Athi River Steel Plant Limited v Rao & 4 others (Civil Appeal 592 of 2019) [2024] KECA 585 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 585 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 592 OF 2019

MA WARSAME, S OLE KANTAI & PM GACHOKA, JJA

MAY 24, 2024

BETWEEN

ATHI RIVER STEEL PLANT LIMITED ..... APPELLANT

AND

PONANGIPALLI VENKATA RAMANA RAO ..... 1ST RESPONDENT

COMMERCIAL BANK OF AFRICA LIMITED ..... 2ND RESPONDENT

KCB BANK OF KENYA LIMITED ..... 3RD RESPONDENT

BANK OF AFRICA LIMITED ..... 4TH RESPONDENT

I & M BANK LIMITED ..... 5TH RESPONDENT

(Being an appeal from the Ruling and Orders of the High Court at Machakos (Hon. Justice D.K. Kemei) given on 26th September 2019 in Machakos HC Insolvency Case No.16 Of 2018)

Holders of floating charges, which pre-date the coming into force of the Insolvency Act, in respect of company property can appoint administrative receivers

The main issue in the case was whether the holder of a floating charge in respect of a company's property, which pre-dated the coming into force of the Insolvency Act, could appoint an administrative receiver of the company. The court noted that section 690 of the Insolvency Act on appointment of administrative receiver in respect of company prohibited did not apply to the holder of a floating charge that was created before the commencement of the section or to an appointment of an administrative receiver made before that commencement. Further, section 690(4) preserved the rights of debenture holders and charges to appoint a receiver/manager, provided the debenture or charge was created before September 5, 2003.

Reported by Kakai Toili

Commercial Law *– insolvency – administrative receivers - appointment of administrative receivers - whether the holder of a floating charge in respect of a company's property, which pre-dated the coming into force of the*

Insolvency Act, could appoint an administrative receiver of the company - Insolvency Act (cap 53), section 690 and 734(2).

Brief facts

The 2nd to 5th respondents advanced various banking facilities to the appellant between 2010 and 2014. Those facilities were secured by debentures, both fixed and floating, and charges over parcels of land owned by the appellant, all executed by the appellant in favour of the 2nd to 5th respondents. The appellant defaulted the repayment obligations. On or about May 18, 2018, the 2nd to 5th respondents appointed the 1st respondent as receiver manager of the appellant under a deed of appointment. On May 28, 2018, they issued a notice of appointment of receiver and manager under the repealed Companies Act. Thereafter, the 1st respondent took possession and control of the appellant's premises, assets and equipment, which according to the appellant occasioned a shutdown of its business and operations.

The situation prompted the appellant to file an insolvency cause challenging the appointment of the 1st respondent and seeking orders essentially nullifying the appointment and restraining the respondents from selling or otherwise disposing of the appellant's properties. The appellant also sought liberty for its Board of Directors to propose a voluntary arrangement with its creditors and to appoint a supervisor to oversee the same under the provisions of the Insolvency Act, 2015. The High Court was satisfied that the appointment of the 1st respondent was within the terms of the contract and also to a large extent in compliance with the Insolvency Act.

Since the debenture was duly registered, the High Court found that the documents on which the right to appoint a receiver/manager of the appellant was founded were valid. The court issued among other orders that the applicant company's board of directors be at liberty to propose a voluntary process as provided in the Insolvency Act, 2015; and that the appointment made by the 2nd – 5th respondents would not be revoked as it was sanctioned under the debenture and floating charges. Aggrieved, both the appellant and the respondents moved to the instant court. The appellant was dissatisfied with the entire ruling and the respondents appeal was limited to the part of the decision that allowed prayer (e) and declining to award them cots of the suit.

Issues

i. Whether the holder of a floating charge in respect of a company's property, which pre-dated the coming into force of the Insolvency Act, could appoint an administrative receiver of the company.

