



REPUBLIC OF KENYA



KENYA LAW
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**KCB Bank Kenya Limited & another v Kimeto & Associates Advocates
& 9 others; Marima & 2 others (Affected Party) (Civil Application
E144 of 2022) [2022] KECA 1047 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1047 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E144 OF 2022
MSA MAKHANDIA, J MOHAMMED & S OLE KANTAL, JJA
SEPTEMBER 23, 2022
IN THE MATTER OF MUMIAS SUGAR COMPANY LIMITED**

BETWEEN

KCB BANK KENYA LIMITED 1ST APPLICANT

PONANGPALI VENKATA RAMANA RAO 2ND APPLICANT

AND

KIMETO & ASSOCIATES ADVOCATES 1ST RESPONDENT

MUMIAS SUGAR COMPANY LIMITED 2ND RESPONDENT

VARTOX RESOURCES INC 3RD RESPONDENT

KHAMINWA & KHAMINWA ADVOCATES 4TH RESPONDENT

WEKESA & SIMIYU ADVOCATES 5TH RESPONDENT

ANNE WEKHOMBA 6TH RESPONDENT

CHURCHILL OKWISIA 7TH RESPONDENT

HENRY KIBONDORI 8TH RESPONDENT

VITALIS MAKOKHA 9TH RESPONDENT

PATRICK MUTIMBA 10TH RESPONDENT

AND

KERETO MARIMA AFFECTED PARTY

SARRAI GROUP LIMITED AFFECTED PARTY

WEST KENYA SUGAR COMPANY LIMITED AFFECTED PARTY



(An application for stay and an injunction pending the hearing and determination of the intended appeal from the ruling of the High Court of Kenya at Nairobi (Mabeya, J.) dated 14th day of April, 2022 in Insolvency Petition No. E004 of 2019)

RULING

1. Before us is a notice of motion dated April 27, 2022 said to be brought under the provisions of Rules 5(2)(b) and 47 of the *Court of Appeal Rules*, 2010, Section 700 of the *Insolvency Act* and all other enabling provisions of the law.
2. The key prayers for our consideration amongst others are that, first, pending the hearing and determination of the intended appeal, there be a stay of execution of the ruling and orders of Mabeya, J. issued on April 14, 2022 appointing Mr. Kereto Marima of KR Consult Ltd as the administrator of Mumias Sugar Company Limited, hereinafter “Mumias” and secondly, an injunction do issue restraining Mr. Kereto Marima of KR Consult Ltd, from taking control of and dealing with all the secured assets charged by Mumias to the 1st applicant pending the hearing and determination of the intended appeal.
3. The application is premised on the grounds on its face and the supporting affidavit of the 2nd applicant and, Bonnie Okumu all dated April 27, 2022. The applicant’s case is that the trial court (Mabeya, J.) by a combined ruling delivered on April 14, 2022 on six applications filed, ordered amongst others, that an independent administrator takes over the administration of Mumias, that the 2nd applicant be removed from the administration of Mumias forthwith; that Mr. Kereto Marima of KR Consult Limited be appointed as the administrator of Mumias forthwith; that the lease entered into between the 2nd affected party “Sarraï” and Mumias on December 22, 2021 be revoked, cancelled and nullified and Sarraï do forthwith vacate the premises of Mumias. Further that the 2nd applicant hands over to Mr. Kereto Marima the full and unhindered control and administration of Mumias within 7 days of the date of the ruling, and the 2nd applicant, as receiver manager appointed by the 1st applicant, do cooperate with Mr. Kereto Marima and ensure the smooth administration of Mumias in default of which the receivership shall stand suspended during the duration of the administration.
4. Aggrieved by the ruling and orders aforesaid, the applicants intend to appeal and have manifested that intention by filing a notice of appeal. Pursuant to the said notice, they have now lodged the instant application seeking the prayers aforesaid.
5. The applicants assert that, they have an arguable appeal with good prospects of success as more particularly set out in the draft memorandum of appeal annexed to the application. Among the grounds that will be canvassed in the intended appeal are that; the trial court erred in undermining the interest of the 1st applicant as a secured creditor by holding that public interest surpasses the interests of the creditors, and further erred in applying principles enunciated by Canadian courts based on the *Canadian Companies Creditors Arrangement Act*, 1993 instead of the Kenya *Insolvency Act*.
6. The applicants also maintain that, the intended appeal will be rendered nugatory if this Court does not intervene and grant the orders sought as Kereto Marima will continue with the process of administration including the taking over the assets that had been charged to secure Mumias’ indebtedness to the 1st applicant and deal with these assets in whichever manner he deems fit to the detriment of the 1st applicant, a secured creditor. Finally, that there was no guarantee that the 1st applicant will be able to recover these securities, should the intended appeal succeed.



