

# Dispute Resolution

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**KENYA**

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## Court reaffirms that holders of floating charges pre-Insolvency Act, retain the right to appoint receivers

The general rule in statutory interpretation is that legislation does not apply retrospectively unless expressly stated or implied by necessity. However, Parliament has the authority to enact laws that apply to past events. This principle is frequently tested in court, particularly in cases concerning contracts and security instruments created before the enactment of new laws.

The Insolvency Act, CAP 53 (Insolvency Act) introduced significant changes to the insolvency regime. A recurring legal issue has been whether its restrictions on receiverships apply to floating charges created before its commencement.

### Background

In *Athi River Steel Plant Limited v Ponangipalli Venkata Ramana Rao and Four Others* [2024] KECA 585 (KLR), the Court of Appeal examined whether a floating charge holder could appoint a receiver, now referred to as an administrative receiver, if the charge was created before the Insolvency Act came into force.

The appellant had obtained credit facilities from various banks, secured by debentures and charges over its assets. Upon default, the creditors appointed a receiver/manager under the terms of the debentures. The appellant challenged this appointment, arguing that it contravened the Insolvency Act, which generally prohibits administrative receiverships.

Both the High Court and the Court of Appeal upheld the appointment, finding that:

- The debentures were executed before the Insolvency Act took effect, making the appointment valid under section 690(4).
- The appellant's contractual obligations were enforceable, and courts cannot rewrite agreements between parties.
- There was no evidence of an imminent sale of assets, and the receiver/manager had fiduciary duties to both creditors and the company.

The Court of Appeal further emphasised that transitional provisions in the Insolvency Act allow pre-existing contractual rights to be enforced.

### Key legal provisions

#### Section 734(2) of the Insolvency Act

- This section provides that certain provisions of the repealed Companies Act continue to apply, despite the repeal, to any past event preceding or following the commencement of the Insolvency Act.
- The effect is that pre-2016 floating charges remain enforceable under the old legal framework.

#### Section 690(2) and (4) of the Insolvency Act

- Section 690(2) generally prohibits the appointment of an administrative receiver in respect of a company's property.
- However, section 690(4) creates an exception, stating that this prohibition does not apply to floating charges created before the Insolvency Act took effect.

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## Court's analysis and findings

### Retroactive application of the Insolvency Act

The key issue was whether the Insolvency Act's restrictions on administrative receiverships applied retroactively to debentures created before its commencement.

The court found that the appointment of an administrative receiver remains valid if the floating charge was created before the Insolvency Act came into force. The court ruled that section 690(4) explicitly protects the rights of pre-2016 debenture holders, affirming that creditors can still enforce their pre-existing rights.

### The sanctity of contracts

The appellant argued that the appointment of the receiver was unlawful, as the notice of appointment did not reference the Insolvency Act and no valid demand had been served.

The court found that the contractual terms between the parties govern enforcement rights, and courts cannot rewrite commercial agreements. Clause 13 of the debenture explicitly granted the creditors the power to appoint a receiver and manager upon default. The court reiterated its role was to uphold, not alter, the parties' agreement.

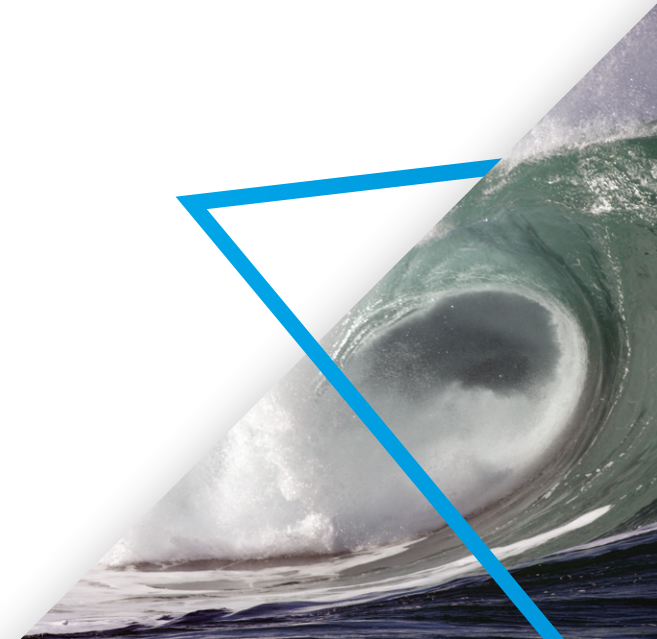
### Directors' powers in receivership

The court reaffirmed that directors retain certain powers even after a receiver is appointed, including the ability to:

- Propose a voluntary arrangement with creditors.
- Appoint a supervisor for restructuring efforts.

## Implications for debtors and creditors

- Pre-2016 floating charge holders retain their contractual rights to appoint administrative receivers, despite general restrictions under the Insolvency Act.
- Courts will uphold properly executed debentures and will not intervene unless there is evidence of procedural non-compliance or bad faith.
- Creditors should ensure their security instruments are meticulously drafted to align with both contractual and statutory provisions.
- Debtors facing insolvency proceedings should explore available restructuring options (e.g. voluntary arrangements) rather than challenging legally valid enforcement actions.
- A validly appointed receiver/manager has fiduciary duties to both creditors and the company, meaning actions taken must align with fair commercial practices.





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ALERT**

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**Conclusion**

The *Athi River Steel* decision reinforces the sanctity of commercial contracts and affirms that transitional provisions in the Insolvency Act preserve rights under pre-existing security instruments.

- **For creditors:** Lenders should carefully assess the timing and terms of their securities to ensure enforceability.
- **For debtors:** Companies facing receivership should prioritise debt restructuring strategies instead of attempting to nullify legally valid enforcement actions.

The Insolvency Act does not automatically override older agreements, and creditors can still enforce their rights under pre-existing floating charges.

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