Held

1. As an appellate court exercising jurisdiction under article 164(3) of the Constitution and section 3(1) of the Appellate Jurisdiction Act, the court's mandate as a first appellate court was to re-evaluate the evidence and make its own findings. That mandate was encapsulated in rule 31 of the Court of Appeal Rules 2022.
2. The indebtedness of the appellant to the 2nd to 5th respondent was not in issue. It was also not in issue that the facilities were secured by debentures and charges which allowed the appointment of a receiver and that the debenture instruments were entered into prior to the commencement of the Insolvency Act. The 2nd to 5th respondents appointed the 1st respondent as a receiver and/or manager. The point of departure between the parties was the lawfulness or basis of the appointment of the receiver and the remedies that were granted by the High Court.
3. It could not be ignored and any starting point for appointment of a receiver or receiver and manager was the existence of an act of default for repayment of an amount that was due and owing. Colossal amounts were advanced to the appellant. Among the securities offered to secure the advance were debentures as well as charges over properties. The debentures were registered and the High Court upheld the validity of the charge created thereunder. At any rate, the validity of the securities was not in issue, as no appeal had been made in that regard. At that point, it could only mean that the first port of call was the contracted position between the parties. The courts could not rewrite a contract between the parties. If anything, it was on the court to not only apply but also uphold the terms of the contract.

4. Clause 13 of the debenture afforded the 2nd to 5th respondents, the power to appoint a receiver and manager. The long title of the Insolvency Act 2015 as replicated in the objects indicated that the Act was meant to *inter alia* to amend and consolidate the law relating to the insolvency of natural persons and incorporated and unincorporated bodies.
5. Section 734(2) of the Insolvency Act 2015 provided that despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continued to apply, to the exclusion of the Insolvency Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it was a step or proceeding that was taken after the commencement. Among the past events was the inability by the company to pay debts which was applicable to the instant situation, the debt behind the appointment of the receiver having accrued as at June 2017 and the Insolvency Act having come into effect on January 18, 2018.
6. Section 690 of the Insolvency Act provided that an administrative receiver in relation to a company, meant; a receiver or manager of the whole (or substantially the whole) of the company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities. It also meant the holder of a floating charge in respect of a company's property could not appoint an administrative receiver of the company. Section 690 did not apply to the holder of a floating charge that was created before the commencement of the section or to an appointment of an administrative receiver made before that commencement.
7. Nothing turned on whether the appointment of the receiver was based on the provisions of the debenture or under the Insolvency Act. The attack on the lawfulness of the appointment of a receiver was at best a smokescreen and it would not address the indebtedness of the appellant to the 2nd to 5th respondents.
8. It was expected that once a receiver and manager was appointed, he or she was expected to take over the control of the affairs of the company.
9. The application being predicated on the imminent sale of the assets of the properties, the same was not backed by evidence. Sale of properties had to be undertaken within certain rigorous steps, none of which had occurred. The 1st respondent conceded that it had some negotiations on the sale of some of the assets but the sale did not materialize.
10. A receiver once appointed had some obligations which under the Insolvency Act were fiduciary in nature for the benefit of both the creditors and the company itself. Directors had continuing powers and duties which included proposing a voluntary arrangement with the appellant's creditors and to appoint a supervisor.
11. All the debentures executed by the parties therein, pre-dated January 18, 2016, which was the date when the insolvency Act came into force in Kenya. There was a default, by the appellant, in the repayment obligations. The appellant did not dispute that it was indebted to the 2nd to 5th respondents. The appellant sought and was unable to obtain several reliefs, including, to bar the 1st respondent from acting or continuing to act as a receiver manager, or order barring or nullifying any sale of assets.
12. The appointment of receiver and manager or administrator was an integral part of the contractual enforcement mechanism included, the appointment of a receiver/manager over the assets, properties and business of the appellants. That was an integral contractual agreement between the parties hence parties were bound by their decisions. Section 690(4) of the Insolvency Act, 2015 expressly allowed the holders of a floating charge, which pre-dated the coming into force of the Insolvency Act, January 18, 2016. That section preserved the rights of debenture holders and charges to appoint a receiver/manager, provided the debenture or charge was created before September 5, 2003. The receiver/manager/administrator was appointed on May 24, 2018 making it within the purview and powers of section 690(4) of 2015.

