately attack or take assets of a company would defeat the overall objective of the administration."

43. We inquired from Mr. Gichuhi, whether it was true that Synergy had written to the Bank inquiring about its indebtedness but there was no response for a period of about 5 months. Counsel's tongue in cheek answer was that there was 'no express response' to that correspondence.

44. Opposing the appeals, Mr. Ahmednassir, SC began by responding to the appellants' objection to his lodging of a supplementary record of appeal. He conceded to Mr. Gichuhi's application for filing of a supplementary record of appeal, he said, because in the certificate and the grounds in support of the application, Mr. Gichuhi urged that it was in the interest of justice that the record be allowed. Counsel contended that unlike Mr. Gichuhi's supplementary record which comprised documents that were not in any court proceedings, his supplementary record of appeal consisted of documents that were part of relevant court proceedings. Mr. Ahmednassir, urged that the Court has no powers to strike out a record of appeal pursuant to Rule 92(1), now Rule 94(1) which, he asserted, gives the respondent absolute discretion to file a supplementary record of appeal once he forms the opinion that further documents are required for the proper determination of the appeal. Counsel continued, the appellant is also given such discretion to file documents without leave of the court pursuant to Rule 88 now

Rule 90. The purpose of Rules 89, 90 and 94 is to ensure that the Court has all the documents it needs to hear and determine the matter properly. Mr. Ahmednassir, submitted that this issue arose in the case of OMEGA ENTERPRISES (K) LTD (supra) which clarified that what can be brought in a supplementary record of appeal need not be part of the record of the proceedings appealed from. One can tender any document in a supplementary record as long as the respondent is of the view that it will help its case.

45. Regarding mootness of the appeals as raised in the preliminary objection, Mr. Ahmednassir, submitted that the present case suffered from double mootness. Firstly, when Synergy was given leave to execute, they executed and attached the property through prohibition. Counsel urged that since execution by attachment of the property has occurred, it is academic for the Court to consider whether Mabeya, J. was right in granting the application for leave. He submitted that under section 560A of the Act, the leave is for 28 days. Within the 28 days, they argued a notice to show cause in court and Cape Holdings failed to show cause and hence execution took effect. Counsel indicated that the second point of mootness is that this Court through its decision of 8th December 2023, upon considering Cape Holdings' application for the review and setting aside of the Court's judgment dated 6th November 2020, determined that by dint of Order 22, Rule 48 of the Civil Procedure Rules, execution of the decree in question was complete, rendering the application moot. Moreover, this Court by its decision dated 23rd February 2024, declined to extend the term of the administrator.

46. Mr. Ahmednassir, drew our attention to the East African Court of Justice's decision in ALCON INTERNATIONAL LTD Vs. THE STANDARD CHARTERED BANK OF UGANDA & 20 OTHERS [2015] eKLR on the doctrine of mootness. The court held that since the common market protocol could not be applied retrospectively to facts or situations that occurred before the protocol came into force, hearing a case that addresses whether it was right to enjoin the 1st respondent bank and whether there was a cause against the 2nd respondent was moot. It was submitted that where an appeal addresses an event in the past or one that does not exist at all, the court should not hear such an abstract issue and deliver a judgment that serves no purpose. Counsel also cited the persuasive decision of Mativo, J. (as he then was) in DANIEL KAMINJA & 3 OTHERS (SUING AS WESTLAND ENVIRONMENTAL CARETAKER GROUP) Vs. COUNTY GOVERNMENT OF NAIROBI [2019] eKLR in which Mativo, J. (as he then was) reasoned as follows;

> " 23. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.
>
> 24. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain.
>
> 25. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit

is academic if it is not related to practical situations of human nature and humanity."

47. On the appeal itself, counsel contended that the key issue was that the appellants were questioning the exercise of discretion by the learned judge under section 560 of the Act in granting leave to execute. In counsel's view, that discretion cannot be overturned by this Court unless the Court is satisfied that the test set out in MBOGO & ANOTHER Vs. SHAH [1968]EA 93 is met. In that case, Newbold, P. stated that, "a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice." Counsel asserted that the test had not been met.

48. Confronting the argument that a debenture holder ranks in priority over an unsecured creditor like Synergy, Mr. Ahmednassir, SC submitted that what was before the learned judge was the application and interpretation of section 560. He charged that Mr. Kabaiku, misled the Court when he submitted that the second schedule of the Act gives preference to secured creditors. Counsel pointed out that to the contrary, the schedule says that priority should be given to preferential creditors. It reads, 'The debts of a person who is adjudged bankrupt, or of a company that is in liquidation, are payable in the order of priority in which they are listed in paragraphs 2, 3 and 4.' Mr. Ahmednassir, SC asserted that the company was not yet under liquidation, it was under administration. He urged that his counterparts had to show how the learned judge erred in interpreting section 560A(1)(c) which provides,

> "When considering whether to grant its approval under section 560, the court or the administrator may in particular take into consideration where appropriate:
>
> the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant."

