



REPUBLIC OF KENYA



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Mercy Lovyne t/a Kavirondo Catering Services v Oyugi (Insolvency Cause E002 of 2020) [2023] KEHC 19413 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
INSOLVENCY CAUSE E002 OF 2020**

JN KAMAU, J

JUNE 29, 2023

BETWEEN

MERCY LOVYNE T/A KAVIRONDO CATERING SERVICES PETITIONER

AND

GEORGE CLIMAX OYUGI CREDITOR

JUDGMENT

Introduction

1. In her Petition dated 3rd December 2020 and filed on 4th December 2020, the Petitioner sought for orders that a bankruptcy order be made in respect of her estate and that she be adjudged bankrupt.
2. She swore an Affidavit in support of her said application on 2nd December 2020. She averred that vide an Agreement dated 4th May 2018, she obtained a loan of Kshs 800,000/= from the Creditor herein and invested in purchasing capital equipment for offering catering services through her business Kavirondo Catering Services.
3. She stated that she breached the contract because her clients paid her in instalments and that the loan had attracted high interest and penalties which led to the Creditor filing a suit against her being Kisumu CMCC No 607 of 2018 wherein she subsequently paid Kshs 140,000/=. She pointed out although her advocates were served, they did not attend court which led to entry of judgment on an undefended suit. She stated that a decree was issued in the said suit and warrants of arrest were issued against her for the sum of Kshs 3,075,000/=.
4. She averred that she was not served with Notice to Show Cause but was arrested in July 2020 and that upon explaining her predicament to court, she was released to appear again in two (2) days' time to look for money to effect payment. She stated that a friend and her pastor raised Kshs 50,000/= which she paid the Creditor in July 2020. She said that she also paid the court bailiffs Kshs 22,000/=.



5. She added that in September 2020, she paid a further aggregate sum of Kshs 100,000/= which she got from friends and a shylock after pledging a deep freezer which she had acquired for her business.
6. She contended that she had recently obtained a contract from Kenya Youth Empowerment Opportunities Program (KYEOP) to train the youth where she expected to earn Kshs 21,000/= per month.
7. She admitted that the Creditor ought to recover the debt he advanced to her but that her current financial challenges had made it impossible for her to pay back what she owed. She said that she had tried to discuss a possible rebate on the debt but he did not pick her calls.
8. She asserted that she did not have the ability to pay the debt she owed with her current cash flow and that she could not access any formal credit facilities in her current financial status. It was her averment that she was constrained to apply for bankruptcy as a last resort so as not to depend on friends to pay off her liabilities as they also had their own financial challenges.
9. On 4th June 2021, the Creditor swore a Replying Affidavit in opposition to the Petitioner's Petition. The same was filed on 7th June 2021. He averred that the Petitioner could not pay her debts and particularly the Judgment herein and that she had all along not been ready and willing to repay the money that he advanced to her and that it took the intervention of court for her to start making payments by instalments. He pointed out the warrants of arrest were issued after she failed to honour the consent that was recorded in court on 13th March 2020 and 3rd July 2020.
10. He stated that the Petition herein was based on false and misleading information and that the same was filed with the object of rendering a nullity the judgment in Kisumu CMCC No 607 of 2018 by avoiding to make payments. He asserted that she was not being candid as she was a person of means which was demonstrated by her ability to make some payments after being taken to court. He added that she had been engaging two (2) advocates in one matter and was paying them and that as late as November 2019, her advocate M/S Ogola Okelo & Company Advocates had confirmed that she would pay Kshs 200,000/= with the balance being paid in three (3) instalments.
11. He also pointed that she was still in the catering business making money and had concealed her properties from creditors as many of her properties were registered in other people's names including the motor vehicle that she drove. He asserted that she had therefore committed a bankruptcy offence and should not be given the orders sought.
12. He asserted that granting her the orders she sought herein would greatly prejudice him since he would continue to languish in poverty as he could not recover what rightfully belonged to him while she would enjoy the protection of the court. He said that the loan he advanced her was from the proceeds of his parcel of land he sold in Kisumu to put up a house. He said that it was in the best interest of justice that people honour their contractual obligations and not to wait until they are forced by the court.
13. On 21st July 2021, the Petitioner swore a Supplementary Affidavit in response to the Creditor's Replying Affidavit. The same was filed on 22nd July 2021. She reiterated that she did not have the ability to offset liabilities and that she only preferred her present advocates when she realised that her former advocates had failed to defend her interests in Kisumu CMCC No 607 of 2008.
14. She denied that she had hidden any properties from creditors and asserted that her estranged husband was the one who paid for her children's school. She also asserted that her daughter got a scholarship at Daystar University. It was her assertion that if she indeed had the means, then her daughter would not have relied on scholarship.



