



**Otieno v Mumias Sugar Company Ltd (Under Receivership) (Cause 90 of 2021) [2022] KEELRC 12866 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12866 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**CAUSE 90 OF 2021**  
**JW KELI, J**  
**OCTOBER 6, 2022**

**BETWEEN**

**MOSES OWINO OTIENO ..... CLAIMANT**

**AND**

**MUMIAS SUGAR COMPANY LTD (UNDER RECEIVERSHIP) .. RESPONDENT**

**RULING**

1. The ruling is on the notice of motion application dated July 7, 2022 by the respondent received in court on the July 13, 2022 seeking the following orders:-
  - i. This application be certified urgent and heard *ex parte* in the first instance.
  - ii. Pending the inter-partes hearing and determination of this application, any further proceedings be and are hereby stayed.
  - iii. Any further proceedings herein be and are hereby stayed until consent of the administrator or approval of the insolvency court in Nairobi High Court Insolvency Petition No E004 OF 2019 is obtained to continue these proceedings.
  - iv. In the alternative to (iii) above, any further proceedings herein be and are hereby stayed pending the hearing and determination of the respondent's intended appeal to the Court of Appeal against the directions and order of this court made herein on May 26, 2022.
  - v. Any other orders that this honourable court may deem fit to grant in the circumstances. '.
  - vi. The cost of this application be provided for.
2. The application is based on the grounds:-



- a) That there is pending before the High Court Insolvency proceedings against the respondent, being the Nairobi High Court Insolvency Petition No E004 of 2019 filed on March 20, 2019 and Nairobi High Court Insolvency Petition No E004 of 2019 filed on April 8, 2019;
  - b) An administration order was made on the November 19, 2021 in Nairobi High Court Insolvency Petition No E004 of 2019;
  - c) Section 650(1)(d)(sic) of the *Insolvency Act* provides that where the company is under administration a person may begin or continue legal proceedings against the company or company's property only with the consent of the administrator or with the approval of the insolvency court.
  - d) The claimant has not obtained the requisite consent of the administrator or approval of the insolvency court to continue these proceedings following the administration order that was made on November 19, 2021.
  - e) The moratorium on legal proceedings provided for under section 560 of the *Insolvency Act* when an administration order is in effect continues to apply in these proceedings unless and until the consent of the administrator or leave of the insolvency court is obtained to continue these proceedings.
  - f) Unless these proceedings are stayed pending the claimant obtaining the consent of the administrator or approval of the court to continue the proceedings, any further proceedings herein will be in contravention of the law and therefore void and any other orders or directions made by the court will be a nullity.
  - g) That the court on the May 26, 2022 fixed this matter for hearing on July 12, 2022. The respondent intends to appeal to the Court of Appeal against those directions and order of the court and has filed notice of appeal.
  - h) Unless the proceedings herein are stayed pending the claimant obtaining leave of the insolvency court to continue these proceedings or pending the hearing and determination of the court of appeal of the intended appeal:-
    - (i) The respondent will suffer substantial loss as the hearing will proceed contrary to the provisions of section 560 of the *insolvency Act* and determination made potentially against it.
    - (ii) The respondent's intended appeal will be rendered a mere academic exercise as it would then seek to stay proceedings which might as well have to an end by the time the Court of Appeal hears and determines the appeal.
    - (iii) It is in the interest of justice that this application is allowed.
3. The application is further based on the affidavit of Ponangipalli Venkata Ramana Rao sworn on the 7<sup>th</sup> July 2022 who avers that he is the receiver manager and administrator of respondent. He was appointed as receiver by KCB Bank Kenya Limited on the September 20, 2019 and that the fact of him being the receiver is not in dispute. Mr Rao repeats the grounds of the application and most relevant to the instant application is the administration order of the insolvency court of November 19, 2021 in Nairobi High Court Petition No E004 of 2019 where he was appointed as administrator of the respondent ( pages 1 to 69 exhibits being the ruling and corrigenda)