49. In counsel's view, that provision meant that even where one has priority rights including, a person with a debenture, the priority of an applicant who seeks leave to execute should take preference. Mr. Ahmednassir submitted that the cases of MACKENZIE (KENYA) LIMITED (supra) and LOCHAB BROTHERS (supra), which reflect common law principles and other doctrines of equity which were decided before the enactment of the Act, cannot override the express provisions of section 560(1)(d) of the Act, since the jurisdiction of the High Court is exercised in conformity with, *the Constitution* of Kenya 2010 and subject thereto, to all other written laws, including the Act. For that assertion, counsel relied on VIRGINIA EDITH WAMBOI OTIENO Vs. JOASH OCHIENG OUGO & ANOTHER [1987] eKLR where this Court stated as follows;

> "The common law comes in to this picture by virtue of the *Judicature Act* (cap 8). The provisions of section 3(1) of that Act are as follows:
>
> "3
>
> (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:
>
> a. *the constitution*;
>
> b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited

in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1987, and the procedure and practice observed in courts of justice in England at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.""

50. Counsel charged that the said debenture was a sham and a fraud. He argued that when the appellants realized that Synergy had received judgment in its favour at this Court in the decision rendered on 6th November 2020, they rushed to create a debenture which was registered in the following year. According to counsel, the debenture was solely intended to defeat the judgment that they had obtained.

51. Mr. Ahmednassir, drew our attention to two letters at pages 334 to 336 of the record, written by him to the Bank with respect to the subject property. The letters are dated 6th April 2021 and 29th April 2021. In those letters, Counsel seeks confirmation from the Bank whether the sums that had been secured vide the charge registered in 2010 had been cleared by Cape Holdings, and if not, what the outstanding amount was. Counsel asserted that the Bank failed to respond to the letters because the charge had been discharged. He pointed out that the title documents at page 273 of the record showed that entry no. 2 which was the charge was discharged in entry no. 30 at page 278. Mr. Ahmednassir, SC cited the United Kingdom decision of NATIONAL WESTMINSTER BANK PLC Vs. JONES AND OTHERS BPIR 1092, specifically paragraphs *39*, *59* and *60* where the court reasoned as follows;

" 39. ...the fact that a particular transaction is palpably artificial is a factor which can properly be taken into account when deciding whether it is a sham. Indeed, it would seem to me to require very unusual circumstances before the court held that a transaction which was not artificial was in fact a sham. I add this. If the court were to conclude that a transaction was artificial, in circumstances where the party relying on it was contending that it was not artificial, then that might be a further reason (although certainly not a conclusive reason) for deciding that the transaction was a sham, given that a sham transaction involves a degree of dishonesty on the part of the parties involved. That is not the position here.

59. ...A sham provision of agreement is simply a provision or agreement which the parties do not really intend to be effective, but have merely entered into for the purpose of leading the court or third party to believe that it is to be effective. Because a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely upon the genuineness of a provision or an agreement, and because the court places great weight on the existence and provisions of a formally signed document, there is a strong and natural presumption against holding a provision or a document a sham...

> 60. ...However, I would suggest that the possible prejudice of innocent third parties who have relied on the documents or the provision should not stand in the way of the court concluding that the document is a sham as between the parties thereto and as against a party who claims to be prejudiced thereby (and particularly the party against whom the sham is directed, if I can put it that way)."

52. Counsel also cited the High Court decision in LANDMARK PORT CONVEYORS LTD Vs. BUZEKI ENTERPRISES LTD [2019] eKLR where the court rendered itself as follows;

> ...Collusion between parties to a contract may not be expressed but may be imputed from the conduct of the parties. In the present case, it appears the objector has allowed the defendant to continue operating, notwithstanding default on its part. This may not necessarily amount to collusion, but inability to act on the face of obvious breach may compromise the objector's rights reserved in the debentures
>
> In the case of Sokhi International (k) Limited Vs. Giro Commercial Bank Limited [2006] eKLR, the court agreed with the observation in the case of Evans Vs. Rival Granite Quarries LimitedB[1910] 2KB979 where it was stated;
>
> > "The debenture holder cannot take up the position that he will allow the company to continue to carry on business, and reserve the right while still permitting it to go on obtaining credit of preventing anyone who deals with it from getting paid."
> >
> > ...
> >
> > The picture that emerges is that the objector has treated the defendant with velvet gloves. In the process, the interests of other creditors have been put to risk and jeopardy. The defendant has defaulted in terms of the debenture. It appears the two parties have agreed to brick wall themselves in anticipation of adverse consequences, and this may not be appealing to any court intent on upholding the principles of equity because, such a situation may be open to abuse by a defaulting party.
> >
> > Both the defendant and the objector are riding on the back of their respective default to perform their obligations under the terms of the debenture. The court cannot countenance such a situation.
> >
> > When all facts relating to the dispute herein are taken into consideration, the irresistible conclusion is that the floating charge has not crystallized and therefore the objector may not claim priority."

53. He concluded by lauding the learned judge's findings in the impugned ruling. He urged that we find the appeals to be moot, but if not, we review the substance of the appeal and find that Mabeya, J. interpreted and applied section 560 correctly.