15. On 25th January 2022, the Creditor swore a Further Affidavit in support of his Replying Affidavit sworn on 4th June 2021. The same was filed on 26th January 2022. He reiterated the averments in his Replying Affidavit and set out events where the Petitioner offered catering services. He explained that in a funeral that was held from 27th to 29th October 2021 at Migori, the Petitioner offered catering services at a total budget of Kshs 478,500/= and under the business name Gepecima Event Management & Catering Services which that she was the owner of the said business entity that was registered on 19th July 2019 and that she was paid a sum of Kshs 100,000/= by Mpesa through her mobile number 0723165687, which he confirmed indeed belonged to her.
16. On 21st May 2022, the Petitioner swore a Supplementary Affidavit. The same was filed on 24th May 2022. She admitted that she registered the business known Gepecima Event Management & Catering Services on 19th July 2019 which was way in advance of the institution of the Petition for bankruptcy. She explained that the transaction at a funeral in Migori was only a subcontract out of which she made Kshs 40,000/= as she was only working at a commission basis.
17. The Petitioner's Written Submissions were dated 14th February 2023 and filed on 20th February 2023 while those of the Creditor were dated 7th February 2023 and filed on 9th February 2023. The Judgment herein is based on the evidence on record and the said Written Submissions.

Legal Analysis

18. The Petitioner pointed out that the standard of proof in the Petition before court was on a balance of probabilities proceedings before court being of civil nature.
19. She invoked Section 3(1) of the *Insolvency Act* No 18 of 2015 and submitted that her Petition was presented under Section 32 of the said *Insolvency Act*. She stated that she had complied with the provisions of Sections 32 and 32(5) of the *Insolvency Act*.
20. She cited Section 25 of the *Insolvency Act* and submitted that the court had the power to adjudge or not to adjudge and/or declare a debtor bankrupt. She stated that the purpose of insolvency proceedings was to provide a "fresh start" to enable a debtor to operate within an environment where he or she could be granted an opportunity to reorganise their finances.
21. In that regard, she relied on the case of *Re Jitesh Dhirajal Malde (A debtor)* [2021] eKLR where it was held that the twin goals of consumer or individual bankruptcy law was to protect creditors and ensure them optimal payment where possible and a fresh start to individual debtors who were overburdened by debt.
22. She contended that the threshold prescribed under Section 25 of the *Insolvency Act* was discharged because she was unable to pay her debt which stood at Kshs 3,075,000/= per warrant of arrest issued on 21st January 2020 which amount continued to increase. She said that her assets were mainly household items that were valued at Kshs 275,000/= according to the Statement of Affairs. She emphasised that she was supported by her mother and relied on goodwill of her friends and landlord. She asserted her intermittent income out of commissions could not be deemed as sufficient enough to enable her pay her debt.
23. In this regard, she relied on the case of *Re James Mwangi Nderitu t/a Jajo Enterprises (A Debtor)* [2020] eKLR where the court found that although the debtor was earning some money for his upkeep, the debtor therein was unable to pay his debts.
24. She urged this court to adjudge her bankrupt, appoint an official receiver to be the Bankruptcy Trustee in respect of her property and the costs of her Petition be borne out of her estate.



