



Kimeto & Associates Advocates & 3 others v KCB Bank Kenya Limited & 3 others; West Kenya Sugar company Limited (Interested Party) (Insolvency Petition E004 of 2019) [2022] KEHC 11902 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11902 (KLR)

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

**WA OKWANY, J
JULY 28, 2022**

BETWEEN

KIMETO & ASSOCIATES ADVOCATES APPLICANT

AND

VARTOX RESOURCE INC 1ST CREDITOR

KHAMINWA & KHAMINWA ADVOCATES 2ND CREDITOR

WEKESA & SIMIYU ADVOCATES 3RD CREDITOR

AND

KCB BANK KENYA LIMITED 1ST RESPONDENT

PONANGIPALLI VENKATA RAMANA RAO 2ND RESPONDENT

**MUMIAS SUGAR COMPANY LIMITED (IN RECEIVERSHIP &
ADMINISTRATION) 3RD RESPONDENT**

SARRAI GROUP LIMITED 4TH RESPONDENT

AND

WEST KENYA SUGAR COMPANY LIMITED INTERESTED PARTY



RULING

Background

1. This matter was from its inception, handled by Mabeya J until July 14, 2022 when the said judge recused himself from the case while stating, in part, that:-

“However there is a party in these proceedings who thinks that it/he can walk differently and get proper results. Fire begets fire. It is said that once a party burns its hands when on a floric of its own the only easy target is the judge. Judges have no personal affinity to matters before them.

In this regard, I have no interest in this or any of Mumias matters. It is unfortunate that spurious and unfortunate and unwarranted allegations have been raised in this matter(s).

For that reason, I hereby recuse myself on this all the Mumias matters.”

2. It is against the above backdrop that the file was placed before me for mention for directions on July 25, 2022.
3. During the mention, Ms Kimetto advocate informed this court that there were several pending applications for the courts consideration.
4. Focus was however shifted to the petitioner’s application dated July 22, 2022 in which an allegation of wastage and/or vandalization of the assets of the company (Mumias Sugar Company (MSC), under administration, was made.
5. Mr Lusi, advocate for Gakwamba Sacco, the 2nd interested party, submitted that the 2nd interested party’s application for the empanelment of a 3 judge bench also needed the court’s urgent attention.
6. After hearing the submissions from more than ten advocates appearing for various advocates in the matter, the court settled on determining the petitioner’s prayer for interim orders in terms of prayer no 2 and 3 of the application dated July 22, 2022 in order to preserve the assets of Mumias Sugar Company.
7. The court then directed parties to skeleton submissions limited to the prayer for interim orders.

Interim orders

8. Through the application dated July 22, 2022, the applicant seeks the following orders:-
 1. This application be certified as urgent and heard *ex parte* in terms of prayer no 2, 3 and 4 below.
 2. Pending hearing and determination of this application, this honorable court does issue urgent preservation orders in the public interest stopping any dismantling, stripping, removal, transfer and/or disposal of any moveable or immovable assets of Mumias Sugar Company Limited (in administration) with immediate effect.
 3. Pending the hearing and determination of this application, this honourable court does order the return of all moveable assets, machinery or equipment that has so far been removed from the premises of Mumias Sugar Company(in liquidation) with immediate effect.
 4. Pending the hearing and determination of this application Sarrai Group Limited, its agents, employees, servants, subsidiaries or other affiliates including Mumia Sugar(2021) Limited and



Rai Cement Limited be ordered to cease any and all activities including the operation of machinery, dismantling, vandalism of machinery, removal of assets or any other activity of whatever nature stored and situated within the premises of Mumias Sugar Company Limited (in administration).