4. Mr Rao avers that by a further ruling dated April 14, 2022 the insolvency court replaced Mr Rao as administrator with Mr Kereto Marima which appointment was stayed by the Court of Appeal in 2 separate orders in court of appeal Civil Application No E133 of 2022 and Court of appeal civil Application No E144 of 2022(at pages 142 and 143 of the application are the 2 court orders respectively) and effectively these orders restored Mr Rao to his position as administrator and reverted to position before the High Court Order of April 14, 2022.
5. Mr Rao avers that the respondent has been in administration since November 19, 2021. That the claimant obtained leave to institute these proceedings in June 2021 before the administration order. That he is aware that under section 650(1)(d)(sic) of the Insolvency Act where a company is under administration a person may begin or continue legal proceedings against the company or the company's property only with the consent of the administrator or with the approval of the insolvency court and the moratorium under section 560 of the Insolvency Act applies if no approval of court is obtained.
6. Mr Rao avers that by letter dated May 26, 2022(pages 144 and 145 of the application) the respondent's advocates Munyao Muthama & Kashindi, wrote to the court informing of the developments with regard to the administration of the respondent the rulings. The court notes that the deponent had not stated the source of this information.
7. The respondent *vide* its counsel antoney Aringa swore an affidavit July 25, 2022 alleging to have filed a letter in court and attached rulings and notice of change and none of the annexures have court stamp, official receipts and are not on the court file hence not on record. The court expunges all those annexure alleged to have been filed in court as being not on record. The court is vindicated by the fact that the respondent vide the law firm of Munya Muthama & Kashindi used the same process to file the instant application which was duly processed and bears court stamps and official receipts. That means that paragraph 14 the affidavit of Rao is also found to be incorrect. Indeed the court on the July 12, 2022 did confirm the said notice of change, the alleged letter and alleged rulings were not on the court file. The court need not state more on the issue but to find the law firm is not candid on the said allegations under the affidavit of Antoney Aringa and paragraph 14 of the supporting affidavit which pleadings are found to be of no probative value. A document is only deemed to be on record if supported by official court receipt on fees payment and /or stamp of the court.

### **The Response**

8. The application is opposed. The claimant filed replying affidavit which he swore on the July 15, 2022 and stated that he obtained leave of the insolvency court in Nairobi High Court Misc Civil Application No E472 of 2021 Moses Otieno Owino v Mumias Sugar Company Limited (in Receivership) to commence the instant suit(MOO1 copy of the court order annexed under claimant's supplementary list of documents dated January 20, 2022 and filed in court on January 28, 2022).
9. The claimant asserts that the said order and/judgment which gave him leave to commence the instant suit had not been appealed against nor reviewed by the respondent who was then represented by the law firm of Munyao Muthama & Kashindi Advocates (MOO2 is the respondent's advocates notice of appointment dated June 28, 2021 filed in Nairobi High Court Misc Civil Application No 472 of 2021)
10. In response to paragraph 12 of the respondent's supporting affidavit, the claimant asserts he was advised by his advocates that section 560(1)(d) of the Insolvency Act should be read together with section 428 of the insolvency Act hence it does not matter whether he obtained leave before the administration order was made. The claimant asserts that he had leave of the court to proceed with the matter.