25. On his part, the Creditor submitted that the Petitioner had not followed the procedure set out in the law to be granted the orders sought. He argued that she did not comply with the mandatory provisions of Section 32 of the *Insolvency Act* which required that the petition be published in a newspaper circulating within the region where the debtor resided as well as the gazette of the Petition herein.
26. He submitted that the requirement for publication was to allow other creditors who resided within the area where the debtor resided to be aware of what was happening and file necessary application either in support of the Petition or oppose the same.
27. In that regard, he placed reliance on the cases of *Re Kinangop Reliance Limited, Charles Mutahi Mwangi, Grace Wangui Mutahi and Alice Wangui* [2021] eKLR and *Kenneth Kinyua Ephantus vs Insolvency Act* [2018] eKLR where the common thread was that the failure to publish a notice of the application for bankruptcy in a newspaper was a fatal error and that courts pursuant to Section 32(5) of the *Insolvency Act* had power to decline to hear such petitions.
28. He asserted that the Petitioner failed to explain why there had been no publication and gazette of the statement as required by the law and that no such attempt was made even after filing of the Petition.
29. He further contended that the Petition herein was also defective for failure to comply with requirements of Regulations 18(1)(c) of the Insolvency Regulations whereby the law requires that the application for bankruptcy by the debtor had to be accompanied by an application for appointment of a trustee.
30. It was his argument that the trustee or official receiver who would have been appointed by the court would make a complete financial report about the affairs of the debtor that would have aided the court in making a determination as to whether to grant the orders of bankruptcy.
31. He pointed out that the Petitioner had also failed to comply with Section 33(1) of the *Insolvency Act* which required that she make arrangements with the creditors on how to settle the debt. He asserted that there had been no official receiver appointed herein and no hearing or meeting had ever taken place on the arrangement for payments of the debts and that she was simply running away from her financial obligations.
32. The Creditor further submitted that she was not entitled to the orders she had sought since she was dishonest and had failed to disclose all her financial information. He was categorical that in her Statement of Affairs that was signed on 2nd December 2020, she was required to disclose all the businesses she had been doing within the past five (5) years but this was never done and that she even failed to disclose that she was also carrying out catering services through another business entity known as Gepecima Event Management & Catering Services.
33. He asserted that although she was still running businesses and earning money, she had not been able to make any payments towards settlement of the debt and that she also failed to file her bank or Mpesa statements to show that indeed she was not making money that would enable her pay her debts.
34. He argued that courts had held that good faith and full disclosure of all information was key to granting of bankruptcy orders. In this regard, he relied on the cases of *Re John Kamau Njau (Debtor)* [2019] eKLR, *In the matter of Ali Jillo Fallan* [2021] KEHC 8 (KLR) and *Re Abdallah Chitechi Munyendo* [2022] eKLR where the common thread was that even though it was imperative that a debtor be shielded through a bankruptcy order, the petition had to have been made in good faith and with full disclosure.



35. He further asserted that even though she informed the court that she was in rent arrears of about Kshs 165,000/= and that she had school fees arrears and had secured a scholarship for her children, this information was not included on her Statement of Affairs. He submitted that the main reason why she was seeking the orders was adverse legal action and excessive interest payments. He added that she had also not cited loss of income or lack of business as one of the reasons for insolvency in her statement of affairs.
36. It was his case that the bankruptcy law also protects creditors by ensuring that arrangements were made on how the debts would be settled. He was emphatic that she was not seeking a fresh start but an opportunity to run away from her obligations when she was capable of settling the debts even by instalments from her regular sources of income. He asserted that he was a retiree and needed the money to cater for his needs which included medical expenses and was ready to accept even payment by instalments provided he got his money back.
37. He therefore termed the Petition herein as having been fatally incompetent, premature and without merit and urged this court to dismiss the same with costs.
38. The Petitioner testified that the state of her affairs had not changed since 4th December 2020 and that there was an adverse legal action against her. She informed the court that she had not recovered from her seasonal conditions and that the work she did was seasonal and was paid by commission. She explained that she used to do events organisation and she would get jobs even twice a month but that that changed because of Covid-19. She testified further that she moved to stay with her mother when things got bad and that at the time his son was in class eight (8) and she had to sell her business equipment (chaffing dishes, tents and others) so as to pay school fees for her children. She added that she made some payments to the creditor by selling some of her equipment.
39. It was her case that she had four (4) dome tents that she would hire at Kshs 10,000/= each and then re-hire to others. She stated that the sum of Kshs 478,500/= was a total budget but she did not get the entire sum as she would normally outsource other equipment. She admitted having registered the business entity Gepecima Events Management & Catering Services in 2019 but that she had never done business capable of enabling her pay her debts as she was getting commissions of Kshs 20,000/= to Kshs 30,000/=. She further testified that she lived in a rental house of Kshs 12,500/= monthly and had arrears of Kshs 165,000/=.
40. She stated that she separated from her husband about eleven (11) months before and that he was not taking care of their four (4) children as he always said he had no money. She urged the court to declare her insolvent.
41. On being cross-examined, she stated that she only ticked adverse legal action and excessive interest payments as cause of her insolvency and that she did not disclose that she was trading as Gepecima. She pointed out that she only used to receive commissions from the businesses through Mpesa and her bank but she did not file any statements to that effect.
42. She admitted having not filed any document to show her landlord was demanding rent arrears and no document was filed to show that her mother and her friends were assisting her pay school fees for her children. She added that she had nothing to show that the daughter was studying on scholarship at Daystar University.
43. On his part, the Creditor told this court it was the first time he had the Petitioner money and that he obtained Judgment in the sum of Kshs 800,000/=. He averred that by 2020, the figure was Kshs 3,075,000/= and interest was still accruing. On being re-examined, he stated that he was not aware of any appeal that had been filed against the Judgment of the lower court.