Appeal dismissed with costs.

Citations

Cases

1. Credit Guarantee Insurance Corporation of Africa vs. Ponangipalli Venkata Ramana Rao & Another (Insolvency Cause No. E017 of 2020; [2020] eKLR) — Mentioned
2. East Africa Cables Plc v Ecobank Kenya Limited; SBM Bank (K) Limited (Interested Party) (Miscellaneous Civil Application E043 of 2020; [2020] KEHC 9295 (KLR)) — Explained
3. Imaran Limited & 5 Others vs. Central bank of Kenya & 5 Others ([2016] eKLR) — Mentioned
4. Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others (Insolvency Petition E004 of 2021) [2021] KEHC 242 (KLR)) — Mentioned
5. KSC International Limited (Under Receivership) & 3 others v Bank of Africa (K) Limited & 8 others (Civil Appeal 27 of 2019; [2022] KECA 911 (KLR)) — Explained
6. Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002; [2003] KECA 175 (KLR)) — Explained
7. National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (Civil Appeal 95 of 1999; [2001] KECA 362 (KLR)) — Explained
8. Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others ((Application 2 of 2011) [2012] KESC 8 (KLR)) — Explained
9. South Nyanza Sugar Co. Ltd v Leonard O. Arera (Civil Appeal 97 of 2018; [2020] KEHC 4648 (KLR)) — Explained
10. Yussuf Abdi Adan v Hussein Ahmed Farah, Hussein Unshur Mohammed, Mohamed Abdikadir Adan & Bluebird Aviation Limited (Civil Appeal 266 of 2016; [2018] KECA 662 (KLR)) — Explained

Statutes

1. Appellate Jurisdiction Act (cap 9) — section 3 (1) — Cited
2. Companies Act (repealed) (cap 486) — In general — Cited
3. Constitution (2010) — article 40(2), 164(3) — Cited
4. Court of Appeal Rules (Legal Notice 40 of 2022) — rule 31 — Cited
5. Insolvency Act (cap 53) — section 625, 628(6), 629, 690(2), (4), 734, 735(1) — Cited

Advocates

None mentioned

JUDGMENT

1. The 2nd to 5th respondents advanced various banking facilities to the appellant between 2010 and 2014. These facilities were secured by debentures, both fixed and floating, and charges over parcels of land owned by the appellant, all executed by the appellant in favour of the 2nd to 5th respondents.

2. In the years 2015 and 2016 the appellant had already defaulted the repayment obligations resulting in demand letters calling for the immediate repayment of the amounts due and owing. An agreement for partial payment of the total amounts due, entered into between the appellant and the 2nd to 5th respondents did not materialize, the appellant not effecting the payment within the agreed timelines, or at all. The 2nd to the 5th respondents got concerned at the failure on the part of the appellant to fulfill its agreed obligations once again.

3. On or about May 18, 2018, the 2nd to 5th Respondents appointed the 1st respondent as Receiver Manager of the Appellant under a Deed of Appointment. On May 28, 2018, they issued a "Notice of Appointment of Receiver and Manager" under the repealed *Companies Act*. This notice was published in the Daily Nation on May 29, 2018. Thereafter, the 1st respondent took possession and control of the

appellant's premises, assets and equipment, which according to the appellant occasioned a shutdown of its business and operations.

4. The above situation prompted the appellant to file Insolvency Cause challenging the appointment of the 1st respondent and seeking orders essentially nullifying the appointment and restraining the respondents from selling or otherwise disposing of the appellant's properties. The appellant also sought liberty for its Board of Directors to propose a voluntary arrangement with its creditors and to appoint a supervisor to oversee the same under the provisions of the *Insolvency Act* 2015. The matter was canvassed before the trial Judge, each party putting its best foot forward.

5. The High Court cautioned that no admission had been made at that stage as to the contents of documents exhibited in the respective pleadings and only the facts agreed upon were those that the parties specifically mentioned as undisputed facts. The court framed six issues the basis upon which its determination was made.

