



**Momanyi v Kountable Trading Limited (Insolvency Cause E011 of 2023)
[2024] KEHC 10257 (KLR) (Commercial and Tax) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E011 OF 2023**

PM MULWA, J

AUGUST 15, 2024

BETWEEN

ALFRED OMWANZA MOMANYI APPLICANT

AND

KOUNTABLE TRADING LIMITED RESPONDENT

RULING

1. The applicant, Alfred Omwanza Momanyi has approached this court through a Notice of Motion dated 31st March 2023. He seeks a stay of execution of the decree issued in Nairobi Milimani High Court Comm No. E187 of 2020 between Kountable Trading Limited and Alfred Momanyi, Cresta Investments Limited and another, pending the hearing and determination of this petition. He also seeks the costs of the application.
2. The application is based on the grounds as set out on its face and his supporting affidavit and supplementary affidavit sworn on 31st March 2023 and 27th February 2024 respectively. The applicant avers he was a former businessman trading in the name and style of Cresta Investments Limited engaged in the supply of wooden power poles. He submits he owes a debt of Kshs. 47,729,964 to its creditors and is currently unable to pay the debt. The applicant seeks to be declared insolvent as the economic vagrancy in the country has forced him into the current position where he is unable to pay the debt.
3. The respondent, Kountable Trading Limited opposed the application through the replying affidavit of Peter Githongo the Trade Specialist sworn on 31st October 2023. He states that the applicant is not candid with the truth as the insolvency petition is a tactic he (applicant) has employed to evade payment of the debt. He submits the respondent has suffered and continues to suffer colossal and irreparable financial loss and harm due to the applicant's dishonest schemes to derail the realization of the fruits of



its judgment. He states that the insolvency petition is misleading as the company Cresta Investments Limited is a going concern and not subject to any liquidation.

4. The parties agreed to have the application canvassed by way of written submissions. The applicant filed submissions dated 6th March 2024, while the respondent's submissions are dated 1st January 2024.
5. I have considered the application, the response, the annexures and the written submissions as filed in respect to the respective arguments. The main issue for determination is whether the court ought to grant a stay of execution of the decree before the issuance of a bankruptcy order.
6. Section 32(1) of the *Insolvency Act* allows a Debtor to make an application to the court for an order adjudging the debtor bankrupt only when the debtor is unable to pay its debt.
7. The applicant argues he is unable to pay the decretal amount owing to the respondent and has approached the court with a bankruptcy petition.
8. The respondent argues that the applicant filed the insolvency petition after failing to comply with the orders of the court and after warrants of arrest were issued. The respondent submits the insolvency petition contravenes the provisions of section 32(4) and (5) of the *Insolvency Act* 2015 which requires mandatory publication of a notice of the intended application for bankruptcy in a newspaper with a national wide circulation. The respondent contends the petition is therefore defective and ought to be struck out.
9. Section 32 (4) and (5) of the *Insolvency Act* provide as follows:
 - (4) A debtor who makes an application under this section shall publish a notice of the application in—
 - a. a newspaper circulating within the region in which the debtor ordinarily resides; and
 - b. in such other publications (if any) as may prescribed by the insolvency regulations for purposes of this section.
 - (5) The Court may decline to hear the application if subsection (4) has not been complied with to its satisfaction.
10. The applicant argues that he complied with the mandatory provisions of Section 32 and adduced newspaper excerpts as proof of advertisement. I have perused the documents attached and the newspaper excerpt as uploaded is deficient. Only a part of it has been uploaded, there is no proof of advertisement in the uploaded part, and the court is therefore not able to establish if the advertisement was done. In the absence of proof of advertisement, the applicant has not complied with the mandatory provisions of Sections 32(4). The result is that the petition is defective.
11. A court will stay execution only when a bankruptcy order commences, as provided in Section 48(1) of the *Insolvency Act*. The said section provides:

“When a bankruptcy order commences—

 - a. all proceedings to recover the bankrupt's debts are stayed; and
 - b. the property of the bankrupt (whether in or outside Kenya), and the powers that the bankrupt could have exercised in respect of that property for the bankrupt's benefit, vest in the Official Receiver.”



12. From the record it is evident that the insolvency petition filed on 31st March 2023 was a reaction to the execution proceedings and more particularly the warrants of arrest issued on 30th March 2023. A cursory perusal of the record reveals that when the matter in Milimani High Court Comm No. E187 of 2020 came up for a notice to show cause, the applicant was directed to file an affidavit of means which the court examined and satisfied itself that he was capable of repaying the amounts due. The court then proceeded to issue a warrant of arrest. In an attempt to avoid arrest, the applicant entered into a consent and agreed to pay the sum of Kshs. 3,000,000/- per quarter with the first payment commencing on 28th January 2023 but failed to pay.
13. It is evident the applicant made several promises to pay the decretal amount but failed to honour the same. Failure to honour the consent and pay the decretal amount necessitated the respondent to proceed with execution. My finding is that the insolvency petition is brought only for the purpose of evading payment of the decretal amount. The respondent is entitled to the fruit of the judgment.
14. The applicant has not demonstrated to this court of its inability to pay the decretal amount. And as I have stated hereinabove, the failure by the applicant to comply with the provisions of Section 32(4) of the Act renders the petition defective. My view is that the instant application is a grave abuse of the court process and lacks merit.
15. The upshot is that the Notice of Motion dated 31st March 2023 is dismissed with costs to the respondent.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF AUGUST 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Makau for Petitioner/applicant

Mr. Marwa for Respondent

Court Assistant: Lilian

