



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Synergy Industrial Credit Ltd (Insolvency Cause
001 of 2022) [2023] KEHC 2950 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
INSOLVENCY CAUSE 001 OF 2022
RB NGETICH, J
MARCH 30, 2023**

BETWEEN

NANCY NJOKI MWANGI DEBTOR

AND

SYNERGY INDUSTRIAL CREDIT LTD CREDITOR

RULING

1. The application before the court for determination is the notice of motion dated May 19, 2022 seeking a stay of execution of the Warrants of arrest for committal to civil jail against the applicant/debtor arising from Milimani CMCC No 9208 of 2017 (Synergy Industrial Credit Ltd v Target promotions Ltd & 2 others) seeking the hearing of the application and the suit.
2. The application is premised on the grounds that the applicant's husband passed away on January 19, 2022 and she was not aware of the proceedings in Milimani CMCC No 9208 of 2017; the warrant of arrests and committal to civil jail arose from the said judgment that she was not partisan. That it is in the interest of justice that the orders sought to be granted.
3. The application is supported by the annexed affidavit of Nancy Njoki Mwangi the applicant herein who deponds that she was unaware of the proceedings before and after the demise of his husband and only learned of the same when she was served with the warrants of arrest against her. That the amount claimed by the judgment debtor is Kshs 4,000,000/= which she has no means to satisfy. She stated that she is dependent on her children for food, care and maintenance. She urged the court to allow the orders sought.
4. In response, the Respondent filed Replying affidavit sworn by Jacob Mbae Meeme and the grounds of opposition filed on November 1, 2022. Grounds of opposition are as follows: -
 - i. That the Notice of Motion is fatally defective, incompetent, misconceived and lacks merit, the application is invalid under the *Insolvency Act* 18 of 2015 as the debtor/applicant has not been



discharged bankrupt; that the court lacks the jurisdiction to issue stay orders before issuance of the bankruptcy order.

- ii. The application is immature as the debtor has not disclosed insolvency or an inability to pay the sum due.
 - iii. The debtor has not published a notice for application for Bankruptcy in a newspaper with national wide circulation and thus offends the provisions of the [Insolvency Act](#) No 18 of 2015.
 - iv. The debtor has failed to make frank full disclosure of her state of affairs so as to demonstrate and prove that the Debtor is truly, factually and commercially insolvent.
5. In the Replying affidavit, Jacob Mbae Meeme averred that the debt stems from a hire purchase facility that was secured by the joint registration ownership for Motor Vehicle Registration Number KBK 805G in the names of Target Promotions Limited and the Creditor as well as a deed of guarantee and indemnity executed by the late Zablon Mwangi Muthaiga. That the debtor is dishonest in her affidavit as she and her late husband Zablon unsuccessfully applied to the court to have the judgment of February 25, 2019 set aside vide a notice of motion dated November 25, 2020.
6. The application was heard by way of written submissions with both parties filing their respective submissions.

Debtor's /applicant's Submissions

7. In the submissions filed on January 19, 2023, counsel submitted that the application before the court is for a stay of execution or any proceedings pending the hearing of the petition; that it is intended to preserve the subject matters in question. He cited Section 16 (2) of the [Insolvency Act](#) which provides as follows:-
- “The court has a general power to dismiss a bankruptcy application or stay proceedings on such application on the ground that the court is of the opinion that a requirement of this part of the insolvency regulations has not been complied with in a material respect.”
8. Counsel submitted that the issue for determination is whether the applicant has complied with the insolvency regulations, which is in the affirmative as the debtor has been issued with a certificate of compliance by the official receiver and urged the court to allow the application as prayed.

Creditor's /respondent's Written Submissions

9. Counsel filed submissions on November 23, 2022 submitting that the only issue for determination is whether the debtor has made a case for the court to adjudge her bankruptcy. Counsel submitted that the debtor filed the current instant petition as a reaction to the execution proceedings initiated by the Creditor pursuant to the decree issued in Milimani CMCC No 9208 of 2017; that the Debtor is not insolvent and has not been declared insolvent. The creditor asserts that the debtor is in a position to settle the debts as she is the Director of Ms. Don Penn Construction Limited.
10. Counsels submitted that bankruptcy law is not meant to protect people like the debtor who is in debt because of their own acts of fraud as cited in the case of [Stephen Nyaega Mose](#) (2018) eKLR.

Analysis And Determination

11. I have considered the application by the Debtor and the response from counsel for the Creditor and the submissions filed. The issue for determination is whether the Debtor has made out a case for a stay of the execution of the decree issued in Milimani CMCC No 9208 of 2017.



12. The gist of the application is that whereas the debtor has petitioned for bankruptcy before this court, there is a decree issued by the Chief Magistrate's court at Milimani, Nairobi whose execution is imminent and underway. The debtor has come to his court praying for a stay of execution pending the hearing of the petition.
13. The Creditor's argument is that the application is made in bad faith as the Creditor is a person of means and capable of repaying the amount due and owing to the Creditor; that the Creditor has adduced evidence to demonstrate that the Debtor is a Director of other companies and thus has the financial muscle.
14. Section 32 of the *Insolvency Act* provides as follows: -
 1. A debtor may make an application to the Court for an order adjudging the debtor bankrupt only on the grounds that the debtor is unable to pay the debtor's debts.
 2. The Court may decline to deal with such an application if it is not accompanied by a statement of the debtor's financial position containing: —
 - a. Such particulars of the debtor's creditors and of the debtor's debts and other liabilities and assets as may be prescribed by the insolvency regulations; and
 - b. Such other information as may be so prescribed.
 3. The Court may reject a statement of the debtor's financial position if it is of the opinion that it is incorrect or incomplete.
 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 be 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.
15. Further Section 428 of the *Insolvency Act* provides;
 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 (IXa) or (b) the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.
 3. If, in relation to a company registered (but not formed) under the *Companies Act*, 2015, the application is made by a creditor, this section extends to any contributory of the company.



16. From the foregoing, after filing of application for liquidation and before liquidation order is made, the creditor or company or contributory may apply for stay of any legal proceedings against the company.
17. The Debtor submitted that she was not aware of the proceedings in Milimani Milimani CMCC No 9208 of 2017 which culminated in the execution proceedings as the matter was dealt with by her deceased husband and urged this court to allow the application as prayed.
18. I take note of the fact that the applicant was issued certificate of compliance dated May 9, 2022 from the official receiver confirming that she has submitted to official receiver the prescribed forms and paid the mandatory Kshs 30,000(Thirty Thousand only) being official receivers' expenses (receipt attached). In my view, the issues raised by the respondent should be dealt with in the petition.
19. Having considered the averments by parties herein, I am of the view that there is need to stay proceedings pending against the Applicant so as to avoid rendering hearing and determination of this petition irrelevant. From the foregoing, I find merit in the application dated May 19, 2022.

20. Final Orders _:

1. I hereby stay execution of the decree issued in Nairobi Milimani CMCC No 9208 of 2017 pending the hearing and determination of this petition.
2. Costs be in the cause.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 30TH DAY OF MARCH, 2023

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Mr Mugo for the Applicant

Mr Meeme for the Respondent