44. 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. Commercial insolvency burdens the debtor to show that his assets exceed his liabilities. However, bankruptcy is regarded as an option of last resort because it has serious consequences.
45. Even though it is imperative that a debtor is shielded through a bankruptcy order, the petition must be made in good faith and there must be full disclosure of all material facts. There must be clear proof of actual insolvency. The petitioner's case must firmly be asserted in the founding affidavit.
46. To establish insolvency, it must be shown that the Petitioner's prima facie case. The court must do its best to decide the probabilities by taking into account the full conspectus of allegations and decide as they appear on the affidavits, read as a whole, which are placed before it. The affidavit must at least demonstrate a prima facie.

liabilities as a fact exceeded her assets and not merely that they might do so, and clear proof of this must be adduced. An applicant must make a
47. In civil cases, the measure of proof is a preponderance of probabilities. The standard of proof in insolvency cases is the same as that which is to be found in civil cases, which is, proof on a balance of probabilities. A party that carries the burden of proof must produce evidence to meet a threshold or "standard" in order to prove their claim.
48. Where there are two (2) versions, the court had to be satisfied that the story of the litigant upon whom the onus rested was true and the other was false. The question to be decided would always be which of the versions of the particular witnesses was more probable considering all the evidence as well as all the surrounding circumstances of the case.
49. The burden placed upon the Petitioner was to establish a prima facie case. The central issue to be decided herein was therefore whether or not she had been proven that she was unable to pay her debts.
50. Her case was premised on her assertion that she was facing adverse legal action and excessive interest payments as cause of her insolvency. It was the considered view of this court that she ought to have adduced documentary evidence to support her assertions that she was completely unable to pay her debts. Tendering Mpesa and bank statements as evidence, could for instance, have greatly assisted this court in establishing whether or not she had demonstrated that she was completely insolvent and was relying on her mother and friends to meet her needs and those of her children and that she was truly indebted to her landlord.
51. It did not help matters that she was represented by counsel in the proceedings herein. There was no indication that her advocate was offering her pro bono services. In the absence of any proof to the contrary, the only conclusion that this court could make was that she would be required to pay legal fees as advocates have to charge fees to earn a living and that she was capable of paying the same.
52. She also appeared to be offering catering services through another entity known as Gepecima Event Management & Catering Services which she had omitted in her Statement of Affairs. This was tantamount to non-disclosure of material facts. She did not persuade this court that such non-disclosure was not a ploy to conceal her assets. It was irrelevant and immaterial that she was getting commissions from such catering services and that which commissions were very small. She was required to make full disclosure as she was seeking an equitable relief.
53. Upon analysing the material before it and the unanswered questions which presented glaring gaps in her case, the Petitioner appears to have fallen in hard times financially. However, she failed to put



forward oral and/or documentary evidence to satisfy this court to exercise its discretion in her favour and adjudge her bankrupt so that she could have a fresh start as she was still earning income from her businesses.

54. It was therefore the finding of this court that she failed to discharge the burden of proof on a balance of probabilities as required.
55. Having said so, even if she had established a prima facie case, the court had the discretion whether or not to grant the order. In this regard, it considered the provisions of the law to establish whether or not she had complied with the mandatory provisions of the law.
56. Section 32 of the *Insolvency Act* provides as follows: -

“When debtor may make application for bankruptcy order

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 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 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.”
57. Insolvency proceedings are class actions by their very nature. This is the reason why the proceedings are advertised in newspapers and the Kenya Gazette. The advertisement affords other creditors an opportunity to participate in the proceedings by either supporting or opposing the petition.
58. The Insolvency Regulations, 2016 further provides the documents to accompany the petition and the details to be included in the statement of the debtor's financial position. A reading of Regulation 18 of the *Insolvency Act* vis-a vis the information that the Petitioner filed shows that she did not exercise diligence in providing all the details required under the said Regulations.
59. Additionally, Regulation 18 (4) of the Insolvency Regulations requires the debtor to sign and date the statement of the debtor's financial position and arrange for the publication of the statement in the Kenya Gazette.



60. The Petitioner was required to comply with the Insolvency Regulations by gazetting the Petition herein. A perusal of the Petition herein showed that the Petitioner did not annex any newspaper advertisement. The court could not shut its eyes to such a grave failure to comply with the law. The omission to advertise the Insolvency Cause went to the root of the competence of the Petition herein. It was not a procedural technicality that could be excused under the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities because it shut out other creditors who may have wished to participate in the Insolvency proceedings herein. The Petition could not be saved but was instead incompetent for want of conformity.
61. In the circumstances foregoing, this court was not persuaded by the Petitioner that she had met the threshold to being granted the orders sought, whether substantively or procedurally.

Disposition

62. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition dated 3rd December 2020 and filed on 4th December 2020 was not merited and the same be and is hereby dismissed. The Petitioner will bear the costs of this Petition.
63. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF JUNE 2023

J. KAMAU

JUDGE