11. The claimant asserts that the purpose of the leave is not to limit the rights accrued to a party before or after the company was placed under receivership and /or administration but to ensure the affairs of the company are conducted under the supervision of the court and the court having granted him leave placed the instant suit under its firm grip and it is redundant and waste of time to go back in order to seek leave which had been granted in the first instance.
12. That through the help of his advocates, he finds there is stark difference of his suit filed with leave of the court and Nairobi HCCC No E004 of 2022( pages 146 to 164 of the respondent's /applicant exhibits ) as the erstwhile case was filed before leave of the court could be sought hence not applicable to his case.
13. The claimant asserts that both his matter being Nairobi High Court Misc Civil Application No E472 of 2021 and the matter referred to by the respondent/ applicant to wit Nairobi HCCC No E004 OF 2022, the judgment and orders have been issued by courts of concurrent jurisdiction and the respondent should not make it appear as if the ruling in Nairobi HCCC No E004 OF 2022 is superior to the ruling in Nairobi High Court Misc Civil Application No E472 OF 2021 which gave him leave.
14. The claimant in further response asserts that it was because of the insolvency petition No E004 OF 2019 that he sought leave of the court before filing the instant suit as required by law.
15. The claimant states that while it is true the administration order was issued on the November 19, 2021, the insolvency petition was filed on the April 8, 2019 and as stated he was legally required to seek leave to sue the respondent as long as there was an insolvency petition in court.
16. That in response to paragraph 14 of the supporting affidavit such information can only be ascertained by court but nevertheless his advocate informs him that until July 14, 2022 all documents that the have been served do not bear the stamp of the court as evidence of proper filing. The court has already made a finding to extent that the documents annexed by Antony Aringa are not on court record for lack of valid court fees receipt and stamp of court and hence stand struck off the record.
17. The claimant asserts he is the one to suffer financial loss if the application is allowed and the matter ought to be allowed to proceed to its logical conclusion so as to regularise his position as a creditor before the insolvency court as without a valid decree of this court proving an claim in insolvency court shall be an herculean task.

### **Submissions**

18. The application was canvassed by way of written submissions. The Applicant's/ respondent's written submissions are dated July 25, 2022. The respondent's/ claimant's submissions are dated July 14, 2022.

### **Determination**

19. The court considered the submissions and pleadings of the parties and was of the opinion that the issue for determination in the instant application is whether the application is merited under the following sub-heads:-
  - i. Whether the instant suit is in compliance with the provisions of section 560(1)(d) of the [Insolvency Act](#).
  - ii. Whether the applicant is entitled to reliefs sought.



**Whether the instant suit is in compliance with the provisions of section 560(1)(d) of the Insolvency Act.**

**The Applicant's submission**

20. It is the applicant's/ respondent's submissions that plain reading of the provisions of section 560(1)(d) of the Insolvency Act the insolvency court having appointed an administrator vide order dated November 19, 2021 in Nairobi High Court Insolvency petition No E004 of 2019, consent of the administrator or leave of the insolvency court is required to continue legal proceedings that commenced against a company before an administration order was made if an administration order is subsequently made against the company. That in the instant case the proceedings having been commenced before the administration order of November 19, 2021 there was need for the claimant to obtain consent of the administrator or leave of the court to continue the proceedings upon the administration order being made. That the leave obtained by the claimant was therefore not the approval of the insolvency court envisaged under section 560(1)(d) of the Insolvency Act.
21. The applicant further submits that the leave obtained by the claimant in June 2021 before commencing the instant proceedings was on the basis that Mumias Sugar Company Limited was under receivership. That as at the time the leave was obtained, the administration order had not been made.
22. That there is no authority and none has been produced by the claimant to support the assertion or suggestion that there is no requirement to comply with section 560(1)(d) of the Insolvency Act where the proceedings that one seeks to continue after the administration order is made were instituted after obtaining leave required by a different provision of law.
23. The applicant submits that there is ample authority to support the respondent's position that section 560(1)(d) must be complied with for legal proceedings to be competent whether in the sense of obtaining consent/approval to begin proceedings after an demonstrative order or to continue proceedings following an administration order. To buttress his submission the respondent relies on the decision in matter of Mumias Sugar Company Limited held in Nairobi High Court Civil Suit No E004 of 2022 Lambert Lwanga Ogochi & other -v- Ponangipalli Venkata Ramana Rao & Others where the court while striking out an application and the suit filed without consent of the insolvency court upheld the objective of the insolvency court, being to ensure that the company under administration is not unnecessarily harassed by way of legal proceedings hence the leave of the court is therefore a prerequisite safeguard. The court has to investigate any intended proceedings before they can be commenced or proceeded with.
24. The applicant further relies on Midland Energy Limited v George Muiruri T/A Leakeys Auctioneers & Another (2019)Eklr where the court held that for the administrators to achieve their objective as contained in section 522 of the Insolvency Act, such a company must be insulated from aggressive creditors by way of a moratorium from other legal processes. And further in Midland Energy Limited v African Banking Corporation Ltd & another (2020) eKLR where the court held that the suit having been filed without leave was in competent ab initio, a fact which the Plaintiff ought to have noted before filing the application dated June 14, 2019. The applicant submits that any suit against a company that continues without leave of the insolvency court after an administration order has been made against the company is also improper and such proceedings without leave following the administration order are a nullity. The applicant cites further authorities being Benson Gicheru Muchomba v Tabir Sheikh Said Grain Millers Ltd(2019)Eklr to buttress the position of seeking consent of the administrator or leave of the insolvency court upon an administration order.



