



**Okoti v Rao & 3 others; Mumias Sugar Company Limited  
(In Receivership) (Interested Party) (Petition E003 of 2021)  
[2021] KEHC 202 (KLR) (Commercial and Tax) (3 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 202 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
PETITION E003 OF 2021  
WA OKWANY, J  
NOVEMBER 3, 2021**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**PONANGIPALLI VENKATA RAMANA RAO (RECEIVER MANAGER) .... 1<sup>ST</sup>  
RESPONDENT**

**KCB BANK KENYA LIMITED (RECEIVER) ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF FINANCE & NATIONAL TREASURY ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**MUMIAS SUGAR COMPANY LIMITED (IN RECEIVERSHIP) .... INTERESTED  
PARTY**

**RULING**

1. This ruling is specifically in respect to prayer No. 4 of the application dated 28<sup>th</sup> June 2021 wherein the applicant seeks orders that: - pending the inter-partes hearing and determination of this application and/or the petition herein the Honourable court be pleased to issue a temporary order of prohibition prohibiting Mr. Ponangipalli Venkata Ramana Rao from advertising to lease or leasing Mumias Sugar Company Limited.
2. The application is supported by the affidavit of the petitioner, Mr. Okiya Omtatah, and is premised on the main grounds that: -



1. The matter is extremely urgent since on 9<sup>th</sup> June, 2021 or thereabouts, the Senate’s Agriculture Committee looking into the affairs of the troubled Mumias Sugar Company (the Company) directed the 1<sup>st</sup> respondent, the Receiver Manager, to within 14 days re-advertise the bids to lease out the troubled Mumias Sugar Company.
2. The Senate got involved after it emerged that the Receiver Manager was engaged in a secretive bidding process to purportedly identify a strategic investor for the company.
3. It is only when he was summoned to the Senate that he disclosed that he had invited the following eight companies to bid: -
  - a) Catalysis Group, Russia
  - b) Sarrai Group, Uganda.
  - c) Kruman Associates, France
  - d) Kibos Sugar
  - e) Devki Group
  - f) Premier JV, India
  - g) Third Gage Capital Management
  - h) Godavari Enterprises, India.
4. It has also emerged that none of the eight bidders he secretly invited to bid have the capacity to revive the Company, leading to fears that a plan was underway to dispose of the company off to the Receiver Manager’s cronies for song.
5. The fears that the Receiver Manager is conflicted were further reinforced by the fact that, while he was the Receiver Manager at Kwale Sugar Company he sold scrap metal to the purported lead bidder, Devki Steel Millers Ltd.
6. At the time the Receiver Manager took over the company to ostensibly “protect its assets and to the best extent maintain its operations,” the company was processing ethanol, from molasses bought mainly from the neighbouring Butali and Busia Sugar Companies.
7. Instead of reviving the company, the Receiver Manager mismanaged the ethanol operations and shut them down in March 2021, thus halting all manufacturing operations at the Company. Also, without proper planning, he ploughed 677 hectares of the Nucleus Estate but failed to plant sugar cane on 307 hectares, letting the effort go to waste.
8. The applicant/petitioner is aggrieved that close to two years after taking over in 2021, the Receiver Manager has not done any of the following: -
  - a) Published a general statement of affairs on the assets and liabilities of the company as at the time he took over.
  - b) Made known the efforts he has taken to protect the assets of the company and the interests of investors (including farmers), creditors, and other parties.
  - c) Published periodic reports on what he has done to reduce the KCB Group debt that is responsible for the receivership.



- d) Published a general statement of affairs on the current state of the assets and liabilities of the company.
9. The applicant/petitioner reiterates that he is aggrieved that the Receiver Manager has been on site for close to two years with nothing positive to show for it. To make matters worse, he has neglected many assets of Mumias Sugar Company, including Nucleus Estate and machinery, resulting in the company making huge losses due to the deterioration of the assets.
10. The petitioner also points out that the neglected assets, especially the nucleus estate which has been left to grow wild, pose a danger to the public.
11. Whereas when a company is put in receivership certain rights of its owners are extinguished, and the appointed receiver takes control of the asset and works solely in the interests of secured creditor, and the receiver may either liquidate the business or revive it, the case of Mumias is different. The company was set up to implement the Mumias Sugar Scheme to benefit sugarcane farmers in Western Kenya and its environs and the general public.
12. Because of the government's 20% shareholding in the company, and the fact that the company sits on land being acquired for the public purpose of setting up a sugar factory to serve sugarcane farmers in the so-called Mumias Sugar Belt, and to support the economy of the wider Western Kenya region, a public interest arises in how the Receiver Manager is running the company given the fact that the 'public' land is idle, and is not being put to the purpose of which it was 'acquired'
13. It is clear that the Receiver Manager who has been on site for some two years now has failed in his mission to protect the Company's assets and to the best extent maintain its operations. Instead, he has completely shut down the company and is en-route to nailing the last nail in the coffin of Mumias Sugar Scheme.
14. Hence, it is necessary that this Honourable Court intervenes in the dispute immediately to protect the public interest in the Mumias Sugar Project.
3. The matter was first mentioned before this court on 26<sup>th</sup> August 2021 when directions were issued that the respondents file and serve their respective responses after which the matter was fixed for mention for further direction on 30<sup>th</sup> August 2021. When the case came up for directions on 30<sup>th</sup> August 2021, Ms Kashindi, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, informed the court that she had a Preliminary Objection (P.O) to raise on the jurisdiction of the court. She urged the court to consider the Preliminary Objection before taking any further steps in the matter.
4. The court however noted that the case was listed for mention for directions and not for hearing of any substantive issues. Parties were nevertheless directed to present their brief arguments on whether the interim conservatory orders sought should be granted.
5. Mr. Omtatah noted that the aspect of the application relating the advertisement for the leasing of the interested party had been overtaken by events but urged the court to grant prayer No. 4 of the application so as to prohibit the 1<sup>st</sup> respondent from leasing Mumias Sugar Company (hereinafter "the Company").
6. The petitioner argued that since there was not public participation prior to the advertisement for the lease, and because previous attempt to lease the company was met with huge public outcry, the orders sought should be granted pending the hearing and determination of the application and suit.