6. The trial court found that the appellant had a cause of action disclosed in their pleadings against the respondent. The court however deferred and reserved for the hearing its decision on whether the 2nd respondent wrongly withdrew consent for an additional loan facility.

7. As to the lawfulness of the appointment of the 1st respondent as Receiver/Manager by the appellant, the learned Judge reasoned that the issue was resolvable on the basis of two questions, - whether the circumstances justified the appointment of a Receiver and whether the appointment was in accordance with the provisions of the law. In addressing the two questions, the learned Judge was satisfied that the appointment of the 1st respondent in the manner it did was within the terms of the contract and also to a large extent in compliance with the *Insolvency Act*. Since the debenture was duly registered, the Judge found that the documents on which the right to appoint a Receiver/Manager of the appellant was founded were valid.

8. On the lawfulness of the takeover of the appellant's business and assets thereon, the learned Judge found the prayer as premature. He noted that while there was evidence of the 1st respondent moving into the appellant's premises, there was no evidence of offering for sale the said property and in any event, there existed mandatory legal provisions that would set in, before such sale especially for land was effected. The Judge found that the remedies to be granted could only be in line with his findings and holdings. In the end, the trial Judge issued the orders as follows in a Ruling delivered on 26th September, 2019:

> " 1. That the interim prayers (a) to (d) be and are hereby dismissed.
>
> 2. That the final prayers (a) to (d) be and are hereby dismissed.
>
> 3. That the Applicant Company's Board of Directors be at liberty to propose a voluntary process as provided in the Insolvency Act, 2015.
>
> 4. That the appointment made by the 2nd – 5th Respondents will not be revoked as it was sanctioned under the debenture and floating charges.
>
> 5. That the parties shall bear their own costs."

9. Aggrieved, both the appellant and the respondents moved to this Court. From the respective Notices of Appeal, the appellant is dissatisfied with the entire ruling and the respondents appeal is limited to the part of the decision that allows prayer (e) and declining to award them cots of the suit.

10. From the appellant's written submissions, the sixteen grounds of appeal have been summarized into three broad grounds in which it is said the Judge of the High Court erred. First is the failure to find that the appointment of the 1st respondent as Receiver of the appellant was unlawful for failure to comply with the mandatory provisions of the *Insolvency Act*, 2015. Second, in finding that the appointment of the 1st respondent as a Receiver of the appellant was to a large extent in compliance with the Insolvency Act and finally, in failing to consider and find that the 2nd to 5th respondents had failed to serve a lawful and valid demand upon the appellant prior to the purported appointment of the 1st respondent and that contractual right (if any) to appoint a Receiver over the Appellant had not arisen in any event.

11. In essence, the appellant asserts that the appointment of the 1st respondent was not within the terms of the debentures, as no valid and proper demand had been served. The appellant further faults the Judge for misapprehending the intent, purport, tenor and effect of the promulgation of the Insolvency Act 2015 and its impact on the rights and remedies of debenture holders in respect of debentures created before and after the commencement of the Act. Thus, transitional provisions in sections 734 of the *Insolvency Act* on saving of past events that would continue to operate and section 735(1) of the Act which empower the Cabinet Secretary to make regulations "relating to the transition of the application of ...the repealed Companies Act to the application of this Act." Importantly, that it is the role of the courts under Rule 141 of the Insolvency Regulations to supervise the receiverships and extend terms of such pre-existing receiverships beyond the first year after commencement of the *Insolvency Act*. The appellant refers to the case of *Yusuf Abdi Adan vs. Bluebird Aviation & Others* [2018] eKLR where this Court struck out a Winding Up Petition filed under provisions of the repealed Companies Act after the commencement of the *Insolvency Act*, 2015.

12. On the second ground of appeal, the appellant argues that the respondents' arguments and emphasis on the provisions of section 690(4) of the Insolvency Act, as the basis of appointment of the 1st respondent as being an afterthought in a bid to justify an unlawful appointment. This is because the Notice of Appointment makes no reference to the statutory provision and that the Judge in his ruling held that the Insolvency Act does not apply to holders of a floating charge that was created before the commencement of that section. The appellant faults the Judge for holding that the 1st respondent was exempt from the provisions of the Insolvency Act and its Regulations.