7. Sarrai supported the application by way of an affidavit sworn by its director, Rakesh Kumar Bvats who deposed that the revocation, cancellation and nullification of the lease had far reaching economic and social consequences to several people in the western region like employees who will definitely lose their jobs, farmers who will be forced to sell their sugarcane at a throw away price dictated by sugar millers. In the process, the County Government of Kakamega will lose out on revenue collections. To this party, the application had met the threshold required under Rule 5(2) (b) of the *Court of Appeal Rules*.
8. The 1st respondent in opposing the application relied on the affidavit of one, Jackline Chepkemioi Kimeto, one of the petitioners in the trial court. She deposed that; the application was an attempt by the applicants to deny them a chance to be heard by the High Court against the tenets of *the Constitution*. That the intended appeal had no chances of success as the applicants had not approached the court with clean hands. That new matters had been introduced in this application through affidavits that were not before the trial court. That the applicants had all along deliberately failed to comply with several court orders and that granting the prayers sought would be used as a shield by the applicants to perpetuate the various illegal activities and disobedience of court orders.
9. The 2nd respondent did not file any response to the application.
10. The 3rd respondent opposed the application through the affidavit of Kristian Khachatourian, its director, who deposed that the applicants had already complied with the orders of the court. That the applicants never sought stay of execution of the ruling and order in time but waited until the time given by the court for compliance of 7 days to lapse before they approached this Court. That granting the orders sought will result in putting Mumias into deeper financial doldrums and will cause its creditors to be left with nothing to hang on.
11. The 4th and 5th respondents equally opposed the application through the affidavits of Dr. John Khaminwa, senior counsel and Cyprian W. Wekesa. They deposed that they were creditors of Mumias which owed them over Kshs.80 million in unpaid legal and professional fees. That contrary to the assertions by the applicants, the court did not place the 2nd respondent under administration in its ruling of April 14, 2022, neither did it extend the administration order granted on November 19, 2022; that the order staying the administration order made under Section 700 of the *Insolvency Act*, is incapable of being granted as no application had been made stemming from the ruling of April 14, 2021; that the 2nd applicant was not willing or able to perform the duties of the administrator hence the appointment of the 1st affected party; that there is no conflict between the administrator and receivership as alleged by the 2nd applicant as the end result of both is to realize the assets for the benefit of the secured creditors. That staying the revocation, cancellation, nullification of the lease and allowing the 2nd affected party to re-enter the premises of Mumias and continue with activities based on a nullified lease poses more irreparable harm, substantial loss to all other stakeholders, in the event that the nullification is upheld by this Court; that equally, the orders of April 14, 2022 were complied with when Kereto Marima took over the administration for the benefit of the secured creditors including the applicants. Accordingly, there was nothing to be stayed. That great prejudice will be visited on the respondents if the orders sought are granted as the applicants will be allowed to continue running the affairs of Mumias with impunity and cannibalization and further proceed to pilfer its assets thereby prejudicing the interests of these respondents and all other creditors. There was no response from the 1st affected party.
12. The 3rd affected party also opposed the application through the replying affidavit of Jaswant Singh Rai its director, who deposed that the application is premature and unmerited. That no prejudice will be occasioned to any party if the same is not granted. That the draft memorandum of appeal did not disclose any arguable appeal at all.



13. Save for the parties mentioned above, the rest did not file any papers either in support of or in opposition to the application.
14. The application was canvassed by way of written submissions with limited oral highlights. The submissions merely reiterated and expounded on the depositions in the various affidavits aforesaid and we need not rehash them.
15. We have considered the application, the grounds in support thereof, the replying affidavits, the submissions, the authorities cited and the law. The jurisdiction of this court under Rule 5(2)(b) of this Court's Rules is discretionary underpinned by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles; that the appeal or intended appeal is arguable and that if the orders sought are not granted and the appeal succeeds, it will be rendered nugatory.
16. This Court in the case of *Trust Bank Limited and Another vs. Investech Bank Limited & 3 Others* [2000] eKLR adumbrated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
17. On the first principle, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants to warrant its ventilation before this Court. In *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:

“vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”
18. We have carefully considered the grounds set out in the draft memorandum of appeal. In our view the appeal is arguable on the issue as to whether, the trial court erred in applying principles enunciated by Canadian courts based on the Canadian Companies Creditors Arrangement Act, 1993 instead of invoking clear, mandatory and applicable Kenyan statutory provisions of the *Insolvency Act*. It is arguable whether, the court erred in sacrificing the interests of the 1st applicant, a secured creditor at the altar of public interest. Without saying more, lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable on those scores alone.
19. As to whether the appeal or intended appeal should it succeed, would be rendered nugatory if we decline to grant the orders sought, the applicants are apprehensive that their rights as secured creditors will diminish if Mr. Kereto Marima's actions pursuant to his appointment are not stayed. That his actions may not be reversible and will be highly prejudicial to them. Indeed, they fear that they may not be able to recover the securities. To our mind, these fears are not idle. It has been said time without number that in determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits.



- 20. In *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] E.A. 227, this Court stated:
 “To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”
- 21. In the circumstances of the instant application, we are persuaded that the applicants have demonstrated an arguable appeal which will be rendered nugatory, absent stay.
- 22. In the upshot, the notice of motion dated April 27, 2022 is allowed to the extent only that there will be stay of execution of the ruling dated April 14, 2022.
- 23. We say so because having granted stay, it will be superfluous to grant injunction. Costs of this application shall abide the outcome of the intended appeal.
- 24. This ruling applies mutatis mutandi to Civil Application No. E133 of 2022 -Gakwamba Farmers’ Co-operative Limited vs. Kimeto & Associates Advocates & 8 Others.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

