

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E063 OF 2021

CYTONN HIGH YIELDS SOLUTIONS LLP

(IN ADMINISTRATION) APPLICANT

- VERSUS -

OFFICIAL RECEIVER RESPONDENT

R U L I N G

1. This ruling determines two applications, namely, one dated 19/5/2022 by the creditors and the one 5/10/2022 by the Administrator. I propose to consider the creditors' application first.
2. The Motion by the Creditors dated 19/5/2022, was brought under *Order 51 Rule 1 of the Civil Procedure Rules, Section 3A and 63(c) of the Civil Procedure Act, Sections 597(1)(2)(a) of the Insolvency Act 2015*. It sought the termination and lifting of the Administration of Cytonn High yields Solution ("CHYS").

3. It also sought orders for the preservation of the assets/projects identified as; the **Alma, Applewood/Miotoni, Riverrun, Ridge and Taraji** all indicated as available for Administration in the affidavit and Petition and have them put in the custody of the Official Receiver. The application also sought that they be allowed to enforce the corporate guarantee.
4. The grounds for the application were set out on the face of the application and in the supporting affidavit sworn by a creditor **JOHN BOSCO MATHEKA**. It was the applicants' case that since his appointment, the Administrator had not undertaken anything substantial in the Administration. That in a virtual meeting held with the Administrator, the Creditors' Committee had raised certain questions arising from the Statement of Proposal but to-date the same had not been responded to. That he had failed to obtain relevant information pertaining to the company on the basis that the management denied him the same.
5. That the management of the company had continued to be in operation of the company even after Administration order. The company had continued to advertise for conversions as well as advertising some assets for sale. That the Administrator had not revealed to the Court and to the creditors that two months prior to the Administration order, he had engagement with the company.

6. The respondent opposed the application vide a replying affidavit dated 23/6/2022 sworn by **EDWIN HAROLD DAYAN DANDE**. He contended that the Administration was meritorious as the company was unable to repay investments of **Kshs 5,933,285,632/-** which by 31/7/2021 had matured. That the purpose of Administration was to provide an avenue for a credible balance sheet, restructuring CHYS debt as well as establishing whether the company's debt obligations could be successfully restructured.
7. That the Creditors had stayed the agenda 2 of the first creditors meeting and therefore could not accuse the Administrator of not taking the right steps in the Administration. He averred that the Administrator had disclosed that he was previously been engaged by CHYS before commencement of the administration in his affidavit dated 30/9/2021 where the company consulted the Administrator on the necessary steps to commence Administration as well as his consent for administration.
8. He averred that the applicants had referred to the Special Purpose Vehicles (SPVs) which however were separate legal entities that were not under Administration. That the SPVs were not part of the proceedings and ought not be condemned unheard and they were not prohibited from dealing with their own assets by virtue of the Administration order.

9. He stated that, the SPVs were allowed to get into contracts for assignment of CHYS's debts in exchange for real estate units just as other creditors were allowed to do. That the SPVs did not require permission from the Administrator to deal with their own assets.
10. The application was also opposed by the Administrator through his replying affidavit sworn on 8/7/2022. He stated that during the first creditors' meeting, the Creditors' Committee was formed and the members of the committee were advised on their role and the documents they were required to sign.
11. That they were given the consent to act, nondisclosure agreement, guidance note and the code of conduct. That only four members signed the nondisclosure agreement and four of them had not signed the guidance note and the code of conduct thus hampering the workings of the Creditors Committee. He further contended that CHYS raised funds from the SPVs which in turn acquired the assets and that he had made demands for repayments to the various SPVs. He stated that his Statement of Proposal demonstrated that the company could not be rescued as a going concern.
12. The application was canvassed by written submissions which I have carefully considered and need not reiterate them here in full. The applicants' submissions were dated 7/7/2022 while those of the respondent were dated 8/9/2022.

13. The respondent submitted that the Creditors' Committee seemed to be unaware of its role. It was constituted to assist him and not supervise him. It had no capacity to commence proceedings against him.
14. For the applicants, it was submitted that there was ongoing dealings with the assets that were available for Administration whereby CHYS was selectively approaching some creditors to convert their debt into apartments. According to them, this would prejudice the rest of the creditors. That the SPVs had refused to pay the Loan Notes. That the assets had been registered under separate legal entities but remained under the full control of the directors of Cytonn Investment Management Plc (CIMP) and its related entities which continued to deal with the assets in a manner prejudicial to the creditors.
15. It was submitted that the dealings by **Edwin Harold Dayan Dande** with the assets without the Administrator's consent amounted to improper motive. That although the Administrator had been in office for seven months, he had not taken charge of the assets that were listed for Administration. That the creditors had beneficial interest in the assets held by the SPVs.
16. I have carefully considered the application, the responses and the written submissions by the parties. I have also considered the entire record. The main issue for determination is whether the applicants have made out a case for the termination and the lifting of the Administration of CHYS.