25. The applicant further submits that in the instant case it is the company who is the respondent. That an administration order that was made against the company subsequent to the commencement of the proceedings cannot be ignored on the basis that leave was obtained to file suit when the company was only under receivership but had not been placed under administration.
26. The applicant submits that the applications should be allowed as prayed for lack of leave for the foregoing reasons.

### **The Response by the Claimant**

27. The claimant submits that the applications should not be allowed as the claimant would be prejudiced. That the Orders of leave granted by Justice DS Majanja in Nairobi High Court Civil Misc Application No E472 of 2021 have neither been appealed against or reviewed and as such the claimant is validly in court.
28. The claimant submits that for the court to rely on the decision of Justice Mabeya delivered in Nairobi HC E004 of 2022 to impugn the leave that Justice DS Majanja gave in Nairobi High Court Civil Misc Application No E472 of 2021 is akin to calling upon this court which also has concurrent jurisdiction like both erstwhile courts to ‘review’ a decision that has not been appealed against. That both matters involved the same respondent and were determining the same thing being leave to sue a company that is under liquidation. To buttress his submission the claimant relies on the decision in CCD V ENB, PKN, VD &BU (2018) Eklr where the court held that it could not fault the decision of concurrent jurisdiction and where the case of [\*Stephen Mwaura Njuguna v Douglas Kamau Ngotho\*](#) Civil Appeal No 90 of 2005 consolidated with Civil Appeal No 247 of 2007 was cited where the Court of Appeal held that a judge has no jurisdiction to determine a matter that was decided by a fellow judge of concurrent jurisdiction and further in [\*Joseph Ndirangu Waweru t/a Mooreland Mercantile Co & Another v City Council of Nairobi\*](#) (2015) Eklr where the Court of Appeal held that a Judge has no jurisdiction to re- hear and interfere with a decision in a matter that was decided by a fellow judge of concurrent jurisdiction. That if the respondent was aggrieved by this ruling and preliminary decree its recourse is appealing against the same. In that case the Court of Appeal found that the learned judge was in error in assuming jurisdiction where she had none and setting aside a proper, regular judgment of a judge of concurrent jurisdiction where such jurisdiction was non- existent.
29. The claimant submits that this court is not bound by the decision in Nairobi HCC No E004 of 2022 since the respondent has not appealed Nairobi High Court Civil Misc Application No E472 of 2021. The claimant prays that the leave granted be held as valid.
30. The claimant submits that the definition of the court in section 2 of the [\*Insolvency Act\*](#), the court means ‘the High Court and if there is an insolvency division of that court , means that division.’” The claimant submits that he sought leave in the commercial and tax division of the High Court which is the relevant division of the High Court which handles insolvency matters. That the act did not state that the leave should be granted in the same insolvency cause. That the administrative order of 21<sup>st</sup> November 2019 made within Insolvency Petition No E004 of 2019 was one of the foreseeable outcomes of the petition. That it was not the intention of the legislature that leave be sought to proceed with any action at the inception of an insolvency petition and also after an administrative order had been issued.
31. That when section 428 of the [\*Insolvency Act\*](#) requires that there be a stay of proceedings once under liquidation order has been made and section 560(1)(d) provides that leave sought after commencing or continuing any court action involving any company under liquidation , it is only logical that the so called leave is granted once and twice or so forth. That it would amount to redundant orders to issue leave more than once.



32. That the court should consider the conduct of the respondent in the matter who failed to file response despite leave being granted to do so hence putting barricades on the claimant's party in pursuit of justice. That the claimant needs decree of this court to prove its claim in the insolvency court.

