



**Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others; Vartox Resources INC & 2 others (Creditor); Sarrai Group Limited & 3 others (Interested Parties) (Insolvency Petition E004 of 2019) [2023] KEHC 20987 (KLR) (Commercial and Tax) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20987 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**INSOLVENCY PETITION E004 OF 2019**

**JWW MONG'ARE, J**

**JULY 31, 2023**

**IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2017**

**-AND-**

**IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015**

**-AND-**

**IN THE MATTER OF MUMIAS SUGAR COMPANY LIMITED**

**BETWEEN**

**KIMETO & ASSOCIATES ADVOCATES ..... PETITIONER**

**AND**

**KCB BANK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PONANGIPALLI VENKATA RAMANA RAO ..... 2<sup>ND</sup> RESPONDENT**

**MUMIAS SUGAR COMPANY LIMITED (IN RECEIVERSHIP &  
ADMINISTRATION) ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**VARTOX RESOURCES INC ..... CREDITOR**

**KHAMINWA & KHAMINWA ADVOCATES ..... CREDITOR**

**WEKESA & SIMIYU ADVOCATES ..... CREDITOR**

**AND**

**SARRAI GROUP LIMITED ..... INTERESTED PARTY**

**WEST KENYA SUGAR COMPANY LIMITED ..... INTERESTED PARTY**



**KERETO MARIMA ..... INTERESTED PARTY**  
**MUMIAS SUGAR 2021 LIMITED ..... INTERESTED PARTY**

## **RULING**

1. By its Ruling delivered of the 19<sup>th</sup> of November, 2021, this Honorable Court issued an Administration Order over the 3<sup>rd</sup> Respondent Company, Mumias Sugar Company Limited, to run concurrently with a partial receivership over the assets of the company on behalf of Kenya Commercial Bank Kenya Limited, the 1<sup>st</sup> Respondent herein. At the same time, the court appointed Ponangipalli Venkata Ramana Rao, the 2<sup>nd</sup> Respondent herein as the 1<sup>st</sup> Administrator of the 3<sup>rd</sup> Respondent (Mumias Sugar Company Limited) on behalf of the Petitioning Creditor and over 100 other supporting creditors.
2. On the 14<sup>th</sup> of April, 2022, the court terminated the 2<sup>nd</sup> Respondent's appointment and appointed Mr Kereto Marima to be the 2<sup>nd</sup> Administrator of the 3<sup>rd</sup> Respondent Company, in accordance with the provisions of the Insolvency Act, for a period of 12 months from the date of appointment. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein filed an Appeal and obtained an order staying the implementation of the Orders of this court of 14<sup>th</sup> of April 2022, effectively terminating the appointment of Mr Kereto Marima as the 2<sup>nd</sup> Administrator of the 3<sup>rd</sup> Respondent. Since then, several applications have been filed before this court and a plethora of court orders have been issued, including orders holding the some of the interested parties in the petition in contempt of court for failing to abide by orders of the court.
3. There are two applications filed on April 29, 2023 and May 4, 2023 respectively by the 3<sup>rd</sup> Respondent and the Petitioner herein. The substratum of the two applications ostensibly is the same as they both seek for the court to appoint an interim administrator of the 3<sup>rd</sup> Respondent Mumias Sugar Company Limited (in receivership & Administration). The two applications are opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who have filed a preliminary objection alongside their Grounds of Opposition and a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent, Ponangipalli Venkata Ramana Rao, who is also the duly appointed receiver manager of the 1<sup>st</sup> Respondent, Kenya Commercial Bank Limited. The two applications are supported by the body of creditors represented in the Petition herein who decry the confusion and inertia on the part of the 3<sup>rd</sup> Respondent, and are apprehensive that in the absence of duly appointed administrator in place, all the other creditors stand to suffer irreparably as they are left out of the receivership which is meant to aid the 1<sup>st</sup> Respondent, to collect its debt secured by various charges and debentures over the assets of the 3<sup>rd</sup> Respondent.
4. Since the Insolvency Act, No 18 of 2015 at Section 593, places a 12 months term limit on the period to be served by a court appointed administrator, the Petitioner and the body of creditors argue that appointment of the 2<sup>nd</sup> Respondent lapsed on the 19<sup>th</sup> of November 2022, in view of the fact that the appointment of Mr Kereta Marima as Administrator was stayed by the decision of the Court of Appeal, when it stayed the execution of the Orders of this court of April 14, 2022. It follows therefore the appointment of the 2<sup>nd</sup> Respondent has since lapsed by operation of the above section of the law, leaving the 3<sup>rd</sup> Respondent without a proper and legitimate administrator.
5. The Petitioner and the body of creditors argue that without a proper administrator duly appointed by the court to oversee the affairs of the 3<sup>rd</sup> Respondent, the resulting effect is a regretful scenario where there is no officer accountable to the court for overseeing an institution that is effectively under administration. The Petitioner and the Creditors herein, with the exception of the 1<sup>st</sup> Respondent have submitted that there is an urgent need to put in place a court appointed administrator to alleviate the



