



REPUBLIC OF KENYA



KENYA LAW
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**In re Sarah Kemuma Osiemo (a Debtor) (Insolvency Petition E005 of 2018)
[2023] KEHC 2739 (KLR) (Commercial and Tax) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E005 OF 2018
DAS MAJANJA, J
MARCH 29, 2023
IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND IN THE MATTER OF
SARAH KEMUMA OSIEMO (A DEBTOR)**

JUDGMENT

1. Sarah Kemuma Osiemo (“the Debtor”) has brought the petition dated 16th October 2018 for an order that a bankruptcy order be made in respect of her estate and that she be adjudged bankrupt.
2. The grounds upon which the petition is based are set out in the Debtor’s supporting affidavit sworn on 16th October 2018. The Debtor states that at the time she filed the petition she was aged 57 years old. That she has never been in formal employment and was in the hawking business primarily buying, ripening and reselling bananas.
3. That sometime in 1997 and with support of her husband, she took a partial Sacco loan to enable her acquire a house; Umoja 1 Estate House No. D 84 which became her single and only asset. The property was however claimed by a third party and which resulted in litigation in the High Court and the Court of Appeal being HCCC No. 999 of 2001, *Mary Wanjiru Njuguna and Sarah Kemuma Osiemo v Joseph Muriithi Njeru* and NRB CA Civil Appeal No. 145 of 2016, *Joseph Muriithi Njeru v Mary Wanjiru Njuguna and Sara Kemuma Osiemo* respectively which resulted in her losing the property. She was also ordered to pay a total of Kshs. 2,644,000.00 being damages and mesne profits.
4. Because of the stress and trauma associated with the suit, she became hypertensive and suffered spinal cord injuries and deep vein thrombosis. As a result, she could no longer continue her hawking business and does not have any other source of income or asset. She was forced to relocate to Kisii when her husband retired in 2016. She therefore states that she has presented this petition without any intention to avoid any debt.



5. The petition was opposed by a creditor, Joseph Muriithi Njeru through his affidavit sworn on 16th March 2022. He stated that he was a Judgment-Creditor as a result of the decision of the Court of Appeal in NRB CA Civil Appeal No. 145 of 2016. He contested the Debtor's contention that she did not have any assets. He engaged a private investigator who found out that she was residing with her husband in Kitengela on a property registered in the name of her husband, Alfred Osiemo. That she did not relocate to Kisii as alleged and that she was capable of paying the debt which has reached Kshs. 3,940,000.00.
6. In her response to the replying affidavit, the Debtor refuted the Creditor's allegations. She stated that she had relocated to Kisii with her husband who is now sick and uses his retirement income to treat his condition.
7. The Debtor was cross-examined on the matter before the matter was reserved for judgment. I have also considered the written submissions filed on behalf of the Creditor.
8. Under section 32(1) of the *Insolvency Act*, 2015, a debtor is entitled to apply to be adjudged bankrupt on the grounds that he or she is unable to pay his or her debts. I have considered the statement of affairs filed by the Debtor which shows that she has only personal effects worth Kshs. 10,000.00 while the aggregate debt due to the Creditor following the judgment against her is at least Kshs. 3,940,000.00 as determined by the Court of Appeal decision. The judgment has been produced in evidence. It is clear therefore that the Debtor is unable to satisfy or pay the debt as her liability far exceeds any assets she may have.
9. The Creditor quotes *Re: Stephen Nyaoga Mose* [2018] eKLR where Makau J., stated that, "Bankruptcy laws were never meant to protect people like the debtor, who are in debt because of their own fraud." In his view, the Petitioner's indebtedness was the result of fraudulent conduct hence she should not benefit from these proceedings to shield her from paying the debt. It points out to the judgment of the Court of Appeal finding that the transaction leading to the decision in his favour was a result of fraud by the Debtor.
10. I have read the Judgment of the Court of Appeal and I disagree. It is the 1st respondent and her husband in that case who sold the property to the Debtor that the court held that, "the procedure that was craft by the 1st respondent and her husband was outrightly fraudulent and cannot be sanctioned by law." In the court's view, because of the fraud, the Debtor could not acquire a good title. To my mind, the fraud complained of by the Creditor is not the kind of fraud that would disentitle the Debtor from seeking a fresh start. The Creditor has not proved that the Debtor's petition has been instituted fraudulently.
11. From the totality of the evidence, I am satisfied that the Debtor is unable to pay her debts. The Creditor's position that she has not paid the debt confirms this position and her testimony was unshaken even in cross-examination.
12. I therefore make the following orders:
 - (a) Sarah Kemuma Osiemo and is hereby adjudged bankrupt and a bankruptcy order is made against his estate.
 - (b) The Official Receiver is hereby appointed to be the Bankruptcy Trustee in respect of the Debtors Property.
 - (c) Cost of the petition shall be borne out of the Debtor's estate.

DATED and DELIVERED at NAIROBI this 29th day of MARCH 2023.

D. S. MAJANJA



JUDGE

Court Assistant: Mr. M. Onyango.

Mr Namada instructed by Namada and Company Advocates for the Debtor.

Mr Njeru instructed by Njeru, Nyaga and Company Advocates for Joseph Muriithi Njeru (a Creditor).