### **Determination**

33. It is undisputed fact that the respondent was placed on receivership, that the claimant obtained leave to file instant suit from the High court under section 560(1) of the *Insolvency Act*, that the High Court appointed the receiver as also the administrator vide order dated 19<sup>th</sup> November 2021.
34. The respondent/ applicant challenges the jurisdiction of the court for lack of a fresh leave of the insolvency court or consent of the administrator upon the issuance of the administration order of court of 19<sup>th</sup> November 2021 by Justice Mabeya in Nairobi High Court Insolvency Petition E004 OF 2019.
35. It is the law that this court has no jurisdiction over a company under administration order without leave of the High Court under section 2 of the *Insolvency Act* and section 560(1)(d) of the *Insolvency Act*. Section 560(1) reads:- "while a company is under administration, (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." (emphasis given).
36. The *Insolvency Act* under section 530 defines an administration order to mean:- "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".
37. Section 522 defines the objectives of administration: " (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."
38. The Court reading of the law (section 522 and 530 above) is that the legal status of the company changes upon issuance of the administration order.
39. The claimant states that in compliance with the provision of section 560(1)(d) he obtained leave of the High Court in Nairobi Commercial and Tax Division in Misc Civil Application No E472 OF 2021 *Moses Owino v Mumias Sugar Co Ltd* (under receivership) where Justice DS Majanja issued Order Dated June 30, 2021 which reads:-

“upon reading the notice of motion dated June 22, 2021 and presented to this honourable court by advocate for the applicant under sections 1A, 1B & 3A of the *Civil Procedure Rules* CAP 21 of the laws of Kenya, section 560(1)(d) of the *insolvency Act*, Rule 10 of the *Insolvency Rules*, 2016, article 159(2)(b) of the *Constitution* of Kenya and all enabling provisions of the law. And upon reading the supporting affidavit of Brian Otieno and annexures thereto :

### **It Is Hereby Ordered:**

1. That leave be and is hereby granted to the applicant herein to institute suit against the respondent for recovery of outstanding and unpaid salaries of Kshs 3,612,253.27/- in terms of the attached memorandum of claim dated June 30, 2021. Issued at Nairobi January 26, 2022. Deputy Registrar High Court of Kenya Nairobi Milimani, Commercial and Tax Division.”



40. On the November 19, 2021, the High Court in Nairobi Insolvency Petition No E004 of 2021 issued administrative Orders against the respondent company and ordered the receivership to run concurrently with the administration and at the same time appointed Ponangipalli Venkata Ramana Rao, the receiver also as the administrator.
41. The respondent submits that the leave granted by Justice D S Majanja is not applicable following the administration order and the claimant ought to seek fresh leave following the administration order in Nairobi High Court Insolvency Petition No E004 of 2021.
42. The claimant submits that the insolvency court is defined as the High Court under section 2 of the *Insolvency Act* and hence the leave having been granted by the High Court under application brought under section 560(1)(d) it is redundant to return to the same court for fresh leave.
43. Considering the foregoing very strong positions by the parties on the leave, the court finds it has to address the mischief sought to be addressed by the requirement of leave under section 560(1)(d) of the *Insolvency Act*. The Court is guided by the English case in *Exchequer v Heydon* (Heydon's case) (1584) EWHC, 76 ER 63, where the barons resolved that 'for the sure and true interpretation of all statutes in general, four things are to be discerned and considered:-
- (i) What was the common law before the making of the Act.
  - (ii) What was the mischief and defect for which the common law did not provide?
  - (iii) What remedy the parliament hath resolved and appointed to cure the disease of the common wealth.
  - (iv) The true reason of the remedy.'

The barons further stated that, 'the office of all Judges is to always make such construction as shall suppress the mischief and advance the remedy.'