sense of frustration and desperation being felt by the creditors in the insolvency proceedings of the 3<sup>rd</sup> Respondent.

6. Further, the petitioner and creditors accuse the 1<sup>st</sup> Respondent, who through its duly appointed receiver, purported to give away the assets of the 3<sup>rd</sup> Respondent to the 4<sup>th</sup> Respondent, an action that was vehemently opposed leading to termination of the said action by order of this court and the resultant contempt of court orders that remain unpurged to date. Subsequently, the creditors argue, that there is a huge vacuum as to the administration and the management of the affairs of 3<sup>rd</sup> Respondent.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have filed a preliminary objection alongside Grounds of Opposition opposing the two applications. The 2<sup>nd</sup> Respondent has also sworn an affidavit on his behalf and in his capacity as the Receiver manager of the 1<sup>st</sup> Respondent, Kenya Commercial Bank. In opposing these two applications the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that this court is bereft of jurisdiction to grant the orders sought in light of the order of the Court of Appeal of June 6, 2022 and September 23, 2022. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further argue that Appointment of Mr Kereto Marima on April 14, 2022 was stayed by an order emanating from the Court of Appeal of June 6, 2022 and September 23, 2022 in Nairobi Court of Appeal Civil Application No E144 of 2022, which by virtue of the said order, ousted the jurisdiction of the High Court in these proceedings until a full determination of the Appeal in Civil Appeal No 144 of 2022 pending before the said court.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have raised a preliminary objection on the issue of jurisdiction and argue that in light of the Orders of the Court of Appeal, jurisdiction in this matter now rests with the said court and no other orders can be made in respect of the Insolvency Petition pending herein till the hearing and determination of the Nairobi Court of Appeal Civil Application No E144 of 2022.

#### **Analysis and Determination:**

9. Taking into account the number of matters pending before this and other courts in the country in relation to the 3<sup>rd</sup> Respondent, this court has identified the sole issue for determination in the two application as follows; “Whether the prayer for appointment of a new interim administrator is merited”. A perusal of the record herein shows that on 19<sup>th</sup> of November 2021 the court declared the 3<sup>rd</sup> Respondent insolvent and placed it under administration thus conclusively satisfying the above conditions of Administration.
10. I have carefully considered the arguments by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that this court is bereft of jurisdiction to hear and determine the applications herein and that by virtue of the ruling of the Court of Appeal of June 6, 2022 and September 23, 2022 in Nairobi Court of Appeal Civil Application No E144 of 2023, the jurisdiction in this matter is now vested in the Court of Appeal. I have carefully perused the said ruling from the Court of Appeal and note that the same stayed only orders of this court of April 14, 2022, which orders had sought to terminate the appointment of the 2<sup>nd</sup> Respondent as an administrator of the 3<sup>rd</sup> Respondent and replace him with the appointment of Mr Kereta Marima, with orders to render accounts of the status of the affairs of the 3<sup>rd</sup> Respondent. The Court of Appeal in its ruling stated that its orders of stay were only in relation to the said order of the High Court of April 14, 2023, until the Appeal is heard and determined. I am therefore satisfied that order did not extend the term of the 2<sup>nd</sup> Respondent beyond the statutory 12 months from the date of appointment. Subsequently, it is my view, that the term of the 2<sup>nd</sup> Respondent lapsed by virtue of Section 593 of the Act on November 19, 2022 and the same having not been extended, as envisioned therein, it follows therefore that there is not in place a court appointed administrator responsible for the affairs of the 3<sup>rd</sup> Respondent.