54. Mr. Ahmednassir insisted that the administration was a sham as Cape Holdings was making a lot of money and was not in distress. He urged us to dismiss the appeal. We sought to know from Mr. Gichuhi whether it was true that Synergy paid Cape Holdings Ksh. 750 million as purchase price for a particular property but when the two companies fell out, neither the money nor the property was given to Synergy and he confirmed that to be the position. He, however, added that the contention arose because Synergy never paid the full purchase price under the agreement but was now claiming

the entire block of the property that was secured by the debenture. In response to Mr. Ahmednassir's submission that the reason why the Bank did not respond to the inquiry on whether the money that had been secured through the charge that was registered in 2010 had been paid was because the charge had been discharged, Mr. Kabaiku, SC rejoined that the discharge was only partial.

Analysis And Determination

55. I have given the totality of this matter due and careful consideration as we are required to do. I find it apposite to first dispose of the two applications by the appellants that seek to strike out the preliminary objection and supplementary record of appeal by Synergy.

56. The attempt to strike out the preliminary objection is easy to get out of the way. Striking out of documents filed is provided for under specific provision of the Court of Appeal Rules. I do not find any general striking out power donated by the Rules, and I am not myself persuaded that Rules 87 and 88, cited by the appellant/applicants, alongside section 3A and 3B, contemplate a striking out of a notice of preliminary objection. I belong to the school of thought that, for economy of time and a more complete determination of appeals, preliminary points should not be raised to engage the Courts precious time unless they are of such a nature as to be wholly dispositive and therefore fit to be handled in limine. Thus, if what is raised is merely a point of law, it ought to be dealt with as part of the hearing of the appeal itself – after all, on a first appeal an appellant is at liberty to raise points of both fact and law.

57. I think that a question of mootness is one that can properly be taken as a preliminary point and I would, therefore, hold that even if there were a power to strike out a notice of preliminary objection, about which I have expressed the gravest doubts, it would not be proper to strike it out. I would therefore dismiss the application in that respect.

58. As to the striking out of the supplementary record of appeal, I recall asking Mr. Kabaiku at the very beginning whether the rules cited in the application addressed supplementary records of appeal. His answer was that they did not expressly say so, but that we still had the power to strike out under section 3A and 3B. I am unpersuaded. Under our Rules striking out is expressly provided for, specifically in respect of notices or records of appeal under Rule 86 in the following terms;

> 86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply the Court to strike out the notice of appeal, as the case may be, on the ground;
>
> a. That the appeal lies; or
>
> b. That some essential step in the proceedings has not been taken or has not been taken within the prescribed time:
>
> Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be."

59. I understand the rule to be unambiguous that striking out is premised on specific reasons, and must be sought within specified timeliness. There is no general floating power to strike out, which is in keeping with settled jurisprudence that striking out of pleadings and sending a party away from the seat of justice is a draconian power to be sparingly exercised.

60. Now, unlike records of appeal which may be struck out as provided in the rule I have cited, our Rules make no provision for, and indeed do not anticipate, a striking out of a supplementary record of appeal, especially one filed by a respondent. The filing of a supplementary record by a respondent, in contrast

to such filing by an appellant, seems to be wide and wholly unfettered, left to such respondent's opinion on what is needful for his case. Rule 94 (1) speaks to this generous, permissive approach;

94

(1) If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of the respondent's case, he or she may lodge in the appropriate registry for copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal."

(My emphasis)

61. It is plain to see that this Court, in its wisdom chose to grant a respondent to an appeal a great deal of latitude. On when, whether and what to put in a supplementary record of appeal;There are no time limits as to when he may lodge it.Whether to lodge it is left to the respondent's discretion guided by his own opinion as to the defects of the record or in sufficiency for purposes of his case.He is free to include any further documents of additional part of evidence.It is all left to his opinion as to what is required from the proper determination of the appeal.

62. In other words, the respondent is the sole decider of the matter meaning, to my way of thinking, that the materials will be accepted by the Court from a liberal stance, and it will then be a matter, not of propriety or admissibility of the documents in the supplementary record, but of the relevance and weight that the Court will attach to them in consideration and determination of the appeal.

63. This free and unfettered licence extended to the respondent in response to a record of appeal or other material lodged by the appellant is to be contrasted with the strictures imposed by the Rules on an appellant. I am of the view that sub-rule (3) of Rule 94 which seems to give an appellant freedom tolodge a supplementary record of appeal at 'any time' is probably misplaced. The proper, effective rule, given the manner in which the Rules are designed, is Rule 90 which sets out the contents of a supplementary record of appeal;

90. Where a document referred to in rule 89 (1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94 (3) and, thereafter, with leave of the deputy registrar on application."

(My emphasis)

64. Thus, for an appellant, what goes into the supplementary record of appeal is pre-determined by the Rules. Further, he is free to lodge such supplementary record of appeal, for purposes of including documents which he omitted from the record of appeal, without leave within 15 days after lodging the record. Should he seek to include such omitted documents outside of the 15 days, he would have to lodge the supplementary record of appeal only after applying for and obtaining leave from the deputy registrar of the Court.

65. Given that the documents in an appellant's supplementary record of appeal are those that ought to have been, but were omitted from the record of appeal, it is arguable that the supplementary record is but an extension of the record of appeal. Should such supplementary record suffer any of the infirmities attracting the striking out of the record of appeal under Rule 86, such application would be sustainable.