5. Sarrai Group Limited, its agents, employees, servants, subsidiaries or other affiliates including Mumias Sugar(2021) Limited and Rai Cement Limited be ordered to cease any and all activities including the operation of machinery, dismantling, vandalism of machinery, removal of assets or any other activity of whatever nature stored and situated within the premises of Mumias Sugar Company Limited (in administration).
 6. Pending the hearing and determination of this application, an order be issued directing the court appointed Administrator of Mumias Sugar Company Limited (in administration) Mr Kereto Marima to take physical charge of and secure the assets of Mumias Sugar Company Limited's (in administration) assets and present a comprehensive report of the status of the assets to this court.
 7. An order be issued directing the Administrator of Mumias Sugar Company Limited (in administration) Mr Kereto Marima to take physical charge of and secure the assets of Mumias Sugar Company Limited (in administration) and conduct and audit of all of Mumias Sugar Company Limited's (in administration) assets and present a comprehensive report of the status of the assets to this court.
 8. An order be issued to Sarrai Group Limited to produce a complete inventory of all the assets of Sugar Company Limited's (in administration) that were handed over to it by Ponangipalli Venkata Ramana Rao and to produce a full account and inventory of all the assets that have been removed from the premises of Sugar Company Limited's (in administration).
 9. An order be issued to Sarrai Group Limited to immediately return , within 48 hours, all the Sugar Company Limited's (in administration)assets that were removed from the premises of Sugar Company Limited (in administration).
 10. The officer commanding Mumias police station be and is hereby ordered to facilitate the safe return of all vandalized and looted assets of the 3rd respondent company in accordance with these orders.
 11. Any other order this court deems fit and just to grant.
 12. Costs of the application to be borne by Sarrai Group Limited.
9. The application is supported by the affidavit of the petitioner's advocate Ms Jackline Chepkemoi Kimeto and is premised on the grounds that:-
1. On April 14, 2022, this court issued an order cancelling the lease over Mumias' assets given to Sarrai Limited(Sarrai) by Ponangipalli Venkata Ramana Rao(Rao).
 2. In his handover letter dated December 22, 2021, the same day the Lease was allegedly signed, Rao expressly stated that the handover of assets was for purposes of cleaning and inspection.
 3. However, the truth is that Sarrai has been ploughing Mumias' nucleus estate as voluntarily admitted by Sarrai in affidavits filed in December 2021 in Milimani Judicial Review no E178 of 2021.
 4. At no point has Sarrai been allowed by any legal instrument to operate Mumias' assets.



5. The applicant has received information that Sarrai has since been dismantling several pieces of motors, turbines and other machinery and transporting the said machinery and other materials out of Mumias.
6. On diverse dates in June 2022 through motor vehicles registration Number KCU 851H(registered in the name of Rai Cement Limited), as per gate pass and delivery note numbers 212, 67929,67931 and 67932 all dated June 10, 2022 several machinery, motors and other equipment belonging to Mumias was removed from Mumias' premises in circumstances that leave no doubt that Sarrai's only intention is to cannibalize and waste away Mumias assets.
7. Rai Cement is fully owned and controlled by Sarrai's owners Sarbjit Singh Rai, Ammanraj Singh Rai and Rajbir Singh Rai.
8. Sarrai's sole intention is to strip, dismantle, and cannibalize Mumia's assets to leave a shell and completely obliterate my prospects that creditors have to recover their debt.
9. All this is happening aware from the glare of the court because there currently no oversight over Sarrai activities since it is unclear to the applicant what steps the new administrator has taken to secure the assets of Mumias.
10. It is also now in the public domain that Sarrai is hurriedly carrying out activities in Mumias with a view to starting operations of the sugar plant in order to render the ruling of this court of April 14, 2022 cancelling its lease null and void.
11. Sarrai's alleged lease had been cancelled. There is no order either setting aside the cancellation or reinstating the lease. Sarrai is blatantly violating court orders.
12. The 4th respondent's activities have been emboldened by utterances made by politicians in public meetings that no one can stop Sarrai from operationalizing Mumias' sugar factory. These remarks are in the public domain.
13. As evidence of these utterances, the local dailies have reported that Sarrai is about to start operations and crushing of sugar cane yet no one has been planted in the Mumias nucleus estate. The actions are in clear violation of the order cancelling the lease issued to Sarrai.
14. It has been observed further that if no sugar cane has been planted or harvested by Sarrai in the Mumias nucleus estate, the only source of sugar that Sarrai will produce to the general public will be imported sugar smuggled from its factories in Uganda which it intends to sell off in Mumias sugar packaging material.
15. This is a very serious public interest issue that can easily turn into a public health crisis if poisonous sugar is allowed to be smuggled into the country through the 3rd respondent company platform.
16. Unless the court immediately steps into supervise activities as an extension of illegalities committed by the 2nd respondent, the 3rd respondent company shall be used as a conduit to import illegal sugar into the country.
17. Furthermore, the new administrator cannot take charge or control of Mumias' assets if Sarrai is in possession of these assets and carrying them away.
18. Based on the glaring evidence of Sarrai's asset stripping exercise and obvious activities and dealing with Mumias' assets, this court ought to order the new administrator, Kereto Marima, to conduct a special audit of Mumias' assets in order to determine their status and value.