11. I note from my reading of the *Insolvency Act*, 2015, that Section 423 (1) of the *Insolvency Act* No 18 of 2015 places exclusive jurisdiction to supervise this insolvency with the High Court alone. The said section provides as follows; “(1) Only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya.” In my view, the Court of Appeal has appellate jurisdiction over decisions emanating from the High Court and did correctly do so by its orders of June 6, 2022 and September 23, 2022. The said orders did not suspend the operation of the *Insolvency Act* and cannot therefore be said to have ousted the jurisdiction of this court as an insolvency court so created by statute. I am therefore satisfied that this court is with requisite jurisdiction to hear and determine matters related to the insolvency proceedings herein, as it has done so, previously, in other applications filed by parties herein.

12. Furthermore, Section 530 of the said *Act* defines Administration in the following terms:-

“An administration order is an order appointing a person as the administrator of a company and providing for the administration of the company by that person.”

Evidently in the instant matter this court has the power to appoint a new interim administrator. Section 531 of the *Act* further provides that:-

“The Court may make an administration order in relation to a company only if satisfied—(a) that the company is or is likely to become unable to pay its debts; and (b) that the administration order is reasonably likely to achieve an objective of administration”.

This position was acknowledged in the courts decision in the case of *Thika Nursing Home Ltd v Rao & 2 others* (2021)KEHC 417 KLR(Commercial and Tax ) where the court stated:-

“a reading of sections 531 and 532 of the Act shows that the Court may make an administration order on an application of a creditor if the court is satisfied that the company is likely to achieve the objections set out in section 522 of the Act.”

13. Section 593 of the *Insolvency Act* provides for an automatic termination of the court appointed administration. The said section of the law provides thus; “The appointment of an administrator automatically ends at the end of twelve months from and including the date on which it took effect.” To my mind, the Court of Appeal ruling relied on by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, did not suspend the operation of the above statutory provision and neither did it remove from the High Court the statutory powers granted to it as the Insolvency Court in whom the power to supervise companies registered in Kenya is vested, as provided under Section by Section 423 of the *Insolvency Act*, 2015.

14. In deciding the applications before this court the court is reminded the purpose and importance of why the order of Administration was first issued and that the same was not done so lightly. The objectives of Administration of a company under the *Insolvency Act* are as articulated under section 522 of Act as follows:-

(1) The objectives of the administration of a company are the following—

- (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 realise 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.
  - (4) The administrator may perform the administrator's functions with the objective specified in subsection (1)(c) only if— (a) the administrator believes that it is not reasonably practicable to achieve either of the objectives specified in subsection (1)(a) and (b); and (b) the administrator does not unnecessarily harm the interests of the creditors of the company as a whole.”
15. From the foregoing and judging by the many applications filed in this matter and in other courts, in my view, the purpose of the administration of the 3<sup>rd</sup> Respondent has not yet been met. It is important to have in place a duly appointed court administrator in order to realise the objectives for which the same was put in place. Similarly, the receivership by the 1<sup>st</sup> Respondent has been in place since 2019. It is important for this court and for the sake of the other creditors waiting in line to get to know what is the status of the recovery process of the debt secured by the debentures held by the 1<sup>st</sup> Respondent and, for which the 2<sup>nd</sup> Respondent had originally been appointed to receive and reduce or pay off the indebtedness, of the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent. To achieve this, the receiver manager herein must avail detailed records to the court for it to objectively determine if indeed the administration process is meeting its objective. It has now become extremely necessary for the court to appoint a new administrator to secure the assets of the company and comply with the objectives of the Administration order as set out under section 522 of the Act, herein.
16. Both applicants have attached to their respective applications a list of licensed Insolvency Practitioners from which this court, having perused the said record, and hereby appoints Harveen Kumar Manoharlal Gadhoke, Insolvency Licence No OR/IP/006 as administrator of 3<sup>rd</sup> Respondent, Mumias Sugar Company Limited (in Administration) in accordance with the Insolvency Act, No 18 of 2015 for a term of 12 months from August 1, 2023. The 2<sup>nd</sup> Respondent, being the Receiver appointed by the 1<sup>st</sup> Respondent, shall with immediate effect handover the affairs of Mumias Sugar Company Limited including all books of accounts, documents, ledgers, leases, title deeds, log books and any other document or material of whatever nature concerning the affairs of the 3<sup>rd</sup> Respondent, Mumias Sugar Company Limited (in Administration).
17. To this end, the Court is satisfied that the two applications are merited and makes the following orders:-

