



**Kabatha v Stanbic Bank Kenya Limited & another (Insolvency Cause
4 of 2019) [2023] KEHC 3716 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
INSOLVENCY CAUSE 4 OF 2019
HK CHEMITEI, J
APRIL 27, 2023**

BETWEEN

JAMES MAINA KABATHA PETITIONER

AND

STANBIC BANK KENYA LIMITED 1ST RESPONDENT

MACHE HARDWARE STORES LTD 2ND RESPONDENT

JUDGMENT

1. The debtor herein a resident of Nakuru vide a petition filed in court on 15th January 2019, petitioned this court for a Bankruptcy Order in respect of his estate on the grounds that he was unable to pay his debts. He prayed that he be adjudged bankrupt. Annexed to the Petition is his Statement of Affairs (Individual Person) reflecting assets worth Kshs. 110,000/= and liabilities to the tune of Kshs. 3,425,591/=. His Creditors whose debts are unsecured are shown as CFC Stanbic Bank Limited-Kshs. 2,868,686/= and Mache Hardware Stores-Kshs. 556,905/=.
2. Additionally, the petitioner provided information relating to his affairs and also filed an affidavit dated 15th January 2019 deposing that sometimes on the 6th December 2006, he entered into a hire purchase agreement with respondent/creditor. The arrangement was to purchase some buses on hire purchase and the bank advanced him a sum of Kshs. 2,868,686/=. He purchased the bus which was registered as xxxx Nissan Diesel MKB 210. According to the petitioner/debtor, he started paying the loan in January of 2007 at the rate of Kshs. 96,000/= per month for a period of (4) months after which the vehicle's engine ceased to work while it was still new. That he informed the respondent/creditor and requested it to finance the repairs of the said motor vehicle but his request was rejected.
3. The petitioner deposed further that in 2008, he realized that he was not able to run the bus business so he entered into an agreement with Kenya Bus Services to have them run the bus and the proceeds be shared equally between them and the respondent/creditor. That before the agreement could



- materialize, the bus was vandalized at the Machakos Country Bus Station during the 2008 post elections skirmishes and he never had money to repaired. Further, that management of Kenya Bus Service informed him that they could not repair the bus beyond Kshs. 100,000/=.
4. The petitioner/debtor went on to depose that after he defaulted in payment of the loan, the 1st creditor referred him to the Credit Reference Bureau and as a result he was unable to get any other financial facility to proceed with the business of the bus.
 5. He deposed on that in 2009, he took some construction material from the 2nd respondent/creditor for a total value of Kshs. 232,194/=. That following the events narrated above, he had been unable to settle the debt owed to the 2nd respondent/creditor which eventually sued him and obtained a decree.
 6. Additionally, in support of his case the petitioner filed further affidavits dated 11th January 2021, 17th May 2021 and 23rd July 2021 respectively.
 7. The 1st respondent/creditor in response to the petitioner's petition filed grounds of opposition. However, the same is not in the court's file but only mentioned in its submissions dated 17th September 2020 and filed in court on 21st September 2021.
 8. The 1st respondent/creditor also filed a replying affidavit dated 12th October 2021 sworn by Simon Mwangi its legal counsel in response to the petitioner/debtor's further affidavits dated 17th May 2021 and 23rd July 2021. He deposed that the petitioner/debtor had always deliberately avoided filing the loan form returns as directed by the Court in an attempt to mislead the Court on his income and assets. That as per his tax return summary of 4th February 2021 annexed to his further affidavit sworn on 17th May 2021, for the period between 1st January 2019 to 31st December 2019 he had a gross total income of Kshs. 606,436.00/=. Further, that the tax return summary dated 10th April 2021, the petitioner/debtor for the period spanning from 1st January 2020 to 31st December 2020 had a gross total income of Kshs. 676,497.45/=.
 9. The respondent/creditor's advocate went on to depose that in the further affidavit sworn on 23rd July 2021, the petitioner/debtor had annexed financial statements prepared by Intercapital Managers and Consultants for the financial year ended 31st December, 2020 which indicated that he received an income from offering consultation services to the sum of Kshs. 4,310,257/=. That after deductions of expenses, he had a surplus of Kshs. 659,332/= for the year 2020 and Kshs. 606,437/= for the year 2019. Further, that from the said financial statements he owned non-current assets valued at Kshs. 5,617,335/= for the year 2020 and Kshs. 5,852,397/= for the year 2019.
 10. Additionally, the respondent/creditor's legal counsel deposed that the petitioner/debtor in an attempt to explain the financial statements indicated that he sold a parcel of land known as Nakuru Municipality Block 7/421 to one Samuel Otara Arama for a sum of Kshs. 2,500,000/= in the year 2014 but the same was not supported by a transfer instrument. Also, that the financial statements indicated that the petitioner/debtor owned a motor vehicle registration number xxxx valued at Kshs. 595,754/= which was allegedly the subject of a chattel mortgage facility with NCBA Bank (NIC Bank) but he failed to attach the said chattel mortgage instrument.
 11. Lastly, the respondent/creditor's advocate deposed that the petitioner /debtor deliberately failed to declare all the assets and liabilities as set out in his 2nd further affidavit sworn on 23rd July, 2021. That he also failed to produce the long form of his tax returns as directed by this Court on 5th of July, 2021. Therefore, that the foregoing discrepancies in his tax return summaries, 2nd further affidavit and statement of financial affairs made it clear that the petitioner/debtor was attempting to frustrate the execution of the decree which was an abuse of the Court's process.



