



REPUBLIC OF KENYA



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**KSC International Limited (Under Receivership) & 3 others v Bank of Africa (K) Limited
& 8 others (Civil Appeal 27 of 2019) [2022] KECA 911 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 911 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 27 OF 2019
RN NAMBUYE, W KARANJA & J MOHAMMED, JJA
JULY 22, 2022**

BETWEEN

**KSC INTERNATIONAL LIMITED (UNDER RECEIVERSHIP) 1ST APPELLANT
KUNDAN SINGH UBHI 2ND APPELLANT
OPKAR SINGH UBHI 3RD APPELLANT
RIPTHUMAN SINGH UBHI 4TH APPELLANT**

AND

**BANK OF AFRICA (K) LIMITED 1ST RESPONDENT
KENYA COMMERCIAL BANK LIMITED 2ND RESPONDENT
I&M BANK LIMITED 3RD RESPONDENT
KOLLURI VENKATA SUBBARAYA KAMASAST 4TH RESPONDENT
DELOITTE CONSULTING LIMITED 5TH RESPONDENT
SAMUEL OKETCH ONYANGO 6TH RESPONDENT
HARVEN GADHOKE 7TH RESPONDENT
VISTA WINDOWS LIMITED 8TH RESPONDENT
HUGHLAND CANNERS LIMITED 9TH RESPONDENT**

*(Being an appeal from the Ruling and Decree of the High Court at Nairobi
(Makau, J.) dated 22nd of October 2018 in HCCC No. 446 of 2015)*



JUDGMENT

JUDGMENT OF W. KARANJA, JA.

1. The 1st appellant is a Construction and Engineering Company which engages in local, regional and international road and bridge construction projects. The 1st to 3rd respondents are Limited Liability Companies and Banking Institutions licenced under the Banking Act, Cap 488 Laws of Kenya. On diverse dates in 2009, the 1st appellant approached Bank of Africa (K) Limited (1st respondent) with a view to obtain credit facilities as follows: Trade bills discounting up to a maximum sum of Ksh. 150,000,000; Guarantee/Bonds upto a maximum limit of Ksh. 100,000,000 and a letter of Credit to crystallize to asset Finance up to a maximum limit of Ksh. 50,000,000.
2. The 8th and 9th respondents signed as guarantors an inter-lenders agreement dated 17th June, 2011 which spelt out the terms of the banking facilities to the 1st appellant. They also charged their properties to secure the said amounts. The 1st respondent through its letter of offer dated 5th November, 2009 sanctioned and agreed to advance to the 1st appellant certain banking facilities in the aggregate sum of Ksh. 300,000,000. To effectuate the terms of the offer letter a debenture dated 5th August, 2011 for a sum of Ksh. 300,000,000 ranking pari passu with a debenture for Kenya Commercial Bank (K.C.B.) and 1& M Bank was registered pursuant to section 96 of the Companies Act on 22nd August, 2011; a charge dated 16th December, 2011 over L.R No. 336/108-Nairobi for Ksh. 300,000,000 ranking pari passu with the legal charges from KCB and 1& M banks were charged on 22nd December, 2011 and an inter-lenders agreement dated 17th June, 2011 were executed.
3. In addition to the common securities of the debenture and the charge by the 1st respondent the 2nd and 3rd respondents also held them on pari passu basis. It was claimed that the appellants persistently defaulted in servicing the said credit facilities and pursuant to the debentures and lenders agreement, the 1st, 2nd and 3rd respondents appointed the 4th, 6th and 7th respondents to act as the receivers and managers over the 1st appellant's assets. The 4th respondent, however, resigned later leaving the 6th and 7th respondents to act as the receivers and managers. Following the alleged default in servicing the loan facilities, the appellants moved the High Court by way of plaint which was amended and further re-amended on 21st August, 2015. For purposes of this appeal, I will not delve into the issues raised in those pleadings as the substantive suit is yet to be determined.
4. It suffices to state that the prayers sought included the lifting of the receivership over the appellant and the discharge or release of all the debentures created in favour of the 1st, 2nd and 3rd respondents; discharge of charges created over several properties held as securities and release of all other corporate, personal guarantees and third party charges and mortgages. They also sought, inter alia, orders of injunction to restrain the respondents from disposing any of the charged properties; an order setting aside the statutory notices issued in respect of the properties named above; an order for the receiver managers to be compelled to render proper accounts; special damages as particularised in the re-amended plaint and general damages.
5. This claim was strongly denied by the 1st to 7th respondents in the further amended defence and counter-claim dated 24th August, 2017. They averred that the 6th and 7th respondents had been appointed as the receivers and that the 2nd and 3rd appellants being the 1st appellant's directors had the capacity to sue and that the 4th and 5th respondents were non suited in the claim and ought to be struck out of the proceedings. The claim had been commenced by the directors of the 1st appellant yet it was under receivership.