**Orders:-**

1. That pending the hearing and determination of the Liquidation Petitions No E004 and E007 of 2019 herein, an order be and is hereby issued appointing Harveen Kumar Manoharlal Gadhoke, Insolvency Licence No OR/IP/006 as administrator of 3<sup>rd</sup> Respondent, Mumias Sugar Company Limited (in Administration) in accordance with the Insolvency Act, No 18 of 2015.
2. That An order be and is hereby issued to the 2<sup>nd</sup> Respondent, Mr Ponangipalli Venkata Ramana Rao, to immediately give access to the new Administrator and file a full, accurate and comprehensive Report of all activities he has undertaken as court appointed administrators of the 3<sup>rd</sup> Respondent, Mumias Sugar Company Limited (in Administration) since November 19, 2021 to this court, through the



Administrator, Mr Harveen Kumar Manoharlal Gadhoke, for purposes of handover of the affairs of the 3rd Respondent, Mumias Sugar Company Limited(in Administration).

3. That An order be and hereby issued to the 2<sup>nd</sup> Respondent, MrPonangipalli Venkata Ramana Rao to immediately handover the affairs of Mumias Sugar Company Limited including all books of accounts, documents, ledgers, leases, title deeds, log books and any other document or material of whatever nature concerning the affairs of the 3rd Respondent, Mumias Sugar Company Limited(in Administration), to Mr Harveen Kumar Manoharlal Gadhoke, the Administrator, with immediate effect.
4. That An order directed at the Inspector General of Police, the County Police Commander of Kakamega County, and the Officer Commanding Police Station Mumias to provide armed escort and security to Mr Harveen Kumar Manoharlal Gadhoke, to enable the administrator to perform his duties and obligations under the *Insolvency Act*, 2015 in the administration of the 3rd Respondent, Mumias Sugar Company Limited (in Administration).
5. That An order directed at the Harveen Kumar Manoharlal Gadhoke, administrator, to conduct an asset count of all the assets, property and chattels of Mumias Sugar Company Limited (In Administration) and develop an asset register to be shared with this court and the creditors of Mumias Sugar Company Limited (In Administration) within two (2) months of being appointed as administrator.
6. That all creditors herein including the 1<sup>st</sup> Respondent shall with immediate effect and not later than 21 days from the date of this order, file their debts as at July 31, 2023 with Mr Harveen Kumar Manoharlal Gadhoke, the administrator herein and the Administrator shall compile and file a report of the same with the court on the next court date but not later than 42 days from the date herein. This matter shall be mentioned for directions on September 20, 2023.
7. Each party shall bear their own costs of these applications.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2023**

.....

**J. W. W. MONG'ARE**

**JUDGE**

In the Presence of:

Ms. Kimeto for the Petitioner.

Mr James Tugee appearing with Mr. Mahat Somane and Mr. Hassan Nura for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

Ms. Sheunda holding brief for Mr. Osundwa for the 3<sup>rd</sup> Respondent(Mumias Company Limited).

Mr. Ismail for Vartox- A creditor.

Dr. Khaminwa S.C, for Khaminwa & Khaminwa Advocates- A creditor.

Edmond Wesonga for Wekesa & Simiyu Advocates- A creditor.

Mr. Amalemba for Sarrai Group-1<sup>st</sup> interested party.

Ms. Bundi holding brief for Mr. Paul Muite, S.Cfor West Kenya Sugar-the 2<sup>nd</sup> interested party.

Ms. Nanjala appearing together with Mr. Victor Mule for DPP.

Ms. Msando for Prof. Tom Ojienda- a creditor.



Mr. Mwale for Hon Peter Salasya, an intended interested party.

Ms Wamuyu holding brief for Wilfred Lusi, an intended creditor.

Mr. Mbatai holding brief for Mr. Issa for Tawfiq- an intended creditor.

Mr. Richu holding brief for Mr. Anzala for former employees of Mumias Sugar-creditor.

Ms. Okoth for 3 contemnors.

Ms. Wambugu for Dubai Bank (in Liquidation)-an intended party.

Sylvia- Court Assistant.

