



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 25 OF 2017**

**DENNISH OWINO OMEGA**

**CLAIMANT**

**v**

**MUMIAS SUGAR CO LIMITED (Under receivership)**

**RESPONDENT**

**AND**

**KCB BANK KENYA LTD**

**OBJECTOR**

**AND**

**PONANGIPALLI VENTATA RAMANA**

**RAO (Receiver Manager of MUMIAS**

**SUGAR CO LTD**

**INTERESTED PARTY**

**RULING**

1. In a judgment delivered on 16 September 2019, the Court awarded Dennish Owino Omega (the Claimant) the equivalent of 5-months' salary as compensation for unfair termination of employment together with costs and interest.
2. The Claimant moved to execute, and on 24 March 2021, the KCB Bank Kenya Ltd (the Objector) filed a Motion seeking orders:
  - (1) ...
  - (2) ...
  - (3) This Honourable Court be pleased to set aside the warrants of attachment and sale issued herein, and as a consequence, an order be issued unconditionally lifting/raising the attachment of all the assets proclaimed.
  - (4) That this Honourable Court be pleased to issue an order of stay of execution of the judgment entered on the 16<sup>th</sup> of September, 2019 and the decree issued on 9<sup>th</sup> March 2021 and all its subsequent and ancillary proceedings (save for this application).
  - (5) This Honourable Court be pleased to make any other orders as it deems fit in the circumstances.
  - (6) Costs of this application be provided for.
3. The Claimant filed a replying affidavit in opposition to the Motion on 31 May 2021.
4. None of the parties filed submissions within the agreed timelines as directed.
5. The principal ground advanced by the Objector in support of the Motion to set aside the warrants/stay of execution were that it was the holder of various floating and fixed debentures over the assets of the Respondent and that it had appointed a Receiver Manager on 20 September 2019 over the assets.

6. Consequently, the Objector asserted that it had a legal and equitable interest in the proclaimed assets and which interest ranked higher in priority to that of the Claimant.

7. The Objector further contended that there were pending insolvency proceedings against the Respondent in Nairobi Insolvency Petition No. E004 of 2019, *Kimeto & Associates Advocates v KCB Bank Kenya Ltd & Ors* and Nairobi Insolvency Petition No. E007 of 2019, by Kimeto & Associates Advocates, and therefore the execution was *ex facie* defective and void *ab initio*.

8. The Objector cited sections 430 and 431(3) of the Insolvency Act, which provides that:

If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void.

9. In opposition to the Motion, the Claimant deposed that his interests ranked higher than that of the Objector as a floating debenture holder and that the appointment of a Receiver did not automatically crystallise a charge and, therefore, the execution was valid.

10. The Claimant relied on *Boleyn Magic Wall Panel Ltd v Nesco Services Ltd; Boleyn International (K) Ltd (Objector)* (2021) eKLR, and *James Job Kihori Kahagi v Kencity Clothing Ltd* (1977) eKLR.

11. The Court has considered the material placed before it by the parties.

12. It is not in dispute that the Objector appointed a Receiver of the Respondent on 20 September 2019 before the Claimant moved to execute (the case of *Kencity Clothing* addressed execution before the appointment of a Receiver).

13. It is also not in dispute that there were at least 2 Insolvency Petitions against the Respondent before the High Court in Nairobi.

14. By dint of section 431(3) of the Insolvency Act, it is deemed that the liquidation of the Respondent commenced when the liquidation applications were made to the High Court in 2019.

15. Consequently, pursuant to section 430 of the Insolvency Act, the execution by the Claimant was rendered void.

16. Despite reaching the conclusion, it is regrettable that none of the parties deemed it appropriate to disclose the current status of the 2 Insolvency Petitions before the High Court.

17. The Court also notes that the Claimant moved to execute over 1-year after judgment, thus probably implicating the provisions of Order 22 Rule 1 of the Civil Procedure Rules.

### **Conclusion and Orders**

18. In light of the above, the Court orders:

(i) An order is hereby issued setting aside the warrants of attachment and sale issued herein on 9 March 2021.

19. Each party to bear own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF NOVEMBER 2021.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

### **Appearances**

For Claimant Omondi Abande & Co. Advocates

For Respondent did not participate

For Objector Munyao, Muthama & Kashindi Advocates

Court Assistant Chrispo Aura