6. The 1st to 7th respondents asked the court to dismiss the appellants' claim and in the counter-claim, the 1st respondent (Bank of Africa Kenya Limited) prayed for judgment to be entered in its favour for:
- a) A sum of Ksh. 791,066,931.69,
 - b. Interest on (a) at the rate of 14% from 31st July, 2017 until payment in full,
 - c. Costs of the counter-claim,
 - d. Interest at court rates from the date of filing the defence and counter-claim and any other relief with costs.
7. As the suit was still pending and two years elapsed since the appointment of the receiver/managers. The appellants appear to have held the view that the receivers/managers term had expired and as the same had not been extended, the 2nd, 3rd, and 4th appellants moved to the premises in a bid to take over the administration and management of the 1st appellant. This is what prompted the 6th and 7th respondents herein (6th and 7th defendants in the suit at the High Court) to file the application dated 26th July, 2018 pursuant to order 40 rule 1(a), 2 and 4(1) of the Civil Procedure Rules, order 51 rule 1, sections 1A, 1B and 3A of the Insolvency Act 2015, section 1024(6) of the Companies Act 2015 seeking, inter alia, the following orders as follows:
- i. An order of temporary injunction restraining the 2nd, 3rd and 4th plaintiffs their agents, servants, employees and or other persons acting or purporting to act on their behalf from interfering with receivers control and possession of the assets of the 1st plaintiff company, including the 1st plaintiff premises situated along baba dogo pending the hearing and determination of this application;
 - ii. An order directing the OCS baba dogo Road police station to provide security and enforce the orders of the court pending hearing and final determination of this application;
 - iii. An order of temporary injunction restraining the 2nd, 3rd and 4th plaintiffs, their agents, servants, employees and or any to the person acting or purporting to act on their behalf from interfering with receivers control and possession of the assets of the 1st plaintiff company including the 1st plaintiff premises situate at baba dogo pending the hearing and determination of this suit;
 - iv. The 6th and 7th defendants/applicants being the receiver of the 1st plaintiff company and having been appointed as such under the repealed companies act prior to the commencement of the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015, continue in office as receivers of the 1st plaintiff, without any obligation to apply for an extension of terms of regulation 141 of the Insolvency Regulations 2016 until the debt owing to the 1st, 2nd and 3rd defendants bank is fully paid or until further orders of this court.
8. The application was premised on grounds: that the applicants are licensed insolvency practitioners appointed as receivers and managers by Bank of Africa, KCB Bank and I&M bank pursuant to debentures dated 18th February, 2015; the applicants were yet to complete their assignment by virtue of a temporary injunction restraining any disposal of the company's assets by receivers and managers pending the hearing and determination of this suit; if the orders are not granted then the premises and assets on receivership shall be in jeopardy; the receivers continue to be in office without any obligation to apply for an extension of term in terms of regulation 141 of the Insolvency Act and that the question as to whether the receivers are properly in office was a subject for determination in the on going suit. The application was further supported by an affidavit sworn by Harveen Gadhoke, a joint receiver and



manager of KSC International Limited with Samuel Onyango. The affidavit reiterates the grounds in support of the application. KCB and I & M banks supported the application.