17. Their contention was that the Administrator had not done anything substantial to aid in the Administration. He had failed to answer questions raised to him and that the management of the company continued to be in control even after the Administration Order. The Administrator contended that the Administration had been in fact stalled by the Creditors Committee whose members failed to sign the required documents such as the nondisclosure document, the code of conduct among others. That the SPVs were separate legal entities that got into contracts for assignment of CHYS's debts in exchange for real estate units just as other creditors were allowed to do. That the project did not require permission from the Administrator to deal with their own assets.

18. The Motion was founded on *sections 597(1)(2)(a) of the Insolvency Act 2015* which provides that -

“(1) A creditor of a company that is under administration may make an application to the Court for an order terminating the appointment of an administrator of the company.

(2) An application under subsection (1) may be made only if it alleges an improper motive-

(a) in the case of an administrator appointed by the Court- on the part of the applicant for the order; or

(b) in any other case-on the part of the person who appointed the administrator”.

19.From the foregoing, it is clear that the burden was on the creditors to show that the conduct of the Administrator warranted his removal. The question therefore is whether the applicants have demonstrated that there was improper motive by the Administrator in carrying out the Administration of the company.

20.My view is that, improper motive is to be discerned from the actions and/or inaction of an Administrator which when viewed against the objectives of Administration under the *Insolvency Act* falls short of those objectives or put in another way, improper motive is when the Administration is carried out in a way that defeats the purpose of Administration.

21.The objectives of Administration are set out in *section 522 of the Insolvency Act (the Act)* as follows: -

“(1) ...

(a) to maintain the company as a going concern;

(b) to achieve a better outcome for the company’s creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);

(c) *to realize the property of the company in order to make a distribution to one or more secured or preferential creditors.*

(2) *Subject to subsection (4), the administrator of a company shall perform the administrator's functions in the interests of the company's creditors as a whole.*

(3) *The administrator shall perform the administrator's functions with the objective specified in subsection (1)(a) unless the administrator believes either—*

(a) *that it is not reasonably practicable to achieve that objective; or*

(b) *that the objective specified in subsection (1)(b) would achieve a better result for the company's creditors as a whole.*

...”

22. On 6/10/2021, CHYS applied to be placed under administration. At that time, the company disclosed that the amount contributed by 3,116 creditors was **Kshs.11,172,133,445/-**. The Company pleaded for an Administration order to give it a breathing space for ‘*balance sheet restructure and preservation of value*’ of the assets of the Company.

23. From the foregoing, it is clear that the Administration was supposed to either maintain the Company as a going concern, achieve a better outcome for the company's creditors or realize the property of the company for distribution. These objectives ought to have been achieved against the backdrop that the interests of the creditors as a whole was central in the Administration process.

24. It is on that basis that an Administration Order was made on 6/10/2021 and **Mr. Kereto Marima** appointed as the Administrator. The said Administrator had been proposed by the Company itself.

25. In his replying affidavit sworn on 8/7/2022, the Administrator set out the actions he had undertaken since the commencement of the Administration. He had filed the relevant notices on his appointment. He had undertaken the verification of claims and developed a Statement of Proposals which recommended an orderly wind down of the CHYS. That he had frequently updated the creditors and the last update was on 26/5/2022 and that he had sought legal opinions on various issues that affected the company.

26. However, the Administrator did not disclose that he had not informed the Creditors as to how much assets of CHYS were in his possession or under his control. He never disclosed the assets, if any, he had recovered from or safeguarded for the company for distribution, neither did he state what he was

actively doing to protect the interests of the Creditors. What the Administrator deposed in his affidavit was that he had made several demands to various SPVs demanding for repayment but had received nothing.

27. As at 7/12/2022, when the matter came up for mention to extend the Administration and seek clarification from the Administrator, there was no evidence to show that the Administrator was actively pursuing the recovery of the amount owed or what he had done to recover anything from the SPVs.

28. It should be remembered that the Creditors accuse the Administrator of being complacent and not taking control of CHYS. That the operations of CHYS were still under the direction and control of the Company directors notwithstanding the Administration order. That he had failed to disclose to the Court that immediately before the petition for Administration was made, he had dealt with the Company. These allegations made on oath were neither rebutted nor denied. Indeed, it was alleged that the directors of the Company were selectively enticing some creditors to take out assets in projects developed by monies lent out by CHYS in settlement of the debts.