44. Section 560 (1) of the *Insolvency Act* reads:- "while a company is under administration, (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."
45. The mischief which the provision sought to address under section 560(1)(d) of the *Insolvency Act* by requirement of leave is spelt in the decision of the High Court Nairobi Insolvency Petition No E004 of 2021 *Lambert Lwanga Ogochi and others v Ponangipalli Venkata Ramana Rao* and others under paragraph 27 where the court stated:- "in this regard the core objective of the *Insolvency Act* is that a company under administration is not to be harassed and its assets wasted by either unnecessary litigation or enforcement of any rights against it. The leave of the court therefore is a prerequisite safeguard. The court has to investigate any intended proceedings before they can be commenced or proceeded with. The interest of all creditors is central in anything done or intended to be done by a company under administration."(emphasis given)
46. It is apparent to the court that the Order of the court by Justice Majanja dated 30<sup>th</sup> June 2021 did consider the claimant's case against the respondent and proceeded to grant leave to institute the instant suit.
47. The respondent submits that the said leave is not valid as it was granted before the Administration Order of 19<sup>th</sup> November 2021 in Insolvency Petition No E004 OF 2022. The respondent relies on the decision in *Lambert Lwanga Ogochi and others v Ponangipalli Venkata Ramana Rao and others*(supra) by Justice Mabeya at paragraph 30 where he held that leave should be sought in the



insolvency proceedings themselves stating that is why there is a requirement for advertising the fact of administration once it takes place. And in paragraph 33 (E004 OF 2021) Justice Mabeya held; ‘accordingly , I hold that to the extent that this suit was brought without the leave of the insolvency court, they are a nullity ab initio. Leave should have been sought within Insolvency Petition No E004 of 2019. Leave cannot be sought as in the present case when proceedings have already been lodged ad more so in a different suit all together.”

48. In paragraph 38 in Lambert Lwanga Ogochi and others v Ponangipalli Venkata Ramana Rao and others (Supra) Justice Mabeya holds that immediately the Order of 19<sup>th</sup> November 2021 was made , those proceedings became subject of the [Insolvency Act](#) and the provisions of sections 522 and 560 of the act kicked in. Any other proceedings that were continued without leave was contrary to law and are of no effect.
49. The court is minded that its jurisdiction is drawn from the Constitution and statues. Its jurisdiction is a specialised one under article 162(2)(a) of the Constitution and section 12 of the [Employment and Labour Relations Court Act](#). Further the court is minded that the jurisdiction under the [Insolvency Act](#) is a preserve of the Court defined under section 2 of the [Insolvency Act](#) being the High Court. There is no dispute that the respondent was placed under administration Order on the 19<sup>th</sup> November 2021. The instant suit was filed on the 30<sup>th</sup> June 2021. That High Court granted leave to file the suit on the 30<sup>th</sup> June 2022 in Nairobi Misc Civil Application No E472 of 2021.
50. The court finds and determines that pursuant to the appointment of the administrator the provisions of section 522 of the [Insolvency Act](#) kicked in. The leave of the High Court though stated to be under section 560(1)(d) was granted before issuance of the administration order.
51. The court agrees with the claimant that there was valid leave at the time of filing suit against the receiver. The court further agrees it has no jurisdiction to review or even set aside the leave granted by Justice Majanja on 30<sup>th</sup> June 2021(supra) being a court of equal status and upholds the court appeal decision in [Joseph Ndirangu Waweru t/a Mooreland Mercantile Co & Another v City Council of Nairobi](#) (2015)Eklr where the Court of Appeal held that a Judge has no jurisdiction to re- hear and interfere with a decision in a matter that was decided by a fellow judge of concurrent jurisdiction. That the court cannot set aside decision of a fellow Judge.
52. The claimant asserts he was advised by his advocates that section 560(1)(d) of the [Insolvency Act](#) should be read together with section 428 of the [insolvency Act](#) hence it does not matter whether he obtained leave before the administration order was made and he had leave of the court to proceed with the matter. section 428 states:- . ‘Power to stay or restrain proceedings against company when liquidation application has been made (1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may — (a) if legal proceedings against the company are pending in the Court— apply to the Court for the proceedings to be stayed; and (b) if proceedings relating to a matter are pending against the company in another court —apply to the Court to restrain further proceedings in respect of that matter in the other court. (2) On the hearing of an application under subsection (1)(a) or (b), the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.”