12. The court directed that parties file submissions which they have complied.

Petitioner's/Debtor's Submissions

13. The petitioner/debtor filed written submissions dated 11th March 2022, where his learned counsel invited this court to consider all the documents filed by the petitioner/debtor. He submitted that the petitioner/debtor had explained in great detail the causes of his financial misfortunes and demonstrated that the same were not of his own making. That based on his net taxable income, the average monthly income earned by the petitioner debtor was slightly above Kshs 50,000. Further, that the income included the fixed assets in the nature of land and buildings which the petitioner debtor demonstrated that he had already sold.
14. The learned counsel for the petitioner/debtor submitted further that considering the modest personal expenditure incurred by the debtor and his net monthly income was Kshs 30,000/=, the same could not settle the debts currently due to the respondent/creditor. That the debtor was not seeking to be shielded by the court from meeting his liability and he had demonstrated that he was a responsible person having worked as a clinical officer at the provincial general hospital.
15. Further, that it was his fortunes which took the wrong turn when he ventured into the public transport business. It was the petitioner's/debtor's prayer that he be granted interim protection as he recovered financially and put himself in a position where he could settle the debts either in lump sum or in instalments. He urged the court to allow the petition as the same was merited.

Respondent's/ Creditor's Submissions

16. The respondent/creditor in its submission identified one issue for determination that is whether the petitioner/creditor met the necessary conditions to be adjudged bankrupt. The learned counsel for the respondent/creditor submitted that under Section 16(2) of the *Insolvency Act* a court of law had the power to dismiss a bankruptcy application where the court is satisfied that the insolvency regulations have been complied with in a material aspect.
17. He submitted further that the *Insolvency Act* under sec 32(2) provided that a court had the authority to decline to deal with any application that is not accompanied with the debtor's financial position containing the debtor's liabilities and assets and any other information as prescribed. Additionally, that vide a ruling of the court dated 8th October 2021, the court asserted that it was the burden of the debtor to show the court that he was acting in good faith by placing all information relating to his financial affairs before the court.
18. The learned counsel for the respondent/creditor went on to submit that the petitioner's/debtor's statement of financial affairs not only failed to declare that he had a source of income, but also that the assets listed in his financial statements as non-current assets were not his but rather that the said parcel of land was sold and the title was never transferred. That the financial statement also indicated that he owned a motor vehicle which he had not declared and was apparently the subject of a chattel mortgage facility. Further, that the petitioner/debtor was not candid with the court as he failed to declare these assets and that after they had been discovered he could not provide for the transfer instrument for the land title and neither could he attach a mortgage instrument for the vehicle.
19. Lastly, it was the learned counsel submission that the intentions of the petitioner/debtor were purely malicious and intended to frustrating the 1st respondent/creditor from recovering money advanced to him.



20. The court's attention was drawn to the case of *Re Paul Mutisya Mutwii* [2010] eKLR where the court held that where the debtor was not candid in his petition by failing to disclose his assets he was disentitled to a favorable exercise of discretion by the court.
21. In conclusion, the learned counsel for the respondent/creditor submitted that the intentions of the petitioner/debtor were not *bona fide*, that he was only using bankruptcy as a means to evade paying his liabilities and had misled the Court on the actual state of his financial position. He urged the court to dismiss the petition herein with costs.

Analysis and Determination

22. I have read the petition and submissions of the parties and the issue for determination is whether the petition is merited taking into consideration the above facts and submissions.
23. The policy underpinning insolvency legislation and practice is that a debtor is entitled to seek relief from unmanageable debt through bankruptcy if the debtor is unable to resolve his or her financial difficulties through other means. Even though it is imperative that a debtor be shielded through a bankruptcy order, the petition must be made in good faith and there should be no material non-disclosure. Also, there must be clear proof of actual insolvency.
24. However, having said that it is important to note that bankruptcy is regarded as an option of last resort because it has serious consequences.
25. Section 32(1) of the *Insolvency Act*, 2015 provides as follows:

“ 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.”
26. Additionally, Section 32(2) of the *Insolvency Act* provides that the Application must be accompanied by a statement of the debtor's financial position. The Statement of Financial Position must contain the following:
 - (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.”
27. Regulation 18 of the *Insolvency Rules* 2016 requires the debtor to provide detailed information on his financial states so as to guide the court and the creditors in ascertaining his creditworthiness. Under regulation 18(4) the petitioner is required to publish the notice in the Kenya Gazette.
28. In view of the foregoing, it is clear that the first step the court ought to determine is to ascertain whether the petitioner/debtor herein has complied with the procedure set out by the law in filing of the petition. In the instant suit, the petitioner/debtor has given an inventory of his assets and liabilities as per his Statement of Affairs annexed to the petition.
29. There are however two critical non-current assets which the petitioner was unable to establish whether he was still the owner or not. These are land parcel number Nakuru municipality Block 7/421 which was allegedly purchased by one Hon. Samuel Otara Arama and a motor vehicle (xxxx) which was charged.
30. There was however no evidence that the said parcel of land had been transferred to a third party or was charged to any financial institution as claimed by the applicant. The same applied to the said vehicle. No evidence was tendered of it being encumbered as well or in a name of a third party.



31. These are critical assets forming part of his net estate and it was within the petitioner's knowledge and control to disclose their status. In the absence of any prove, this Court takes it that the petitioner has not been candid enough and therefore cannot benefit from the protection of this court.
32. In the premises and for the above reasons the petition is dismissed with costs to the creditor.

DATED SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF APRIL 2023.

H. K. CHEMITEI.

JUDGE