29. The Court was not satisfied with the explanation given on how he had dealt with the Company prior to his engagement as a potential Administrator. Although he was appointed by the Court, it behooved him to act professionally

and not to be under the control and direction of those who proposed his appointment.

30. It is therefore no wonder that even after the Administration order, **Edwin Harold Dayan Dande**, who describes himself as the Chief Executive Officer of CIMP is the one swearing and filing affidavits.

31. Further, the Court is alive to the fact that during the first Creditors' meeting meant for March, 2022, the Creditors bitterly complained about the short notice the Administrator had issued to them. The same was less than 24 hours. They were to consider and vote on the Statement of Proposal running up-to 75 pages. Indeed, they came to Court and stayed one of the agendas.

32. In allowing the stay, this Court observed: -

“Having listened to the administrator, I am not satisfied that the time given to the creditors to interrogate the Statement of Proposal is reasonable. At least there should have been a minimum of 7 days before the body of creditors can be required to interrogate the administrator on the proposal and vote on the same.

As already stated, this is a matter of public interest. The number of creditors involved, the Interest the matter has generated, it

would be unfair to expect the creditors to fully and meaningfully participate in the deliberations with the short notice given.

Accordingly, I am inclined to allow prayer no.2 – that agenda (iii) be suspended for a period not exceeding 45 days- from 2/3/2022

It is upon the Administrator to at all times act in the best interests of the creditors. That includes giving them all the reasonable materials required and within a reasonable time as the administration of the company moves forward.”

33.Despite that clear direction by the Court, the Administrator never yielded. He was later on, in the present application, accused by the Creditors of having refused and/or failed to answer certain questions put to him by the Committee. His feeble and unsatisfactory answer was that, certain members had refused to sign and return certain documents he required of them. These included issues of confidentiality etc. That won't do. The Administration process is there for the benefit of the Company and all its creditors. He should have come to Court for directions. It is the Court which would have given directions on what to do in the circumstances.

34. The Court notes that the original period of 12 months of Administration has come to an end. Nothing substantial has been done. Monies in excess of **Kshs.11 billion** contributed by the members of the public numbering over 3000 has sunk and not a dime has either been recovered or any effort shown by the Administrator to recover the same.

35. He is dilly dallying and doing absolutely nothing towards achieving any of the objectives of the Administration. He stated that he only had Loan Notes given by SPVs which he had demanded but received nothing. He never stated when he allegedly made the demands; to who and how much he demanded; what the response was and what action he had taken or intended to take in view of the recalcitrant position taken by the SPVs.

36. The SPVs are under the control and direction of **Edwin H. Dande**, the Chief Executive Officer of the Company? They are all “Cyttons”.

37. From the foregoing, it is clear to this Court that the actions and inactions of the Administrator were not in the best interest of the Creditors. They were contrary to the objectives of the Act. The Administrator was more shielding the promoters of the Company than acting in the best interest of the Company and the creditors. In delaying to recover what was owed to CHYS, that was highly prejudicial to the Creditors.

38. The applicants have also sought for preservation orders of the assets/projects disclosed as **Kilimani Asset, The Alma, Applewood/Miotoni, Riverrun, Wasini/ Cysuites, Superior Homes, Athi river Asset, The Alpha and Taraji** and have them put under the custody of the Official Receiver. This has been opposed on the grounds that those projects belong to other entities and that it would be against the rules of natural justice.

39. It was the respondent's contention that the SPVs were registered under different entities and were not under the control of the Company.

40. From the Administrator's Statement of Proposal, dated 28/2/2022, he disclosed that CHYS was owed a total of **Kshs 5,808,831,300/-** from the following SPVs as at 6/10/2021.

- a) Cytonn Intergrated Project LLP, **The Alma – Kshs. 1,437,277,107/-**
- b) Cytonn Investments Partners Five LLP, **Riverrun – Kshs. 535,897,103/-**.
- c) Cytonn Partners Eleven LLP, **Ridge – Kshs. 33,144,258/-**.
- d) Cytonn Investments Partners 12 LLP, **Riverrun – Kshs.295,921,551/-**.
- e) Newtown Mystic Plains, – **Kshs 60,534,764**
- f) CIPS Four LLPS, **Athi river – Kshs 236,294,957**
- g) Cytonn investment Partners Twenty LLP, **Cysuites - 187,385,636**.