19. If Sarrai is allowed to continue being in possession of and with no security provided to ensure Mumias' assets are not destroyed, stolen or carted away, Sarrai will deliver the kiss of death to Mumias leaving it as a shall right before our eyes.
10. The creditors, respondents and Interested parties filed their respective responses and skeleton submissions either in support of or in opposition to the petitioner's application.
11. It is at this juncture worth mentioning or reiterating that this ruling is specifically in respect to the issue of the conservatory orders sought by the petitioner to preserve the assets of the company pending the hearing of the application inter parties. For this reason, the court will not delve into making substantive orders on matters of fact, an outcome that may prejudice the determination of the substantive orders sought in the application. Mr. Nyanchoga, learned counsel for the creditor, Omaera Pharmaceuticals supported the petitioner's application.
12. Mr Ismael advocate for Vartox Resources Inc, a creditor, also supported the application and submitted that the 2nd respondent, Mr P V Rao had filed an affidavit wherein at paragraphs 17-22, he indicates that he is no longer in control of the company.
13. Mr Ismael submitted that his client was concerned that the 4th respondent, Sarrai Group, had indicated that they want to take over operations of the company thus taking it away from the purview of the creditors.
14. According to Mr Ismael, the stay orders issued by this court, (differently constituted before Chepkwony J) and the stay orders issued by the Court of Appeal could not be interpreted to mean that the orders issued by Mabeya J on April 14, 2022 had been set aside.
15. Mr Wesonga, advocate for Wekesa & Company Advocates, a creditor, also supported the application and observed that at paragraph 4, 15, 18, 20 and 21 of Mr P V Rao's affidavit, he informs the 4th respondent to stop its activities at Mumias Sugar Company.
16. Mr Wesonga reiterated that the stay orders issued by the Court of Appeal did not set aside this courts order of April 14, 2022.
17. Mr Shisanya, advocate for Mumias Sugar Outgrowers Company (MOCO) also supported the application.
18. Mr Muite senior counsel similarly supported the application for interim orders and emphasized that the duty of this court, in an Insolvency Petition, is to preserve the assets of the company.
19. Mr Anzala, learned counsel for the former employees of Mumias Sugar Company also supported the application. Mr Anzala noted that at paragraph 17 of Mr P V Raos replying affidavit, he indicates that he had, as at April 21, 2022 complied with this court's ruling of April 14, 2022 and handed over the assets of Mumias Sugar Company to court appointed administrator Mr Kereto Marima. According to Mr Anzala, the said appointed administrator cannot rely on the orders of stay from the Court of Appeal to give credence to the suggestion that the 4th respondent (Sarrai Group) can deal with the company' Assets.
20. MrTugee, learned counsel for the 1st and 2nd respondents opposed the application and argued that the claim that some assets of Mumias Sugar Company had been removed was without basis and that the photographs attached to the application should be struck out as they do not meet the evidentiary test under Section 107 of the *Evidence Act*.