66. Before leaving the subject of Synergy's supplementary record of appeal, I need to speak to the argument that what was contained therein should have been introduced as additional evidence and only after leave sought and granted under Rule 31 of the Rules of Court. With respect, much as the argument

is attractive, it cannot be right. From the framing of Rule 31, it should be quite obvious that the party who would want to adduce further evidence has ordinarily to be the appellant, being the person aggrieved by the decision of the court appealed from. He proceeds on the basis that the additional evidence would, or would tend to, alter the decision arrived at by that Court. Since, however, this is a court of record and it is called upon to proceed by way of re-hearing by re-appraising the evidence and drawing its own inference so as to decide whether the judge appealed from erred as the appellant contends, it is bound to confine itself to only what was before that court, and which should be in the record of appeal, admitting additional evidence only in exceptional circumstances, and even then on first appeals only.

67. A respondent need not adduce additional evidence as he should in the first instance ordinarily be content to defend the decision of the court appealed from on the basis of the record unless the record be defective or insufficient in which case, he has an easy path of introducing further documents freely under Rule 94(1) without the necessity of the leave that an appellant must obtain under Rule 31.

68. Thus, from a plain reading of the Rules and the practical considerations of appellate litigation, my inevitable conclusion is that Synergy's supplementary record of appeal is properly before us. The motions to strike it out are devoid of merit and I would dismiss them with costs. I am fortified in this holding by the holding in OMEGA (supra) to the effect that the question of a supplementary record of appeal is one to be left the judges hearing the appeal. The question is properly before us and I have given my considered answer.

69. The next question I must answer is whether, as argued by Synergy, these appeals are moot. A matter is said to be moot if it is of no practical significance, is hypothetical or academic, a moot case being one where the matter in controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights. There does exist the mootness doctrine, more strictly adhered to in some jurisdictions, like in America, than in others, encapsulated in the principle that courts will not decide cases in which there is no longer any actual controversy, or are moot. See B lack's Law Dictionary 10th Edn, Pp 1161, 62.

70. It is Synergy's objection, raised in limine, that these consolidated appeals, which challenge the legality, correctness or propriety of the ruling of the learned judge granting leave to proceed with execution, is now overtaken by events, is merely academic and therefore moot, on account of events subsequent to that ruling which completed the execution. Those events are the issuance of a notice to show cause against Cape Holdings, whereafter a deputy registrar of the High Court issued a prohibitory order in execution of the decree on 5th January 2022, and the execution was complete when the prohibition so issued was registered against the title of the suit property on 14th January 2022. Moreover, Synergy thereafter issued instructions to Moran Auctioneers who advertised the suit property for sale by public auction, on 8th February 2022. Cape Holdings did file a memorandum of appeal in the High Court against the deputy registrar's action but it is contended that the execution being complete and subsequent steps by the parties having gone too far, the appeals before us are moot.

71. The two appellants' answer to the charge of mootness is that it does not lie because; first, this Court did issue a stay of execution in Civil Application No. 459 of 2021 and so the execution, on the basis of which the appeals are being characterized as moot, should not have proceeded. Second, it is contended that on the basis of various authorities, including LOCHAB BROTHERS Vs. KENYA FORFURAL CO. LTD (supra) execution can only be said to be complete after the property subject of a debenture, is not seized by the court, but actually sold. Before the sale, it remains the property of the law until it is released through sale. Only then can the right of the debenture holder be distinguished – namely if sale occurs before appointment of the administrator.

72. I have considered the authorities cited, including MACKENZIE (KENYA) LTD Vs. PHARMICO LTD [1976] eKLR and MENENGAI ROLLING MILLS & ANOTHER Vs. BLUE NILE WIRE PRODUCTS LTD & ANOTHER [2019] eKLR which considered and followed it, with Tuiyott, J. (as he then was) holding that "a debenture holders interest takes precedence over that of the executing creditor but only if the execution is not complete." (My emphasis). Also in that category is DESBRO (KENYA) LTD Vs. GENERAL PRINTERS LIMITED; I & M BANK LTD & ANOTHER (OBJECTORY APPLICANTS) [2021] eKLR where Ngenye-Kariuki, J. (as she then was) stated, with regard to that case that;

> In the instant case, it is evident that where the defendant's assets have been attached by the plaintiff who is the executing creditor, the execution process has not been completed since the assets have not been sold."

73. Juxtaposed with those pronouncements that posit that execution is complete when sale of the attached property occurs, we have the express provision of Order 22 Rule 48 of the Civil Procedure Rules which provides in unmistakable terms how and when attachment of immovable property in execution is complete;

> "Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be completed and effective upon registration of a copy of the prohibitory order or inhibitor against the title of the property."

74. It is not in dispute that an order of attachment of the suit property, was made by the deputy registrar of the High Court on 5th January 2022 following the hearing of the notice to show cause. It is also not in dispute that the said prohibitory order was registered against the title on 5th January 2022.

75. Given the clear provision of the Civil Procedure Rules, the propriety of which has never been challenged, I would think that any judicial pronouncements that is any way suggestive that in the case of immovable property the attachment is complete at a later date, and at the happening of any event other than the registration of a copy of the prohibitory order or inhibition against the title, can only be per incuriam at best. I would therefore respectfully hold without hesitation that the execution having been completed by attachment on 14th January 2022 when the prohibitory order was registered against the title, the appeals herein seeking to question the correctness of the leave granted to Synergy are moot.

