



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

MISCELLANEOUS CAUSE NO. 18 OF 2019

OWITI, OTIENO AND RAGOT ADVOCATES.....APPLICANT

VERSUS

MUMIAS SUGAR CO. LIMITED (UNDER ADMINISTRATION).....RESPONDENT

RULING

The application is dated 12th March 2020 and is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21 Laws of Kenya, Section 560 (1) (d) of the Insolvency Act, Rule 10 of the Insolvency Regulations, 2016, Article 159(2) (b) and e) seeking the following orders;

1. Leave be granted to the applicant herein to continue with these proceedings against Mumias Sugar Company Limited, the respondent herein which has been placed under administration.
2. Costs of this application be provided for.

The application is based upon the annexed affidavit of David Otieno and on the grounds that the applicant had filed a reference in this instant suit before the respondent was placed under receivership. The said application had not been prosecuted by the time the respondent was placed under receivership. The applicant desires to prosecute the application but had been unable to prosecute the said application in the absence of leave as provided for by the law. That it is in the interest of justice that cases are handled justly and expeditiously as the plaintiff will suffer prejudice if this application for reference is not prosecuted. That unless the orders sought in this application are granted the ends of justice will be defeated to the detriment of the plaintiff/applicant.

This court has considered the application and the submissions therein. The respondent was served but failed to file any response. Section 560(1) of the Insolvency Act provides:-

While a company is under administration—

- "a) A person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;**
- b. A person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;**
- c. A landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and**
- d. A person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court."**

From the above section, it is clear while a company is under Administration, for one to take steps to enforce a security over the company's property one has to obtain a consent of the administrator or act with approval of the court. This includes executions. In the case **In re Nakumatt Holdings Ltd (2017) eKLR** the court stated that;

“Administration, though, is now a tool intended to offer breathing space for insolvent companies whilst also putting better returns

and packages for creditors, not ordinarily available in liquidation. And, unlike compromises, administration as an alternative rescue process leads to a stay of past and future legal proceedings as per ss.560 & 561 of the Act hence making it cheaper for the company.”

In the case of **Midland Emergency Limited vs George Muiruri t/a Leakey Auctioneers & another (2019) eKLR** the court said that;

“The design of our current Insolvency Laws is to give a second chance to financially distressed Companies. A break from the past where the fate of an ailing Company would invariably be a Winding up or liquidation order. Administration is one of the alternatives to liquidation and is provided for in part VIII of the Act. The objectives of administration are set out in Section 522 of the Act

So as to achieve that objective, the Company must be insulated from aggressive Creditors who could cause a run of the Company assets. The statute contemplates that upon such protection a Company will not be distracted from precipitate action and so the Administrator will be able to perform his function in the interest of all of the Company’s Creditors. The insulation of the Company is provided by way of a moratorium from other legal processes.”

Be that as it may, the court needs to take into consideration a number of factors as laid down under **section 560 A** of the Insolvency Act as follows;

“when considering whether to grant approval under section 560, the court may in particular take into consideration – (a) the statutory purpose of the administration; (b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;(c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and (d) the conduct of the parties.”

In the instant case I find that the applicant has a legitimate interest having represented the respondent in a court matter. I find this application is merited and order that the Notice of Motion dated 12th March 2020 be granted in that leave/consent of the court is granted to the applicant to continue the proceedings against the respondent which is under administration. There will be no orders as to costs as the same was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 8TH DECEMBER 2020.

N.A. MATHEKA

JUDGE