The court does not find section 428 cited in the Order of June 20, 2022. Nevertheless, the court finds the status of the company then was that it was under receivership.

53. The court taking into consideration the provisions of section 522 of the [Insolvency Act](#) is of the opinion that the legal status of the respondent changed from receivership only upon appointment of the



administrator bringing it under the insolvency court control. That the leave issued on the June 30, 2021 was not in respect to the administration but receivership only.

54. Consequently, in order to proceed with the instant suit, it is mandatory to comply with the provisions of the *Insolvency Act* section 560(1)(d) read together with section 522 to get the consent of the administrator or leave of the insolvency court which leave the court determines should be sought within the proceedings of Nairobi Insolvency Petition No E004 OF 2019 being the court which issued the administration order for Mumias Sugar Company Limited (under receivership) the ex-employer of the claimant.
55. Consequently, the court finds and determines that notice of motion dated July 7, 2022, is successful and grants the following Orders:-
- a. Any further proceedings herein be and are hereby stayed until the consent of the administrator or approval of the insolvency court In Nairobi High Court Insolvency Petition No E004 OF 2019 is obtained in these proceedings.
  - b. Costs in the cause.
  - c. It is so ordered.

#### **Observation from the court**

56. The Court in penning out wishes to call out on the conduct of the respondent's advocates for deliberately delaying the conclusion of this matter. Instead of filing application as ordered on the May 10, 2022 they alleged to have written a letter to the court which letter has never been placed officially in the court file and the court saw it for the first time as exhibit under the instant application. The court frowns at such conduct. Further the respondent's counsel swore an affidavit annexing documents which have never been officially filed in court and without court stamp further wasting the court's time. The court wishes to remind counsel on upholding their oath of office by adopting the decision of the *Supreme Court in Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others* (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) {2022} KESC 54 (KLR) (ElectionPetitions) (5 September 2022) (Judgment ) as follows:-

“ [139] One of the most serious losses an advocate may ever suffer is the loss of trust of Judges for a long time. Such conduct amounts to interference with the proper administration of justice. Further, it puts counsel in jeopardy of being found in contempt of court. This Court in the case of *Republic v. Ahmad Abolfathi Mohammed & Another*, SC Petition No 39 of 2018; [2019] eKLR underscored the vital role that advocates play in assisting the court to effectively carry out its duty of administering justice. We can do no more than reiterate the words of the court as follows: “[6] On admission to the bar, all advocates make an affirmation, as officers of the court. Section 15(4) of the *Advocates Act* provides that an aspiring advocate: “shall take an oath or make an affirmation as an officer of the court before the Chief Justice in such form as he shall require, and shall thereafter sign the roll in the presence of the Registrar or a Deputy Registrar who shall add his signature as witness.”

- (7) The status of an advocate as an officer of the court, is expressly provided for in section 55 of the *Advocates Act*. An advocate, consequently, bears an obligation to promote the cause of justice, and the due functioning of the constitutionally-established judicial process ensuring that the judicial system functions efficiently, effectively, and in a respectable manner. In that context,



advocates bear the ethical duty of telling the truth in court, while desisting from any negative conduct, such as dishonesty or discourtesy. The overriding duty of the advocate before the court, is to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice. .... [11] It is clear, therefore, that Advocates, while discharging their duties, are under obligation to observe rules of professionalism, and in that behalf, they are to be guided by the fundamental values of integrity.” The court has nothing useful to add to the observation of the Supreme Court.

57. The court considers that the legal moratorium in the instant suit is in place until the issuance of the leave by the insolvency court in Nairobi High Court E004 OF 2021 as stated in the ruling.
58. For administration purpose only the matter will be mentioned before court Deputy Registrar on the November 30, 2022 to confirm whether the said leave has been issued.
59. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 6TH OCTOBER 2022.**

**J.W.KELI,**

**JUDGE.**

**In the presence of:-**

**Court Assistant: Brenda Wesonga**

**For Claimant:- Brian Otieno**

**For Respondent:-Mr Tugee**