76. I am happy to note that I am not alone in so thinking: my learned colleagues M'Inoti, Sichale and J. Mohammed came to the same conclusion in Civil Appeal (Application) No. 81 of 2016 in concluding their ruling on the review application;

> 39. The respondent has, lastly, contended that this application is moot and an academic exercise whose primary aim it to have the Court issue orders in vain. It is the respondent's submission that the application has been overtaken by events and that the Court cannot be asked to review and set aside a judgment which has already been executed.
>
> 40. The applicant does not dispute that the judgment that it seeks to recall, review and set aside has already been executed. The respondent has deposed in its replying affidavit in opposition to the application that on 5th January 2022 the High Court issued an order for attachment of the applicant's property LR No. 209/19436 in satisfaction of the decree arising from the arbitral award. The prohibitory order was registered against the said tile on 14th January 2022.

...

40. By dint of that provision, the execution of the decree is complete and we agree with the respondent that this application is moot."

77. My finding on mootness should be enough to dispose of the consolidated appeals. However, given that the parties did address us at length on the merits of the appeal, and bearing in mind that this Court does play a critical didactic role in our judicial hierarchy, I will move swiftly to a consideration of the merits. I am fortified in this approach by what the Bench in the review application did, rendering itself substantively on the motion that was before them notwithstanding their ultimate finding that the same was moot. It is safe to say that for us in this jurisdiction, the mootness doctrine is one of necessity and pragmatism but there is no doctrinal offence committed when our courts go further to pronounce themselves on the merits, (though they need not), more out of an abundance of caution, thereby avoiding decisional lacunae.

78. I say this while accepting as good law and wholly sound the jurisprudence on mootness that has been cited before us including ALCON INTERNATIONAL LTD Vs. STANDARD CHARTERED BANK OF UGANDA & 20 OTHERS [2015]eKLR, a decision of the East African Court of Justice; Mativo, J's (as he then was) erudite rendition of the principle in DANIEL KAMINJA & 3 OTHERS Vs. THE COUNTY GOVERNMENT OF NAIROBI [2019]eKLR, as well as comparative jurisprudence, all to the same end, including the South African Constitutional Court's decision of IT PUBLISHING (PROPRIETARY) LTD & ANOR Vs. MINISTER SAFETY AND SECURITY, MINISTER OF HOME AFFAIRS, GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICAN CCT 49/95 and the Canadian Supreme Court's JOSEPH BOROWSKI Vs. CANADA (ATTORNEY GENERAL) [1989] 1 SCR 353 which state that where there is no longer a live controversy or concrete dispute, the substratum of a case of appeal having disappeared, so that a decision of the court will have no actual or practical impact on the rights of the parties, meaning it is only for academic and not utilitarian thus inimical to judicial economy, It is moot.

79. Regarding the merits of the appeal proper, I did hereinabove advert to this Court's deliberate slowness to interfere with a first instance judge's exercise of discretion. It is not for us to substitute our view of the matter for that of the judge so that we take a decidedly deferential stance, eschewing interference with discretion unless the decision amounts to an abuse of discretion or is otherwise perverse and unstainable having resulted in misjustice.

80. Having considered the two appeals and the submissions made, thereon, I note that Cape Holding has clustered its 15 grounds of appeal into 3 clusters which are all amenable to full treatment and determination within the heads suggested by the Bank in summarizing and urging its grounds of appeal under these thematic areas or issues which it presents as grounds;

    i. Whether the Bank established its legal interest in the suit property.

    ii. Whether Synergy met the threshold to warrant the grant of leave to continue with the execution proceedings.

    iii. Whether Synergy's interest ranks in priority over the Bank's secured interest.

81. As the legal and factual considerations and bases for answering the three issues are cross-cutting, I propose to address them globally although in doing so I will have answered each and all of them.

82. It was the Bank's contention, fiercely resisted by Synergy, that a first legal charge over property known as LR 209/19346 together with a Debenture dated 15th December 2020 and registered on 8th January 2021 as a continuing security as a fixed and floating charge over all of Cape Holdings' assets to secure a

25,000,000 USD facility constitute its legal interest in the suit property or "subject matter", as it states. Synergy points out, correctly from my own perusal of the record, that the property referred to in the Bank's ground under examination namely L.R. 209/19346, is not covered by the Debenture. Clause 4 of the First Schedule to the Debenture does not list the suit property. The effect is that it has no bearing whatsoever to the suit property over which no legal charge was ever created by the Bank. The said property remained free of encumbrances. Absent such charge, I would think there is substance in Synergy's contention that it is false and misleading for the Bank to refer to the suit property as "the charged property in its submissions." The record is clear that it is a different property, Riverside Towers, over which the Bank had a charge.

83. It is under that Debenture that the Bank identifies and contends that an event of default did occur in the contemplation of clause 12 thereunder which then triggered the automatic crystallization of the floating charge into a fixed charge. The event of default is said to have been the issuance of a Garnishee Order Nisi dated 9th April 2021 against Cape Holdings' named account with the Bank. This crystallization meant the Bank had accrued rights under the Debenture entitling it to take full possession of the suit property, so that allowing Synergy to execute would impair justice, and proceeded from the learned judge's erroneous failure to recognize the Bank's interest or priority under the Debenture.