13. It adds that section 690 must be read in the context of the specific part of the Act in which it appears. The section appears in section 690 and is contained in Part X of the Act which is headed "Provisions Applicable to Companies that are either in liquidation or under Administration" Accordingly, the debentures in favour of the 2nd to 5th respondents are primarily fixed over substantial properties being LR Nos.17849 and 17852, plant & machinery of the appellant and floating over the other assets. That they are not therefore purely floating debentures as contemplated under section 690 for the respondents to bring themselves within the ambit of section 690(4). That in fact, the value of the appellants' assets as per the valuation commissioned by the respondents is in its fixed assets comprising land, plant and machinery affixed thereon in the sum of Shs.10,772,388,000.

14. Further, that under section 690(4) a floating charge created prior to the Act remains valid and an Administrative Receiver can be appointed by the debenture holders under the provisions of the *Insolvency Act*, 2015. There is however, no provision to appoint a receiver under the repealed Companies Act as argued by the respondents. That as a matter of fact, the debenture instrument at clause 10 allowed for the application of the prevailing law as amended or re-enacted from time to time.

15. Moreover, the appellant argues, that by applying for and obtaining an Insolvency Practitioner Licence under the *Insolvency Act* 2015 and by applying to the High Court and obtaining an extension of time of his receivership, the 1st respondent expressly subjected himself to the Insolvency Act and its

Regulations whose mandatory provisions it had totally failed to comply with (See Insolvency Cause No. E017 of 2020 *Credit Guarantee Insurance Corporation of Africa vs. Ponangipalli Venkata Ramana Rao & Another* [2020] eKLR).

16. On the Judge's finding that the appointment of the 1st respondent complied with the Insolvency Act, the appellant argues that this finding was contradictory. This is because the Judge having found that the appointment was made outside of the Insolvency Act, there was no room for the hybrid application of the Companies Act and the Insolvency Act. In arguing so, the appellant reckons that the respondents' consistent case is that they are not bound by the Insolvency Act and its Regulations on account of erroneous position that section 690(4) excludes holders of floating charges in place prior to the commencement of the section. The appellant refers to the final orders (d) in which the Judge did not uphold the appointment made by the 2nd to 5th respondents because it was not sanctioned by the court. The Judge however did not revoke the appointment for having been sanctioned under the debentures and floating charges.

17. The appellant faults the trial court for failing to appreciate the history of receiverships in Kenya and the mischief the legislature sought to arrest by enacting the Insolvency Act and its Regulations to protect the interests of the insolvent company itself as well as whole body of creditors from the risk of financial and operational mismanagement and ruin by a person acting as an administrator, the Insolvency Act provides for stringent protocols to be adhered to by an administrator to ensure this objective is achieved. Reference is made to the High Court decision by Odunga J. (as he then was) in *Imaran Limited & 5 Others vs. Central bank of Kenya & 5 Others* [2016] eKLR.

18. The appellant therefore prays that the Court allows the appellant's appeal as prayed with costs in the High Court and this Court.

19. On its part, the respondents in their joint written submissions start by indicating the facts not in issue. These are the undisputed facts to the effect that the appellant owes and admitted being indebted to the 2nd to 5th respondents in the amounts in excess of Shs.6.445 billion as at June, 2017 and is estopped from asserting otherwise. The other undisputed fact according to the respondents is that the 2nd to 5th respondents all hold debentures which are floating charges and which all pre-date 18th January 2016 when the *Insolvency Act* 2015 came into force.

20. In its legal analysis, the respondents submit that the appellant's main relief/final order that sought a declaration that the appointment of the 1st respondent as the "Receiver and Manager" or "Administrator" as being null and void ought to be disallowed in several respects.