7. On the claim that the petition is not properly before the court for failure to comply with Section 567(1) (f) of the *Insolvency Act*, the petitioner submitted that the petition is not against the company and does not therefore fall under the said section. He further submitted that petitions filed under Articles 22 and 258 of the *Constitution* cannot be limited by legislation or Acts of Parliament.
8. The Petitioner maintained that the case is largely based on violation of the Constitution as the company, has been receiving public funding such that the Public Procurement and Disposal Act should be applicable in its leasing.
9. Mr. Omtatah argued that this is a public interest litigation which may be rendered nugatory if the leasing is allowed to proceed without compliance with the law.
10. In a rejoinder, Ms Kashindi opposed the prayer for interim orders and submitted that there is no prima facie case established when a fundamental issue of jurisdiction has been raised in the Preliminary Objection. According to Ms Kashindi, the court must satisfy itself that it has jurisdiction before going into determining the merits of the application.
11. Ms Kashindi argued that there are proceedings in Case No. E004 of 2019 where an administration order is sought and that under Section 562 of the *Insolvency Act* (hereinafter “the Act”) leave must be sought and obtained before any proceedings can be instituted. Counsel submitted that the petitioner cannot run away from the provisions of Section 561 of the Act as the orders that he seeks are against the company that is in receivership as the Receiver is not acting in his own individual capacity.
12. Counsel also informed this court that there are multiple proceedings in this matter as the same orders sought by the petitioner herein were sought by Ms Kimitto Advocate in 2019 in Case No. E004/2019 wherein Kasango J. declined to grant the same orders sought herein.
13. Counsel noted that there are currently 3 different suits challenging the leasing of the company thus raising the issue of multiplicity of suits and the doctrine of sub-judice.
14. Counsel further argued that the petitioner lacks the locus standi to file these proceedings as the decision by the duly appointed Receiver Manager, to lease the assets of the company cannot be a constitutional issue.
15. Counsel noted that the court had declined to grant orders sought by secured creditors to stop the leasing of the company assets and that the petitioner has no basis for stopping the leasing.
16. On substantial loss and balance of convenience, counsel submitted that the Receiver had explained why the leasing option was the only viable option available to the secured creditor in order to recover its debt that is running unto hundreds of millions of shillings and that the lease would be beneficial to all the parties affected by the company’s collapse including the farmers, employees, the petitioner and the general public.
17. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, stopping the leasing process will be counterproductive as it will mean that the company’s revival is stalled while assets will remain dormant or waste away.
18. Counsel submitted that the Public Procurement and Disposal Act is not applicable in these proceedings as company is not a public entity.
19. Mr. Bett for the 4<sup>th</sup> respondent joined issues with Ms Kashindi in respect to the doctrine of sub judice and compliance with the provisions of Section 561 of the Act. He added that the company is largely a private entity against whom the petitioner has no known cause of action.



20. After hearing the submissions by counsel over the issue of conservatory orders, the court ordered the 1<sup>st</sup> and 2<sup>nd</sup> respondent to proceed and open the bids in respect to the lease that was to close on 31<sup>st</sup> August 2021 in an open and transparent manner and in the presence of all the bidders.
21. The court also ordered the respondents not to evaluate the said bids pending the delivery of this ruling is delivered.
22. I have carefully considered the rival arguments made by the parties herein over the granting of conservatory orders pending the hearing of the application and the suit.
23. I note that the following issues were not disputed: -
  - a) That the company is under receivership and that the 1<sup>st</sup> respondent has been sued in his capacity as the duly appointed Receiver/Manager under various debentures issued to the 2<sup>nd</sup> respondent.
  - b) That there exists a similar proceedings filed by unsecured creditors being Nairobi HCC IP No. E004 of 2018; Kimetto & Associates Advocates versus KCB Bank Limited, Ponangipalli Venkata Ramana Rao & Mumias Sugar Company Limited and that the orders sought in an application dated 28<sup>th</sup> June 2021 in the Insolvency proceedings are similar to the orders sought herein in prohibiting the receiver from proceeding with the leasing of the assets of Mumias Sugar Company Limited.
  - c) The Insolvency proceedings are part heard.
24. Having regard to the clear and uncontested issues listed hereinabove, I find that even though the petitioner's claim was filed in response to a recent advertisement for bids to lease the assets of company, the fact still remains that an identical issue over the leasing process is the subject of the earlier Petition E004/2019.
25. I find that owing to the existence of similar proceedings over the same subject matter, it will not be proper for this court to proceed and issue orders stopping the leasing process when the same issue is the subject of an ongoing case that is already part heard. An order stopping the leasing would, in my considered view, not only cause an embarrassment should the judge hearing the earlier petition ultimately come up with a different verdict, but would also be tantamount to hijacking and/or pre-determining the verdict in the said earlier petition.
26. For the above reasons, I decline to grant the interim orders sought. For avoidance of doubt, I direct that the status quo currently obtaining, in respect to the bids for the lease, be maintained pending the decision to be made in the earlier case.
27. I make no orders as to costs.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 3rd day of November 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Okiya petitioner in person.

Mr. Kashindi and Mrs Kashindi for the Receiver and Bank



Mr. Bett for 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

Court Assistant: Margaret