84. Synergy's retort to that position is that the Bank was unable to demonstrate or lay any basis for a finding that Cape Holdings had defaulted on its loan repayment obligations to the Bank. Referring to the administrator and the Bank's affidavits in opposition the application for leave rather colourfully as "a classic case study in subterfuge, a calculated legal jiggery-pokery exercise and wilful silence and refusal to show candour to the court," Synergy highlighted before the learned judge the absence of a breakdown of defaults by Cape Holdings and any steps taken to deal with any such defaults even by as simple an act as correspondence from the Bank demanding payment, or threatening adverse action under the Debenture. Indeed, the Bank's Assistant Manager, Ms. Chege, swore that it was not default of payment but the Garnishee Order Nisi, that constituted an act of default, a narrative itself falsified by the fact that the Bank took no less than 7 months after being served with the order nisi issued on 9th April 2021 to appoint an Administrator on 12th October 2021.

85. The real reason for the appointment of an Administrator according to Synergy, and I see no plausible controvert of the same, can be gleaned from the chronology of events captured in its submissions and confirmed on record;

    a. The Court of Appeal delivered its judgment in favour of the 1st respondent on 6th November 2020 paving way for the 1st respondent to initiate execution proceedings.

    b. The Debenture was created almost immediately on 15th December 2020 and registered promptly on 8th January 2021.

    c. On 5th March 2011 the Court of Appeal (Okwengu, Musinga & Gatembu, JJ.A) dismissed the 2nd respondent's application seeking leave to appeal the decision of the Court of Appeal on 6th November 2020 to the Supreme Court.

    d. Afterwards, the Garnishee Order nisi was issued by the Superior Court on 9th April 2021 as there was no order staying any execution proceedings initiated by the 1st respondent.

    e. On 8th October 2021 the Supreme Court dismissed the 2nd respondent's application seeking stay of execution of the judgment of the Court of Appeal of 6th November 2020.

f. Exactly 3 days after the decision of the Supreme Court of 8th October 2021, the appellant purported to place the 2nd respondent under administration on 12th October 2021.

86. I think, with respect, there is much persuasive force in the view, propounded by Synergy, that the placing of Cape Holdings under Administration was a well-calculated move resorted to by the Bank in thinly veiled collusion as one last ditch attempt to aid Cape Holdings in its spirited quest to evade execution of the long-outstanding decree once all room for legal stratagems had been exhausted.

87. What is writ large on the record is an Administration activated under the most suspicious timing – immediately the Supreme Court placed the final nail on the coffin of legal manoeuvring. The Bank took this drastic action against a company that was not in default and whose accounts clearly indicated that it was patently solvent. It was so solvent that it was demonstrable from the Bank statements that it had rental income far exceeding the monthly loan repayments, and part of the surplus funds were being used by its directors, with the Banks knowledge and concurrence, to put up a construction on their other company's different property, being L.R. No. 5884/16 Riverside Towers.

88. I am thus persuaded, on a balance of probabilities, in fact more, that the statutory management was executed for the sole purpose of aiding Cape Holdings to escape execution. It appears to me to be a rather ingenuous and cynical exploitation of a statute to perpetuate an injustice against a decree holder. Given the collusion and the mala fides, it sounds ill, in my way of thinking, that the Bank should expect to benefit from the salutary jurisprudence that is founded on debentures that are created and resorted to in good faith, a virtue signally lacking in the case at hand.

89. My inevitable answer on the question whether the Bank did sufficiently establish its legal interest in the suit property is in the negative.

90. I now turn to the question whether Synergy met the threshold to warrant leave. The appellants contend, quite correctly in my view, that "the objective of administration under the *Insolvency Act* is to maintain a distressed company as a going concern and to get the best outcome for the creditors by most probably turning it around instead of distinguishing it." Indeed, the placement under administration is meant to give such company some breathing space, some wriggle room so that it can recharge and get back to viability and profitability. It can be viewed as some form of stabilization and life-saving surgery for the company which can, then, hopefully, keep the mortician away. I agree with the reasoning of Tuiyott, J. (as he then was) in MIDLAND ENERGY LTD Vs. GEORGE MUIRURI T/A LEAKEY'S AUCTIONEERS & ANOR (supra) that in order to achieve the objectives of the Act "the Company must be insulated from aggressive creditors who could cause a run [on its] assets. The statute contemplates that upon such protection the Company will not be distracted from (sic) precipitate action and so the Administrator will be able to perform his functions in the interest of all of the Company's Creditors. The insulation of the Company is provided by way of a moratorium from other legal processes."