21. First, that there was default by the appellant in the repayment obligations under the floating charges which in turn led to accrual of a right of enforcement to recover monies owed to each of the 2nd to 5th respondents, and the contractual enforcement mechanism included but was not limited to the appointment of a Receiver over the appellant. Secondly, that section 690(4) of the *Insolvency Act*, mirrors the English Insolvency Act and the Business Enterprises Act 2022 in expressly empowering the holders of a floating charge which pre-dates the coming into force of the Insolvency Act (18th January 2016) to appoint a Receiver, despite the general prohibition set out in section 690(2) of the Act. That section 690(4) was enacted to protect the voluntarily contracted right on the lenders with existing pre-2015 debentures thereby taking cognizance of the Lenders Constitutional right to property guaranteed under Article 40 of the *constitution* and in particular Article 40(2) on arbitrary deprivation of property. The respondents cite *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and Another* [2001] eKLR that a court of law cannot rewrite a contract between parties.

22. The respondents urge this Court to keep sight of the fact that the appellant seeks to render the provisions of section 690(4) redundant and that the appellant fails to address how it will repay the 2nd to 5th respondents who are owed billions of shillings, the appellant having adopted a nonchalant approach to the indebtedness and its continued insolvent state. The respondent adds that neither the provisions of the law invoked by the appellant in seeking aforementioned reliefs nor the facts relied upon by the appellant help them for the reasons specifically set out in the submissions.

23. Among the reasons is that the 1st respondent has categorically denied having any intention of disposing off the appellant; the appellant fails to appreciate that the 1st respondent is an agent of the appellant by dint of the aforesaid debentures in favour of the 2nd to 5th respondents; the appellant has not furnished the 1st respondent with a statement of affairs; the proposal of a voluntary arrangement is dependent on compliance with the provisions of Part IX of the *Insolvency Act* in particular section 625 and 628 (6) and 629. That in essence, the appellant seeks to bypass the express provisions of Part IX of the *Insolvency Act*.

24. Moreover, that given the appellants' admitted and continued indebtedness to the 2nd to 5th respondents, it is quite clear that the appellant would not be entitled to any injunctive and/or equitable relief which would serve as a bar to the enforcement of the 2nd to 5th respondent's contractual rights. This principle was enunciated in *Mrao Ltd vs. First American Bank* [2003] KLR 125 at p.128 wherein it was held that in the case of a default by a borrower, there exists no basis upon which the borrower in default can obtain an injunction.

25. In conclusion, the respondents pray for the dismissal of the appeal and allowing the cross appeal with costs.

26. As an appellate court exercising jurisdiction under Article 164(3) of the Constitution and section 3(1) of the *Appellate Jurisdiction Act*, our mandate as a first appellate court is to re-evaluate the evidence and make its own findings. This mandate is encapsulated in Rule 31 of the *Court of Appeal Rules* 2022.

27. In *KSC International Limited (Under Receivership) & 3 others vs. Bank of Africa (K) Limited & 8 Others* (Civil Appeal 27 of 2019) [2022] KECA 911 (KLR) (22 July 2022) (Judgment) the court held as follows:

> " 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 ..."

28. From the record, it is evident that the indebtedness of the appellant to the 2nd to 5th respondent is not in issue. In the same breadth, it is not in issue that the facilities were secured by debentures and charges which allowed the appointment of a Receiver and that the debenture instruments were entered into prior to the commencement of the *Insolvency Act*. It is also common ground that the 2nd to 5th respondents appointed the 1st respondent as a Receiver and/or Manager.

29. What emerges as the point of departure between the parties is the lawfulness or basis of the appointment of the Receiver and the remedies that were granted by the learned Judge. Accordingly, this appeal can in our view be disposed off by addressing the following questions;

    a. Whether the 1st Respondent was lawfully appointed as a Receiver and Manager and on what basis.

b. Whether the Judge erred in the remedies given.

(a) Whether the 1st Respondent was lawfully appointed as a Receiver and Manager and on what basis.

30. The appellant maintains, as it did before the High Court, that the appointment of the Receiver was made under the repealed and non- existent *Companies Act* rendering it untenable under the prevailing applicable law being the *Insolvency Act*, 2015. The appellant submitted that the activities of the 1st respondent were geared towards grounding the appellant and sell its assets at undervalue.