9. The application was opposed by the appellants vide a replying affidavit of Opkar Singh Ubhi sworn on 20th August, 2018. The 8th and 9th respondents (5th and 6th plaintiffs) opposed the application by raising 4 grounds as follows: the motion is an abuse of the court process and is founded on suppression and/or misrepresentation of material facts; the applicants are entitled to equitable reliefs as they moved the court with clean hands, they seek to found a cause of action on their own wrong doing and that they seek to approbate and reprobate; the applicants are estopped by the doctrine of election and res judicata having successfully moved this court in Misc. Application No. 141 of 2018; sections 734(2) of the *Insolvency Act*, 2015 and section 1024(6) of the *Companies Act*, 2015 are not applicable to the circumstances of this case and the motion.
10. The 9th respondent (6th plaintiff at the High Court) filed grounds of opposition stating, inter alia,; the application is frivolous, vexatious and lacked merit; the application is premised on failure to appreciate the fundamental distinction between the question whether the applicants were lawfully appointed as receivers of the 1st plaintiff (which was a central issue on whether they could act under the provisions of the repealed *Companies Act* and without regard to the provisions of the *Insolvency Act* 2015.); the application was centered on two issues; whether the receiver/managers could still act on the repealed law and whether they could seek extension of time to act; section 1024 of the *Companies Act* could not govern corporate insolvency proceedings from receivership/administration to liquidation; the application was defective since the applicants were attempting to use the provisions of the *Companies Act* to defeat or circumvent clear provisions of the *Insolvency Act* and Regulations and that the applicants were acting in bad faith.
11. Having considered the application, the trial court in its ruling held that the appointment of the receivers continued and the same was expressly regulated under the *Companies Act*, to the exclusion of the *Insolvency Act* as provided under section 734(2) of the *Insolvency Act*. Therefore, the appointment of the receivers and managers of the 1st appellant on 15th March, 2015 and 20th March, 2015 was an act permitted to be done by the *Companies Act*. The learned Judge thus concluded that the receiver managers were supposed to remain as such until otherwise discharged by the Court, or until the debt was paid in full, and they were not required to apply for extension of term of receivership under the *Insolvency Act*. Further, that the applicants had the locus to participate in the proceedings and even file the present application. The Court ultimately granted orders as follows:
 - a. An order of injunction restraining the 2nd, 3rd and 4th plaintiffs, their agents, servants, employees and or other persons acting or purporting to act on their behalf from interfering with receivers control and possession of the asset of the 1st plaintiffs premises situated along Baba Dogo Road, pending the hearing and determination of the suit;
 - b. The OCS Baba Dogo Road Police Station to provide security and enforce the orders of this court, pending the hearing and determination of this suit;
 - c. The 6th and 7th defendant/applicants being the receivers of the 1st plaintiff company and having been appointed as such under the repealed *Companies Act* prior to the commencement of the *Companies Act* No. 17 of 2015 and the *Insolvency Act* No. 18 of 2015 to continue in office as receivers of the 1st plaintiff without any obligation to apply for an extension of term in terms of Regulation 141 of the Insolvency Regulations 2016 until the debt owing to the 1st, 2nd and 3rd defendant banks is fully paid or until further orders of this court.



12. Aggrieved by the above orders, the appellants filed a Notice of Appeal, dated 25th October, 2018 followed by a memorandum of appeal raising grounds whereby the learned Judge is faulted for, inter alia,: Allowing the 6th and 7th respondents' application dated 26th July, 2018; granting prayer 6 of the application after having already found and ruled that the said prayer could not be granted at that interlocutory stage; failing to take into account and find that the 6th and 7th respondents were estopped from contending or arguing that they do not need extension of time under Regulation 141 of the Insolvency Regulations even after they had already obtained an extension of time under the Regulation 141 of the Insolvency Regulations; granting the 6th and 7th respondents an injunction against the appellants when they have no suit or claim against the appellants in the main suit; granting a temporary injunction when the legal requirements for the grant of such an injunction as laid out in *Giella v. Cassman Brown & Company* [1973] EA 358 had not been met.
13. The learned Judge is also faulted for finding and holding that the 6th and 7th respondents purported receivership over the 1st appellant continues to be regulated under the repealed *Companies Act* to the complete and total exclusion of the *Insolvency Act* 2015 and the Insolvency Regulations made thereunder; finding and holding that the 6th and 7th respondents did not need to obtain extension of time under Regulation 141 of the Insolvency Regulations 2016; finding and holding that the appointment of the 6th and 7th respondents as purported receivers and managers of the 1st appellant was an act "permitted to be done" by the repealed *Companies Act*; finding and holding that the 1st, 2nd and 3rd respondents "are owed billions of Kenya shillings" by the 1st appellant when this is one of the major issues to be determined in the main suit. The appellants entreat this Court to allow the appeal with costs.
14. Parties filed submissions and lists of authorities in support of their rival positions, which submissions we have given careful consideration. At the plenary hearing of the appeal, learned counsel Mr. Taib (SC) appeared with Mr. Sarvia for the appellants, Mr. Wafula appeared for 1st, 4th, 5th, 6th and 7th respondents. Mr. Musyoka appeared for the 2nd respondent while the 3rd respondent was represented by Mr. Gachuhi. There was no appearance for the 8th and 9th respondents, who we were told were not participating in the appeal. Counsel present highlighted the salient issues raised in the written submissions.
15. Mr. Taib emphasised the point that as the application before the learned Judge was at an interlocutory stage, the learned Judge could not issue determinative declaratory orders. He also maintained that the learned Judge's finding that the receivers were to remain in office without applying for extension was a determination that ought not to have been made at that stage. According to learned Senior Counsel, the main suit is as good as determined at that interlocutory stage. He faulted the Judge for granting interpretive declaratory orders that had not been sought in the pleadings. Citing the locus classicus case of *Shah vs Mbogo* (1968) E.A 93 counsel maintained that the learned Judge had applied wrong principles of the law and had therefore, arrived at the wrong decision, which in the circumstances ought to be set aside.
16. Counsel drew the Court's attention to the fact the respondents knew that they were supposed to apply for extension of their term and that is why they had "surreptitiously" moved before another Judge in HC Misc. No. 141 of 2018 and obtained orders extending their term. Counsel was of the view that the respondents cannot be allowed to approbate and reprobate. Counsel urged the Court to allow this appeal and give way to the High court to determine the challenge on appointment of receivers, and also the issue of whether there is any outstanding loans, which the appellants strongly contest.
17. On his part, Mr Wafula relied on their written submissions and case digest. The said submissions revolve around the issues as to whether the receivers of the 1st appellant having been appointed under