- h) Cytonn Investment Partners Ten LLP, **Taraji heights - Kshs 53,889,634/=**
- i) Cytonn Investment Partners Sixteen LLP, **Kilimani- Kshs 1,730,867,063/=**
- j) Cytonn Investment Partners Fifteen LLP, **Superior Homes -Kshs 383,985,131/=**
- k) Cytonn Investment Partners Three LLP, **Amara- Kshs 502,860,365/=**

41. The evidence on record shows that the monies paid by the creditors of CHYS was sunk in these projects. There are no securities held by way of Charges for the loans lent to these SPVs.

42. It may be that the said SPVs are separate entities and independent of the CHYS but not the projects. This Court respects and salutes the rules of natural justice. No man should be condemned unheard. However, there is a higher calling of justice and fairness while effecting these rules. In the circumstances where a party can still be heard, a Court of law and/or equity may temporarily restrain a party from dealing with its property awaiting an opportunity for it to put forward its case.

43. In the present case, the Administrator has confessed that he has been unable to realize and recover the Loan Notes. All he has as assets for the Company are Loan Notes (mere pieces of paper he's been unable to enforce?). In my view,

under the Common Law doctrine of tracing, the Creditors would be entitled to trace their funds into these projects. Let those properties be conserved/protected awaiting the realization of the assets of CHYS. Ruling otherwise would be to abate a possible fraud upon the Creditors. This would be so because, the so SPVs may dispose of those projects to the extreme prejudice of the Creditors whose monies was used to acquire them.

44. At the time of liquidation, those entities would be given a hearing either to dispute the Loan Notes or pay up the same. The Court must be sensitive and alive to the plight of over 3000 members of the public who sank their over **Kshs.11 Billion** into these projects and therefore lean towards a lesser evil, which is to preserve those assets for the time being.

45. I have come to the conclusion that, the Creditors interests was not taken into account and the Administration is still under the initial stages. No satisfactory explanation has been given for the inordinate delay. By virtue of *section 580 of the Act*, the Administrator had the power to take any action which was likely to contribute to the effective and efficient management of the affairs and property of CHYS. He has not performed his said duty to the satisfaction of the Court.

46. In his affidavit, he admitted that CHYS cannot be rescued as a going concern because it has no credible funding model. In this case, there is no likelihood of turning the company around and therefore there is no justification of extending the term of the Administrator or appointing a new one.

47. In **re Nakumat Holdings Limited [2017] eKLR** it was held: -

“The Company is evidently unable to pay its debts. For all the reasons stated in this ruling, the Company, in my judgment, has however not shown to the required standard that an administration order is reasonably likely to achieve an objective of administration. I am not satisfied that this is a case for administration for the following additional reasons.

The level of indebtedness may be beyond salvage and neither the company nor the administrator has taken the time to address this. Secondly, there has been a lack of candor on the part of the company which in my judgment appears to have been intended to only benefit the company, yet administration as a process ranks both the company and creditors in any rescue mission on equal footing”.

48. In the present case, it is not in dispute that CHYS is seriously ailing and the creditors have suffered and continue to suffer as CHYS is unable to pay what it owes them. The Administration has not worked and the Court is of the view that the viable option would be to liquidate the company.

49. Apart from the prayer by the Creditors to place the CHYS under the Official Receiver, there is before me an application for extension of the Administration. I would treat the same as an application under *section 533 of the Act* and make an order for liquidation.

50. *Section 533 of the Insolvency Act* gives the Court the power to treat an administration application as a liquidation application and make any order that the Court would make under *section 426 of the Act*. It provides: -

“1) On hearing an application for an administration order in respect of a company, the court may

a) ...

...

(e) treat the application as a liquidation application and make any order that the Court could make under section 426;

(f) make any other order that the Court considers appropriate.”

51. In the premises, I find merit in the application by the Creditors dated 19/5/2022 and I allow the same to the extent that: -

a) The Administration of CHYS is hereby terminated and is hereby placed under liquidation.

- b) Since the current Administrator has shown to be very accommodative to the promoters of CHYS to the detriment of the Creditors, I hereby appoint the Official Receiver as the Liquidator of the Company. The Administrator to forthwith surrender to the Official Receiver all the properties and belongings of CHYS as well as the documents relating to the Administration.
- c) The properties set out in the Motion dated 19/5/2022 are hereby ordered to be preserved until the Liquidation is concluded.
- d) In view of what I have found above, the application dated 5/10/2022 for extension of the Administration is hereby declined and dismissed with costs.
- e) The pending ruling on all applications for leave to proceed with executions and/or other legal proceedings is hereby arrested to await the process of Liquidation. All those claims be lodged with and be proved before the Liquidator.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 6th day of January, 2023.

A. MABEYA, FCIArb

JUDGE