These are the concerns that prompted the appellant to approach the High Court in the first place.

31. On the other hand, the 2nd to 5th respondents buttressed this position that as at June 2017, the appellant was indebted to them for over Kshs.6.45 billion and the respondent's had recourse in appointing the 1st respondent as the receiver manager due to the default by the appellant. The respondents assert that the appointment was above board, in accordance with the debenture.

32. The trial court was persuaded by the respondents and upheld the appointment of the Receiver. The High Court also directed that the appellant's board of directors were at liberty to propose a voluntary arrangement with the appellant's creditors.

33. In our view, it cannot be ignored and any starting point for appointment of a Receiver or Receiver and Manager is the existence of an act of default for repayment of an amount that is due and owing. It is clear to our minds, and the appellant does not dispute that colossal amounts were advances to it. Among the securities offered to secure the advance are debentures as well as charges over properties. It is also not in dispute that the said debentures were registered and the High Court upheld the validity of the charge created thereunder. At any rate, the validity of the securities is not in issue, as no appeal has been made in that regard.

34. At this point, it can only mean that the first port of call is the contracted position between the parties. It is settled that the courts cannot rewrite a contract between the parties. If anything, it is on the court to not only apply but also uphold the terms of the contract. In *South Nyanza Sugar Co. Ltd vs. Leonard O. Arera* [2020] eKLR, we held that:

> " 15. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such

35. The ensuing question that begs an answer is whether the said debenture provides for an appointment of a Receiver. Clause 13 of the Debenture, as correctly noted by the Judge affords the 2nd to 5th respondents, the power to appoint a Receiver and Manager. It provides:

> " At any time after the principal monies hereby secured become payable either as a result of a lawful demand being paid or under the provisions of clause 11 hereof, or if requested by the company and so that no delay or waiver of the rights to exercise the powers hereby conferred shall prejudice the future exercise of such powers and without prejudice to any other remedies provided by law the Bank may in writing under the hand of any of its officers of attorneys or under its common seal appoint in writing any person or any persons whether an officer or officers or agent or agents of the bank or not to be a receiver and/or manager or joint receivers or receivers and managers of the property and assets hereby charged or any part thereof (in this Debenture referred to as "Receiver") upon such terms as to remuneration or otherwise as the Bank shall think fit and may in like manner from time to time remove any receiver so appointed and appoint another or others in his or her stead. Where more than

one Receiver is appointed the Receivers shall have power to act severally unless the Bank shall specify otherwise in their appointment."

36. This has been the position in insolvency matters and as echoed in the case of *East Africa Cables Plc vs. Ecobank Kenya Limited; SBM Bank (K) Limited (Interested Party*) [2020] eKLR where the Court held:

apposite:

> 'the law is well-settled that a receiver of the assets of a company appointed by a debenture holder is entitled to the custody and control of the assets covered by that debenture ..... This entitlement to custody and control is superior to a liquidator's statutory right and duty .... to take the company's property into his custody and under his control. The secured creditor is entitled to stand outside the winding-up and to rely on his security, including his contractual right thereunder to appoint a receiver.'

The court continued:

> "I find that the law is settled that a secured creditor is entitled to exercise its rights under the security document or statute in the event of default by the company. That power is not subject to insolvency proceedings commenced against the company by any other creditor. Further, an administrator or liquidator cannot interfere with the exercise of those rights. A fortiori, any other creditor of the company cannot intervene in the exercise of the secured creditor's rights against the secured property"

37. However, the appellant takes issue with the appointment of the receiver commencing with the Notice of Appointment which it submits was made under the repealed Companies Act after the Insolvency Act had come into operation. If we were to accept the appellant's argument, it calls for our interrogation of the transition into the *Insolvency Act* 2015. Its long title as replicated in the objects indicates that the Act is meant to inter alia to amend and consolidate the law relating to the insolvency of natural persons and incorporated and unincorporated bodies.

38. Could this be a situation where 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? Section 734(2) of the Act provided that despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continued to apply, to the exclusion of the Insolvency Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it was a step or proceeding that was taken after the commencement.