21. Mr Anzala submitted that the application does not meet the test conditions for granting orders of injunction as stated in the *Giella vs Cassman Brown* case.
22. Mr Gichaba, learned counsel for Sarrai Group, the 4th respondent, submitted that the urgent orders sought could not be granted as no single itemized asset sought to be preserved or returned had been identified.
23. According to the learned counsel for the 4th respondent, the court cannot be invited to issue a general order that cannot be implemented. Counsel argued that the application does not meet the test for granting conservatory orders especially the high threshold required for mandatory injunctions. Mr Gichaba further stated that no special circumstances had been presented to warrant the granting of the orders.
24. It was submitted that this court cannot sit on appeal on the stay orders issued by this court and the Court of Appeal.
25. According to Mr Gichaba, the stay orders are to operate as if the ruling of April 14, 2022 does not exist because no appeal has been preferred against the Court of Appeal order. Counsel urged this court not to sit on appeal on the stay orders of this court and the Court of Appeal.
26. Counsel argued that granting the orders sought will negatively impact on the 4th respondent's employees, the cane suppliers and farmers as the company was already in operation. Counsel added that it will be against public interest to grant the orders sought which orders will conflict with the court of Appeal orders of stay.
27. Mr Lusi, advocate for Gakwamba Farmers Sacco, an interested party supported the 1st and 2nd respondent's submissions and reiterated that the application does not meet the conditions set for the granting of injunction.
28. Counsel argued that the effect of the stay orders was to allow the 4th respondents lease and administration by the 2nd respondent to continue.
29. In a rejoinder, Ms Kimetto submitted that the items referred to prayer in 2 and 3 in the application were listed at page 29 -31 of her affidavit in support of the application.
30. I have carefully considered the prayer for conservatory orders to preserve the assets of the Mumias Sugar Company, the affidavit and replying affidavits in support and opposition of the application. I have also considered the written skeleton submissions which the parties' respective counsel highlighted at the hearing of the application for interim orders.
31. It was not disputed that the company was placed under administration by this court and that the 2nd respondent was appointed as the administrator.
32. It was further not disputed that the 2nd respondent leased the assets of the company to the 4th respondent (Sarrai Group) sometime in December 2021 and that the said lease was the subject of a court contest that resulted in the ruling of this court (differently constituted) on April 14, 2022. It was not disputed that in the said ruling, the court cancelled the lease issued to Sarrai Group and at the same time removed the 2nd respondent, as an administrator and in his place; appointed a new administrator Mr Kereto Marima. It was also not disputed that the said orders of April 14th April, 2022 have not been varied, and/or set aside.
33. The 1st, 2nd and 4th respondents together with the 1st interested party (Gakwamba) submitted that the stay orders issued by this court on April 25, 2022 and subsequently by the court of Appeal meant that



the ruling of April 14, 2022 did not exist thereby justifying the return of the 2nd and 4th respondent to Mumias Sugar Company and their operations that are the subject of the present application.

34. With all due respect to the advocates for the said 1st, 2nd and 4th respondent and the 1st interested party, this court is of the considered view that stay orders are not equivalent to the setting aside or overturning of the orders of April 14, 2022.
35. In my very respectful view, the orders of Mabeya J are still in force, ‘alive and kicking’ until they are either set aside, varied or otherwise reviewed.
36. In this regard, I find that the applicants are justified in their apprehension at the activities current of the 2nd and 4th respondents at the company. The 2nd and 4th respondents activities are ideally being carried out by a party whose lease had been cancelled by court. I have perused the order issued by the Court of Appeal on June 6, 2022 and I note that it is worded as follows:-

“Pending the delivery of the ruling on September 23, 2022 there shall be an interim order of stay of execution of the ruling and order of the High Court.”

37. My take is that an order for stay of execution cannot by any stretch of imagination be interpreted to mean that the orders of the High Court had been set aside. A simple reading of the date on the Court of Appeal orders shows that it was issued on June 6, 2022, long after parties complied with the orders of April 14, 2022 and the new administrator taken over the reigns of the company. This scenario then logically begs the question as to the effect of stay of execution orders issued long after the event sought to be stopped has already taken place. It is clear to me that the stay orders were issued long after the proverbial horse had bolted.
38. For the above reasons, and looking at the grounds set out in the application I am persuaded that the applicant has presented compelling reasons for the granting of the orders sought in the application. The confusion currently obtaining at Mumias Sugar Company poses a grave danger to the company’s assets and the interests of the creditors and other stakeholders.
39. I therefore allow prayers 2, 3, 4 and 10 of the application dated July 22, 2022.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2022.

W. A OKWANY

JUDGE

In the presence of: -

Ms Kimetto for petitioner

Mr. Gichaba for Sarrai Group Limited.

Mr. Sheunda for Osundwa for 3rd Respondent.

Mr. Muthuri for Ismael for Vartex – Creditor.

Mr. Gitonga for West Kenya -Interested Party.

Mr. Omari for Gakwamba for an Interested Party

Mr. Opwaka for Wekesa & Company – Creditor.

Mr. Songok for Kiragu Kimani for 1st and 2nd Respondents

Court Assistant- Sylvia