the Companies Act were required to apply for an extension of their term under the Insolvency Act; whether the receivers of the 1st appellants had locus standi to file and seek injunctive orders against the appellants; whether the receivers were entitled to the orders sought and what orders ought to be issued in the circumstances. It is submitted that the 6th and 7th respondents were the duly appointed receivers and managers of the 1st appellant having been appointed by the 1st, 2nd and 3rd respondents vide instruments of appointment dated 13th March, 2015 and 20th March, 2015 respectively.

18. They submit that the appointment of the receivers preceded the coming into effect of the Insolvency Act 2015 and the Companies Act 2015. The receivers were governed by section 734(2) of the Insolvency Act and section 348(1) of the Companies Act since their appointment was regarded as a past event. The activities of the receivers continued to be regulated under the Companies Act to the exclusion of the Insolvency Act. The receivership continued unless the same was lifted by an order of the court. To buttress this argument, the court has been referred to the persuasive decision in *Surya Holdings Limited & 4 others v. ICICI Bank & Another* [2018] eKLR. Further, that even though the receivers had moved the court vide an application seeking to extend their term, this could not oust the law as provided under section 31 of the Interpretation and General Provisions Act. Though Regulation 141(2) of the Insolvency Act Regulations provides for a right of an insolvency practitioner to seek an extension of time the same does not impose a time limit on pre-existing receiverships.
19. On the issue raised by the appellant that the receivers had ceased being the 5th respondent's employees and could not, therefore, legally act as receivers, section 345 of the Companies Act exempts corporate bodies from being appointed as receivers and the appointment was personal to the receivers and it is not tied to their former employer.
20. On whether the receivers had locus standi to file and seek injunctive orders, because they had not filed a counter-claim against the appellants, it is submitted that the application was premised on Order 40 rule 1 of the Civil Procedure Rules. The receivers and managers could carry on the business of the company and this includes the power to file, defend and compromise suit. Therefore, the court had the inherent power to grant orders to preserve the subject matter of the suit. Further, that the receivers in their application were not seeking declaratory orders at the interlocutory stage, and having satisfied the court to grant the orders sought as set out in *Giella v. Cassman Brown & Co. Ltd.* [1973] EA 358, On the other hand, the appellants had failed to demonstrate that they had satisfied the debt owed to the 1st, 2nd and 3rd respondents.
21. On behalf of the 2nd respondent, Mr Musyoka adopted his written submissions and case digest. He identified the germane issue in this appeal to be whether the receivers having been appointed under the Companies Act were affected by the Insolvency Act coming into force. He posited that Section 734(1) of the Insolvency Act applies to the extent that the receivers did not need to apply for extension. He reiterated that the learned Judge was right and that there cannot be estoppel against the Law and the fact that the receivers had applied for extension earlier should not be applied against them. This Court's decision in *Henry Muthee Kathurima v. Commissioner of Lands & Another* [2015] eKLR, was cited in support of that proposition.
22. Further, that section 734(2) of the transitional provisions of the Insolvency Act provides that the receivers and managers continued to apply to the exclusion of the past event. Being a subsidiary legislation, the insolvency regulations could not conflict with the parent Act, and if it is so then it



becomes void to the extent of the inconsistency. Section 24(2) of the [Statutory Instruments Act](#), No. 23 of 2013 provides that:

“a statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or any act and the statutory instrument shall be void to the extent of the inconsistency”

23. On whether the grant of injunctive orders was rightly granted, it is submitted that the High Court did not err. The subject matter in dispute was in danger of being wasted, damaged and or alienated. The Court has been urged to disregard the appellants’ argument that the receivers could not seek injunctive orders since they had not filed a counter-claim against the appellants. As parties to the suit they had the right to seek the orders.
24. The 3rd respondent’s submissions dated 20th September, 2021 and response to the appellant’s submissions mirror those of the other respondents which we have summarised above. Mr. Gachuhi learned counsel for the 3rd respondent maintained that the orders given by the High Court were not final orders and that the same were to remain in force until the suit was determined or until other orders were granted by the court. This Court has been urged not to interfere with the High Court ruling unless it is satisfied that the decision is clearly wrong or that the court had misdirected itself or acted on matters it should not have. The Court is being urged to be careful not to try to resolve any issues of fact, as that is the preserve of the court dealing with the matter as in this case. See *Mbogo & Another v. Shah* (supra).
25. Mr Gachuhi reiterated that the activities of the receivers and managers continued to be regulated by the repealed [Companies Act](#). Section 734(1) of the [Insolvency Act](#) could not apply to these proceedings. It is their submission that the interpretation of a past event and whether Regulation 141 applied to the parties in this appeal was an issue pending before the High Court for determination.
26. On whether injunctive orders which had not been prayed for in the main suit could be granted, counsel emphasised that the orders were triggered by actions arising after the suit had already been filed and so they could not have been included in the plaint or counterclaim. He stated that the orders were meant to protect the subject matter of the suit and they were therefore in order.
27. In rejoinder, Mr Sarvia reiterated that the respondents have failed to answer the question whether they are bound by Regulation 141 of the [Insolvency Act](#) and also that the respondents have just skirted around section 734(2) of the [Insolvency Act](#). He maintained that the impugned orders were final orders and they ought not to have been granted at an interlocutory stage.
28. This being a first appeal, this Court has a duty to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold as was reiterated in the case of *Kenya Ports Authority vs Kuston (Kenya) Limited* [2009] 2EA 212 where this Court espoused that mandate or duty as follows:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

Upon reading the record of appeal, the submissions by the parties and relevant case law, I discern the following as the issues arising for determination:



- i. Whether the orders of injunction sought in the interlocutory application could be granted, having not been prayed for in the main suit.
- ii. Whether the learned Judge made determinative orders at an interlocutory stage, thus exercising his discretion improperly.

As stated earlier, the 1st respondent appointed the 4th respondent to act as the receiver manager over the 1st appellant's assets and later it appointed the 6th and 7th respondents to act as receivers and managers together with the 4th respondent. The 2nd and 3rd respondents appointed the 6th and 7th respondents to act jointly with the 4th respondent as the receivers and managers of the 1st appellant's assets. The 4th respondent, however, resigned later leaving the 6th and 7th respondent to act as the receivers and managers.

29. It is not disputed that the 6th and 7th respondents were appointed on the 20th March, 2015 as per the notice of appointment under section 103 of the repealed *Companies Act*. It is not disputed either that the *Insolvency Act* and the *Companies Act* 2015 had not come into force then. The appellants urged that the 6th and 7th respondents were estopped from reliance on section 141(2) of the *Insolvency Act*. The application by the 6th and 7th respondents seeking to extend their term was premised on this section. However, the 6th and 7th respondents submitted that this step was not necessary in the first place and it has not been taken lightly by the appellants who contend that the court should not allow them to approbate and reprobate by saying the regulation allows them to seek extension and then later change to a position that the law cannot be superseded by a subsidiary Act. I note that the issue of whether the receiver managers were required to apply for extension of their term, and which provisions of the law were applicable to them was one that called for serious discourse and one that, in my considered view ought not to have been conclusively determined at an interlocutory stage.
30. I say so because, it was an issue that had been the subject of other litigation, the said respondents had moved the court for extension of time, ex-parte orders had been given, then challenged and only extended for 7 days "in the interest of justice". The 6th and 7th respondents are said to have abandoned that suit, and then brought up that issue in the suit which is the subject of this appeal. We note that indeed the issue was raised in the 6th and 7th amended defence. In his Ruling, the learned Judge at paragraph 50 thereof pronounced himself on the said issue as follows:-

"In view of prayer No.6 in the applicants' application and authorities thereto, it is clear at this stage that this court must refrain from making any orders that may have a pre-emptive effect on the suit pending before this court as what is sought is a final finding or determination in prayer No. 6 of the application. The application granted (sic) should not be granted at the interlocutory stage without hearing this matter fully which is already pending defence. I therefore find prayer No. 6 of the applicant's application to be misguided and not tenable at this stage. The same cannot be granted at this stage. It has to await full hearing."