91. That is not to say, however, that the *Insolvency Act* or Insolvency practice generally contemplates an absolute bar to proceedings against the company in distress. I find persuasive the balanced treatment of this issue in COOK Vs. MORTGAGE DEBENTURES LTD [2016] EWCA Civ 103 which dealt with the purpose and effect of a moratorium once an Administrator is appointed. That judgment, referred to by Majanja, J. in HOGGERS LTD (IN ADMINISTRATION) Vs. JOHN LEE HALAMANDRESS & 11 OTHERS [2021] eKLR stated, in relevant part;

> An administration may be a prelude to a liquidation or once an administrator gives notice of an intention to make distributions to creditors, may become a substitute for a liquidation. In such circumstances, the purposes described above apply also to the moratorium in the

case of an administration. But before that point is reached, the principal purposes of the administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted for unnecessary claims. As Nicholls LJ put it in In re Atlantic Computer Systems plc [1992] Ch 505 at 528, the moratorium provides 'breathing space.' Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so." (Emphasis mine)

92. The balance I speak of is discernible in the provisions of the *Insolvency Act*. While legislating an automatic moratorium upon appointment of an Administrator, it nonetheless gives room for proceedings to proceed either with the consent of the Administrator, or with leave of court expressed thus at section 560(1);

> "While a company is under administration –
>
> ...
>
> c. A person may begin or continue legal proceedings (including) execution and distress) against the company or the company's property only with the consent of the administration or with the approval of the court."

93. It was argued by the appellants that it was improper and premature for Synergy to have moved to court as it should have first sought the Administrator's consent. I think that, given the disjunctive manner in which the provision is couched, that argument is plainly wrong and the learned judge was correct to reject it as follows;

> 26. The Company and the Bank contends (sic) that the application is premature as the consent of the administrator was not sought. With due respect the present application is not a proceeding meant against the Company but one which seeks the approval of the Court to proceed with execution/proceedings. A party has the right to choose whether he should seek the consent of the administrator or the approval of the court under section 560(1)(d) of the Act. In this regard, it was not necessary for the applicant to seek the administrator's consent before bringing the present application. Accordingly, that objection is without basis and is rejected."

94. Now that the matter was properly before the learned judge and he exercised his discretion in granting the approval sought, all I need to consider is whether the learned judge acted properly and exercised his discretion in a judicious manner since it is a judicial discretion to be exercised judicially on the basis of sound principles, and not capriciously, arbitrarily or whimsically. All parties agree that "leave to institute or continue with proceedings in the face of a moratorium is the enabler of the right to access to justice but the Court must be satisfied that sufficient cause has been shown to open up the moratorium and grant leave to institute proceedings", as argued by counsel for the Bank.

95. In arriving at a conclusion whether the learned judge erred, this Court must move with caution, interfering with the discretionary decision only where as was authoritatively held by Madan, Kneller & Hancox, JJ.A in UNITED INDIA INSURANCE CO.LTD Vs. EAST AFRICAN UNDERWRITERS (K) LTD [1985] KLR 888 at 899) it is established that the judge;

> (a) Misdirected himself in law;

b. Misapprehended the facts;

c. Took into account considerations of which he should not have taken account;

d. Failed to take account of considerations of which he should have taken account;

e. His decision, albeit a discretionary one, is plainly wrong."

96. Indeed, I associate myself fully with the words of Madan, JA in the leading judgment, and which has set the law for this Court for the last four decades, that;

> The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case."

97. In the present case, Mabeya, J. considered the following factors. As I have alluded to them in the earlier parts of this judgment, I will paraphrase them thus;

a. The purpose of administration is to give a distressed company a second chance to survive, a resuscitation

b. There was no evidence that Cape Holdings was in distress, unable to meet its obligations, on the verge of collapse to warrant placement under administration

c. The administration was ostensibly triggered by service of a decree nisi, the alleged 'act of default'

d. Such service took place in April 2021 but the Bank took no action until more than 7 months later

e. The Administrator was appointed immediately, within a couple of days in fact, of Cape Holdings ultimate failure to the Supreme Court

f. Cape Holdings was receiving huge rental income from the suit property which its directors were using to develop a different property Parks.. Towers with the Banks knowledge and facilitation

g. The administration was not for the purposes intended by the *Insolvency Act* but to trigger a moratorium to shield and immunize Cape Holdings from meeting the lawful obligations under Synergy's decree

h. Synergy had placed a caveat emptor in newspapers of national circulation in September 2011 warning the whole world and had also placed a caveat on the title so the suit property was not free to be given as security by Cape Holdings the Bank.

i. Despite the caveats and a judgment of this Court in favour of Synergy in November 2020 respect the suit property Cape Holdings and the Bank purported to create a floating Debenture over Cape Holdings property.

j. Synergy twice wrote to the Bank enquiring about Cape Holdings indebtness to it but the Bank ignored the enquiries and maintained a studious silence

k. Cape Holdings and the Bank acted in bad faith, in concert and collusion with the sole purpose of shielding the former from meeting its lawful obligations under a lawful decree repeatedly confirmed by superior courts of the country and with finality by the Supreme Court.

98. I think, with respect, and without the necessity of examining anew, beyond what I have earlier done herein, the learned judge did not at all err in making those findings and arriving at those considerations. They were all relevant and germane to the determination of the matter that was before him and I cannot fault him for granting leave to as deserving an applicant as was before him. I find to be apposite, proper and faithful his reference to and application of the principles enunciated in OWITI OTIENO & RAGOT ADVOCATES Vs. MUMIAS SUGAR CO. LTD (UNDER ADMINISTRATION) [2020] eKLR that;

> When considering whether to grant approval under section 560, the court may in particular taken into consideration
>
> (a) the statutory purpose of the administration:
>
> (b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss:
>
> (c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of applicant; and
>
> (d) the conduct of the parties."