39. Among the past events is the inability by the Company to pay debts which as we already stated is applicable to the present situation, the debt behind the appointment of the receiver having accrued as at June 2017 and the Insolvency Act having come into effect on 18th January 2018.

40. On the other hand and more important, Section 690 of the Insolvency Act provides that an administrative receiver in relation to a company, meant; a receiver or manager of the whole (or substantially the whole) of the company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities. It also meant the holder of a floating charge in respect of a company's property could not appoint an administrative receiver of the company. Section 690 did not apply to the holder of a floating charge that was created before the commencement of the section or to an appointment of an administrative receiver made before that commencement (see *Kimeto &*

Associates Advocates v KCB Bank Kenya Limited & 2 others (Insolvency Petition E004 of 2021) [2021] KEHC 242 (KLR) (Commercial and Tax) (19 November 2021) (Ruling)). The appellant nevertheless challenge the applicability of this provision in two respects. First, that the argument was introduced not only as an afterthought but also that its securities in form of floating charges excluded the applicability of the Act. Second that the respondents had invoked the repealed *Companies Act* and debenture and therefore argued for the exclusion of the applicability of the Insolvency Act. The appellant further faults the learned Judge for having made a contradictory finding on the applicability of the Insolvency Act to the present situation while at the same time affirming the appointment under the debenture

41. In the end, nothing turns on whether the appointment of the receiver was based on the provisions of the debenture or under the Insolvency Act. The attack on the lawfulness of the appointment of a receiver is at best a smokescreen and it would still not address the indebtedness of the appellant to the 2nd to 5th respondents. We fail to find merit in this argument.

42. Turning to the second ground, the judge having affirmed the validity of the appointment of the receiver did not find merit in the prayers sought in the application save for one already highlighted earlier. The gist of the prayers sought were in the nature of injunctive reliefs, to otherwise curtail the 1st respondent from acting as a receiver.

43. It is expected that once a Receiver and Manager is appointed, he or she is expected to take over the control of the affairs of the Company. 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:-

> " ... 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."

44. We echo the above finding and appreciate the learned judge's findings and remedies issued. The application being predicated on the imminent sale of the assets of the properties, the same was not backed by evidence. As rightly noted by the trial Judge, sale of properties has to be undertaken within certain rigorous steps, none of which has occurred. The 1st respondent concedes that it had some negotiations on the sale of some of the assets but the sale did not materialize. A Receiver once appointed has some obligations which under the Insolvency Act are fiduciary in nature for the benefit of both the creditors and the company itself. As noted by the Supreme Court in the above cited case, directors have continuing powers and duties which include proposing a voluntary arrangement with the appellant's creditors and to appoint a supervisor.

45. It is important to appreciate that all the debentures executed by the parties herein, pre-dated 18th January, 2016, which was the date when the insolvency Act came into force in Kenya. There was a default, by the appellant, in the repayment obligations. The appellant does not dispute that it is indebted to the 2nd to 5th respondents. The appellant sought and was unable to obtain several reliefs, including, to bar the 1st respondent from acting or continuing to act as a Receiver Manager, or order barring or nullifying any sale of Assets. The appointment of Receiver and Manager or Administrator was an integral part of the contractual enforcement mechanism included, the appointment of a

Receiver/Manager over the assets, properties and business of the appellants. That was an integral contractual agreement between the parties hence parties are bound by their decisions. Section 690 (4) of the *Insolvency Act*, 2015 expressly allow the holders of a floating charge, which pre-dates the coming into force of the Insolvency Act, January 18, 2016. The said Section preserved the rights of debenture holders and charges to appoint a Receiver/Manager, provided the debenture or charge was created before September 5, 2003. Clearly, the Receiver/Manager/Administrator was appointed on 24th May, 2018 making it within the purview and powers of section 690 (4) of 2015.

46. In conclusion as the substantive matter is still before the High Court, let the same be determined on its merits. Ultimately, the appeal fails in all respects and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

.....

JUDGE OF APPEAL

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

SIGNED DEPUTY REGISTRAR