31. The learned Judge, nonetheless, went ahead and granted prayer C which is the same prayer he had stated would be inappropriate to grant at interlocutory stage. This Court in *Kenya Deposit Insurance Corporation v Richardson & David Limited & Another* [2017] eKLR, restated this position and expressed that:

"It is wrong for a judge to grant at an interlocutory stage of proceedings final orders, thus disposing of the suit before the parties are heard. The right to be heard is fundamental and



only in extremely rare circumstances will a court of law issue orders to the effect of which is to determine the suit with finality or render the suit superfluous.”

In that regard, I agree with counsel for the appellants, that the learned Judge fell into error by making the determinative declaratory order on whether or not the receiver managers needed to apply for extension of their term, an issue that was integral to the substantive suit at an interlocutory stage, when the suit was yet to be determined. That aspect of the appeal, therefore succeeds.

32. On whether the 6th and 7th respondents could file an application seeking orders of injunction that were not sought in the substantive suit, it is correct to say that the respondents had not sought any orders of injunction in the suit by way of counterclaim. However, as submitted by learned counsel for the respondents, the act that triggered the application had not occurred by the time of filing suit, nor was it contemplated. In my view, the application was proper and the respondents did not need to file a fresh suit seeking injunctive orders for them to file the application for injunction within that suit. The orders sought were meant to protect/ preserve the suit property. There was, in my view, no violation of Order 40 rule 1 of the *Civil Procedure Act*.
33. On the respondents’ locus standi, this issue was intertwined with whether or not the receivers needed to apply for extension of their term or not. However, as at the time of filing the suit, their capacity as receivers/managers had not been impugned. In *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, Application No. 2 of 2011* [2012] eKLR the Supreme Court expressed itself as follows:-

“The question as to whether the receiver’s power to commence or defend proceedings in the name of a company under receivership is exclusive has received judicial attention in foreign jurisdictions. While it remains the position that a receiver and manager supplants the board of directors in the control, management and disposition of the assets over which the security rests, it is also acknowledged that the receiver and manager does not usurp all the functions of the company’s board of directors. The extent to which the powers of the directors are supplanted will vary with the scope of the receivership and management vested in the appointee. Directors have continuing powers and duties. Their statutory duties include: the preparation of annual accounts; the auditing of those accounts; calling the statutory meetings of shareholders; maintaining the share register and lodging returns.”

In expressing itself as above, the Supreme Court relied on the decision in *Hawkesbury Development Co. Ltd v. Landmark Finance Pty Ltd* [1969] 2 NSW 782 and *Newhart Developments Ltd v. Co-operative Commercial Bank Ltd* [1978] 2 ALL ER 896 (CA) where it was held that the power given to the receiver to bring proceedings was an enabling provision so that he could realize the company’s assets and carry on business for the benefit of the debenture-holders.

34. On the question as to whether the two other orders given by the learned Judge were merited, my considered view is that the orders were issued for purposes of preserving the suit property and this was for the benefit of both the debenture holders and the appellants. I see no need to interfere with those orders. I am nonetheless persuaded that order No. C was issued in error for the reasons I have given above. The same is severable from the rest of the orders.
35. The appeal succeeds in part to the extent that orders No. (a) and (b) of the Ruling dated 22nd October, 2018 are upheld but order No. (C) is hereby set aside. The issue of whether the managers/receivers needed to apply for extension of their term and whether they were properly in office be determined by



the High Court at the conclusion of the substantive suit. In view of this outcome, I order that each party bears its own costs of this appeal.

This judgment is delivered pursuant to Rule 32(3) of the Court of Appeal Rules, Nambuye, JA having retired from service before its delivery. As J. Mohammed JA agrees, this shall be the Judgment of the Court.

CONCURRING JUDGMENT OF J. MOHAMMED, JA.

I have had the benefit of reading in draft, the judgment of my sister, W. Karanja, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI, THIS 22ND DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