99. It is inevitable that my conclusion on this aspect of the appeal is that it is unfounded, and for rejection.

100. The last issue raised is whether Synergy's Interest "ranks in priority over the Bank's interest." The appellants contend that Synergy as a judgment creditor does not take priority over other creditors and that the Administrator would be the proper person to handle all assets of an insolvent company. It is argued, further, that the Bank, being a secured creditor, holds a preferential position and ranks over Synergy. Reliance is placed on KENYA NATIONAL CAPITAL CORPORATION LTD Vs. ALBERT MARIO CORDEIRO & ANOR [2014] eKLR in which this Court restated the privileged ranking position of a Debenture holder over all other creditors claiming against a company, and in MICHAEL OYUGI & 181 OTHERS Vs. INDUSTRIAL PLANT (EA) LTD IN RECEIVERSHIP & ANOR [2006] eKLR in which the rationale for such priority for debenture holders was expressed as "their having committed their capital to join the foundation for the life of the business. In return for their substantial resource risk [They] are accorded legal protection; they have a right to appoint a receiver when they are faced with grave risks of their capital investment. So at that stage, their interests have priority ..."

101. The Bank faults the learned judge for not according it the preferential position it deserved in law in granting leave, and, furthermore, in according Synergy aforesaid a position over and above all other creditors, thereby prejudicing them. It cited WALKER Vs. SYFRET NO. 1911 AD 141 the South African case where De Villers C.J. expressed the view that in sequestration, and, I suppose in Administration as well, the rights of the general body of creditors has to be taken into account, and "no creditor should obtain any undue advantage over the other creditors" and to their prejudice.

102. A peculiar aspect of this case is that neither the Administrator of Cape Holdings nor the Bank could point to any other creditor of Cape Holdings, even when the matter was raised by Synergy who asserted that beyond itself, there were no other creditors save, perhaps, utility companies for utilities supplied. Absent any showing that there did exist any other creditors who would be prejudiced by the leave granted by the learned judge, it seems to me that the argument that the leave afforded Synergy "preferential treatment over the general body of creditors" becomes merely hypothetical and academic, and I need not expend further energy on it, being moot.

103. As to the Bank's claim to priority on account of the debenture, I think that my conclusions regarding the second issue are equally dispositive. The Debenture is said to have been created, so expressed inconsequence of my holding, in tandem with the learned judge, that it was not a genuine exercise but a sham one proceeding from collusion and mala fides. As at that time, Synergy's caveat had been registered against the title to the subject property, so no valid legal interest could be created over it while the caveat subsisted. Moreover, there was also the pre- existing prohibition order dated 1st September 2011 issued in Milimani ELC No. 440 of 2011 against the same title on 7th September 2011. It was fraudulent, and, I dare say, null and void.

104. In light of those legal impediments and fatal infirmity, and given the want of good faith in its creation, I do not think that the Debenture was capable of creating rights and priority in favour of the Bank that could defeat the rights of the judgment creditor that Synergy was. At any rate, the *Insolvency Act*'s pathway of prior court approval under section 560(1) donates discretion to a judge to consider an application and make appropriate orders. As I have opined already, the learned judge properly exercised his discretion and any purported preferential rights based on a debenture conceived in collusion and purported to be registered in contempt of an extant court order and caveats cannot be a basis for faulting his decision.

105. I would, therefore, come to the conclusion that there was no error on the part of the learned judge in holding the Debenture to be suspect, bearing in mind his observations and conclusions as to its antecedents, and the real nature of the security taken by the Bank from Cape Holdings debt;

> "45. The bank alleges that it holds a debenture over the assets of the company. The Court has already analysed the circumstances under which the debenture was created and fond them to have been suspect. That the bank at all times knew the applicant's claim over the suit property since 2011. That is why, in schedule 4 of the debenture, the bank could not specify the suit property as the charged property.
>
> 46. Further, it was not been denied that the debt attributed to the debenture is in respect of the debt of a sister company by the name Nandlal & Company Ltd. Indeed, the actual security that was taken in respect of the debt assigned to the Company Limited. There is nothing on record to show that the said security would not be sufficient to cover any outlay due to the bank."

DISPOSITION

106. Being of that mind, I would dismiss the consolidated appeals in their entirety. As Achode and Gachoka, JJ.A are in agreement, the dispositive orders are as follows;

a. Civil Appeal No. E758 of 2021 and Civil Appeal No. 788 of 2021 be and are hereby dismissed with costs to the 1st respondent.

b. The motions dated 6th June 2022 in Civil Appeal No. E758 of 221 and 6th June 2024 in Civil Appeal No. 788 of 2021 be and are hereby dismissed with costs to the 1st respondent.

Order accordingly.

Judgment Of L. Achode, JA

107. I have had the advantage of reading the judgment of Hon. P. Kiage, JA in draft. I am in full agreement with his reasoning and conclusions and, therefore have nothing useful to add.

Judgment Of Gachoka, JA

108. I have had the benefit of reading the judgment of Kiage, JA in draft. I entirely agree with his findings and conclusions and I have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024.

P. O. KIAGE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

GACHOKA, C.Arb, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR