



**Mereka & Company Advocates v Kitololo t/a Kitololo Consultants
Services (Insolvency Petition E023 of 2022) [2023] KEHC 24765 (KLR)
(Commercial and Tax) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E023 OF 2022
MN MWANGI, J
SEPTEMBER 29, 2023**

BETWEEN

MEREKA & COMPANY ADVOCATES PETITIONER

AND

ENG. KITOLOLO T/A KITOLOLO CONSULTANTS SERVICES RESPONDENT

JUDGMENT

1. On 20th July, 2022 the petitioner/creditor herein, M/S Mereka & Company Advocates (hereinafter referred to as “the creditor”) filed this Insolvency Petition against the debtor Eng. Kitololo t/a Kitololo Consultants Services (hereinafter referred to as “the debtor”) seeking the following orders -
 - i. That the Court be pleased to grant a bankruptcy order to allow the petitioner recover the debt owed;
 - ii. That the Honourable Court be pleased to appoint some fit and proper person as Trustee of the property of the said debtor;
 - iii. That the costs of this petition together with the sum of Kshs.15,536,310.00 plus interest at the rate of 14% p.a. be provided to the petitioner and be paid out of the assets of the debtor in priority; and
 - iv. That this Honourable Court be pleased to make such further or other orders as may be deemed just and expedient in the circumstances.
2. The grounds upon which the petition is anchored on are set out on the face of the petition and on the creditor’s supporting and supplementary affidavits sworn on 15th July 2022 and 3rd April, 2023, respectively, by David Mukii Mereka, learned Counsel for the creditor. In opposition to the petition,



- the debtor filed a replying affidavit sworn on 23rd March, 2023 by Eng. Austin Salmon Kitololo, the debtor herein.
3. The instant petition was canvassed by way of written submissions. The creditor's submissions were filed on 31st May, 2023 by the law firm of Mereka & Company Advocates, whereas the debtor's submissions were filed by the law firm of Muthee Kihiko & Associates Advocates LLP on 30th June, 2023.
 4. Mr. Mereka, learned Counsel for the creditor submitted that the creditor in his capacity as an Advocate was instructed by the debtor to represent him in HCCC No. 40 of 2006. That on conclusion of the matter, the creditor filed a bill of costs dated 19th April, 2011 in Mombasa Misc. Application No. 329 of 2011, which bill was taxed at Kshs.9,199,868.00 on 7th October, 2011. Counsel submitted that since the year 2011, the creditor has attempted to enjoy the fruits of his judgment through various execution proceedings such as garnishee proceedings, warrants of attachment and warrants of arrest, but none of those have been successful.
 5. It was stated by Counsel that in the year 2017, the creditor successfully managed to execute warrants of arrest against the debtor issued by the Court on 5th July, 2017, wherein the debtor was arrested, and thereafter, the parties herein entered into an agreement dated 12th June, 2017 for payment of the decretal sum to secure his release. The creditor stated that there are no existing execution proceedings pending between the parties herein in respect of the debt in issue.
 6. Mr. Mereka stated that the creditor issued the debtor with a statutory demand dated 19th November, 2021 but the debtor has not complied with the said demand to date, thus necessitating the petition herein.
 7. Counsel cited the provisions of Sections 15 and 17(1) of the *Insolvency Act*, 2015 and submitted that the petitioner is a valid creditor of the respondent by virtue of holding a valid decree against him that has not been satisfied and/or set aside thus the instant petition is not an abuse of the Court process. He submitted that this petition has fulfilled all the pre-requisites for the filing of a creditor's petition as provided for under Section 17(2) of the *Insolvency Act*, 2015. Counsel stated that the debt currently stands at Kshs.15,536,310.00 inclusive of interest, thus exceeding the prescribed bankruptcy level.
 8. Counsel referred to the case of Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies v Twiga Properties Ltd (Insolvency Cause No. E006 of 2021) [2022] KEHC 12 (KLR) and stated that the debtor has failed to demonstrate that the petition herein is frivolous and an abuse of the Court process as alleged. He submitted that the debtor's replying affidavit is a repetition of what he had stated earlier, and that the said debtor has not made any settlement proposals to settle the debt due. Counsel submitted that in as much as the debtor disputes the debt herein, he has not tendered any evidence to controvert the same.
 9. Mr. Mereka stated that the debt due to the creditor is not a disputed debt since it is as a result of lawful orders issued by the Court. He cited Section 20(3) of the *Insolvency Act*, 2015 and submitted that the debtor has not fulfilled the requirements for dismissing a creditor's application as stipulated in the said provisions. He contended that in the event the petition herein is disallowed, it will negate the provisions of Article 159(2)(b) of *the Constitution* of Kenya, 2010 which articulates for the need of justice not to be delayed.
 10. Ms. Okello, learned Counsel for the debtor submitted that the debt herein is not supported by any evidence thus the instant petition is an abuse of the Court process. She also submitted that the debt in issue is disputed mainly on grounds that the creditor failed to factor in Kshs.8,000,000/= received from the purchaser's Advocate in relation to the sale of the suit property which formed the subject



matter in HCCC No. 40 of 2006, and the creditor has failed to provide a breakdown of the sum of Kshs.15,536,310.00. She stated that given the said facts the petitioner cannot be a bona fide creditor. Counsel relied on the decisions made In re Turbo Highway Eldoret Limited [2016] eKLR and Flower City Limited v Poly tanks & Containers Kenya Limited (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR), where the Court held that once a debtor showed that even one issue had a sufficient degree of cogency to be arguable, a finding of a genuine dispute had to follow.

11. Counsel contended that the creditor has pending proceedings for recovery of the alleged debt that he is yet to fully exhaust. She further contended that adjudging the debtor bankrupt is a draconian measure which should be employed as a last resort when every other mode of execution of a decree fails. In submitting that the Civil Procedure Rules, 2010 provide for several means of execution of a judgment sum, she expressed the view that the creditor has failed to take the steps provided for therein to enforce payment, since any steps taken by him were abandoned prematurely. Ms. Okello relied to the case of Mohammed Yusufali & another v Bharat Bhardwaj & another [2007] eKLR, where the Court cited the decision In the matter of Leisure Lodge Limited ML WC No. 29 of 2006 (UR).
12. It was stated by Counsel that the debtor is one of the oldest consultant engineers in Kenya thus he is able to pay his debts. She further stated that the debtor cannot be compelled by the creditor to pay unreconciled and disputed debts. Ms. Okello referred to the case of Mereka & Co. Advocates v Eng. A. S. Kitololo T/A Kitololo Consultants Engineers [2014] eKLR and submitted that in that case, the creditor outlined various projects that the debtor has undertaken including University Towers and substantial construction projects in the DRC Congo. She stated that the debtor has several assets worth well over Kshs.1 Billion and as such, the instant petition does not fulfill the pre-requisites set out under Section 17(2) of the Insolvency Act, 2015 since the debtor is not only able to pay the debt herein, but he also has reasonable prospects for being able to pay, save after for the disputed amounts being reconciled and agreed upon. Counsel referred this Court to the provisions of Section 25 of the Insolvency Act, 2015, which outline instances when the Court may refuse to adjudge a debtor bankrupt.

Analysis And Determination.

13. I have considered the instant petition and the affidavits filed in support thereof, the replying affidavit filed by the debtor and the written submissions by Counsel for the parties. The issue that arises for determination is whether a bankruptcy order ought to issue against the debtor and his estate.
14. The creditor in his supporting affidavit deposed that the debtor has continued to frustrate his efforts to execute his decree hence he filed the petition herein in a bid to enjoy the fruits of his judgment entered on 7th October, 2011. He averred that despite acknowledging the debt and entering into an agreement dated 12th July, 2017 which provided for a payment plan to settle the debt herein, the debtor has refused to settle the said debt.
15. It was stated by the creditor that when the debtor failed to comply with the agreement dated 12th July, 2017, he caused a fresh Notice to Show Cause dated 7th May, 2019 to issue against the debtor but the said Notice to Show Cause has been mentioned and adjourned severally due to the dishonest nature of the debtor. The creditor further stated that despite several reminders, the debtor has refused to settle the debt in issue and he has remained evasive and taken for granted the creditor's indulgence and good faith hence necessitating the filing of the petition herein.
16. He averred that on 15th December, 2021, he served the debtor with a statutory demand for the said Kshs.15,536,310.00 inclusive of interest. That thereafter, the debtor filed an application to set aside the said statutory demand but his application was dismissed vide a ruling dated 10th June, 2022. The



creditor deposed that the debtor has never complied with the said demand and in any event, he has and continues to incur liability, he is insolvent and is unable to pay his debts as and when they fall due.

17. The debtor in his replying affidavit deposed that the creditor filed a bill of costs in Mombasa Misc. App No. 329 of 2011, where costs were taxed at Kshs.9,199,868.00 in favour of the creditor. That the said bill of costs related to Mombasa HCCC No. 40 of 2006 where the creditor represented him in his capacity as an Advocate.
18. He averred that the creditor also represented him in a land transaction relating to the same land, that forms the subject of Mombasa HCCC No. 40 of 2006, where he received Kshs.8,000,000/= on his behalf. The debtor averred that he requested the creditor to offset the said Kshs.8,000,000/= that he was holding from the said amount but the creditor insisted on being paid the taxed amount together with illegal interests and has made it clear that he does not intend to release the monies he is holding on his behalf.
19. It was stated by the debtor that the said sum of Kshs.8,000,000/= was never factored in, when the bill of costs was being taxed thus the creditor is illegally withholding money belonging to the debtor. He further stated that the amount of Kshs.15,536,310.00 has no basis whatsoever since it is compounded on unfounded grounds of interest accrued at the rate of 9%.
20. He contended that he was dragged to a Police Station where he was coerced and forced to sign an agreement with the creditor against his free will. The debtor deposed that the creditor had filed a Notice to Show Cause dated 7th May, 2019 in Nairobi HCCOMM No. 84 of 2018 seeking to recover the debt in issue, which matter is still pending in Court.
21. The debtor stated that he is and has always been willing to have a sit-down with the creditor and discuss the issue of fees with a view of amicably settling the said issue, but the creditor has insisted on bullying his way through. He further stated that the creditor's actions are geared towards unjustly enriching himself at his expense.
22. The creditor in his supplementary affidavit deposed that the debtor's replying affidavit does not offer a proposal for the payment of the decretal amount. He averred that this Court in a ruling dated 10th June, 2022 found that the debtor was not bona fide in his alleged counter-claim.

Whether a bankruptcy order ought to issue against the debtor and his estate.

23. It is not disputed that the creditor has a valid decree of Kshs.9,199,868.00 against the debtor as a result of taxation of the debtor's bill of costs in Mombasa Misc. Application No. 329 of 2011. The said judgment has not been varied and/or set aside and there is no order staying execution of the said judgment by the creditor. It is also not disputed that the debtor has not fulfilled or in the very least attempted to fulfill the said decree by paying the creditor the entire or part of the sum of Kshs.9,199,868.00. It was submitted by the creditor that since the year 2011, he has attempted to enjoy the fruits of his judgment through various execution proceedings such as garnishee proceedings, warrants of attachment and warrants of arrest but none was successful thus necessitating the filing of the instant petition.
24. The record reveals that the creditor issued the debtor with a statutory demand dated 19th November, 2021 on 15th December, 2021 demanding Kshs.15,536,310.00 which comprises the decretal sum plus interest, pursuant to a judgment delivered on 7th October, 2011 in Mombasa Misc. Application No. 329 of 2011. After the issuance of the statutory demand, the debtor filed an application dated 3rd January, 2022 seeking to set aside the said statutory demand for reasons that the said debt is disputed on grounds that the statutory demand is defective for want of form, there are still active execution



proceedings of the debt in issue that are still pending and the creditor is indebted to him to the tune of Kshs.15,000,000/= arising out of the sale of LR. No. 780/II MN, Mombasa. Vide a ruling dated 10th June, 2022 the debtor's application dated 3rd January, 2022 was dismissed and the Court directed that the creditor was at liberty to present a bankruptcy application immediately.

25. The debtor in his replying affidavit in opposition to the instant petition avers that the debt herein is disputed on grounds that the creditor failed to factor in Kshs.8,000,000/= received from the purchaser's Advocate in relation to the sale of the suit property which formed the subject matter in HCCC No. 40 of 2006 and that the creditor has failed to provide a breakdown of the sum of Kshs.15,536,310.00, thus the petitioner cannot be a bona fide creditor. On perusal of the ruling delivered on 10th June, 2022, it is evident that the Court already dealt with some if not all of the issues raised by the debtor in opposition to the instant petition. For instance, on the issue of whether the debt herein is disputed on account of illegally compounded interest, the Court at paragraph 8 of its ruling held as follows –

“On the substance, it is common ground that the debtor is in fact indebted to the creditor for KES. 15,536,310.00 arising from a judgment of the Court that has not been set aside. This dispose of any argument that the debt is disputed. What I understand the Debtor to be arguing is that there are parallel execution proceedings pending in the same matter. I have looked at the depositions on record and I do not see any such proceedings at the instance of the Creditor. It appears that he gave up on execution when the debtor undertook to settle the sum. What is pending or has indeed been determined is the debtor's application to have a new Advocate represent him in the matter. More importantly though is the principle that a party has the right to elect any mode of recovery of a debt hence it is not illegal or irregular for a creditor to issue a statutory demand where, as in this case the debt is not disputed on any ground.”

26. In light of the above decision, and the fact that the ruling delivered on 10th June, 2022 was issued by a Court of competent and concurrent jurisdiction as this Court, I find that the debt herein is not disputed on that ground.

27. On the issue of whether the creditor is indebted to the debtor to the tune of Kshs.8,000,000/= received from the purchaser's Advocate in relation to the sale of the suit property which formed the subject matter in HCCC No. 40 of 2006, the Court at paragraph 10 of its ruling dated 10th June, 2022 stated as follows –

“From the totality of the evidence, I doubt that the Debtor has a bona fide counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand. The claim of the deposit is the subject of separate proceedings by the same Advocates hence it cannot be said to be a claim. I also agree with the Creditor that the judgment debt has been due since at least 2011 and that if there was counterclaim, the Debtor would have lodged sooner rather than wait to defend a statutory demand ten years later. While the Debtor has every right to lodge a complaint before the Advocates Complaints Commission, the fact that it was lodged in 2022 after the application herein was filed only goes to undermine his claim.”

28. This Court finds that the allegation that the creditor is indebted to the debtor to the tune of Kshs.8,000,000/= which ought to be set-off from the total debt due and owing to the creditor from the debtor is not a bona fide counterclaim, set-off or cross-demand to warrant this Court to conclude that the debt herein is disputed.



29. In the premise, this Court finds that the debt herein is not disputed and the debtor is indebted to the creditor to the tune of Kshs.15,536,310.00 by virtue of a judgment on taxation dated 7th October, 2011. In the case of Benson Mulevu Mulwa & 59 others v Invesco Assurance Co. Limited & another [2020] eKLR, the Court in defining who a creditor is held as hereunder –

“Section 2 of the Act defines the term “Creditor” to include a person entitled to enforce a final judgment or final order.”

30. For the reason, this Court finds that the creditor herein is a proper creditor pursuant to the provisions of Section 15(1) of the [Insolvency Act](#), 2015 qualified to file the instant petition. This Court’s finding is that the petition herein is properly before this Court by virtue of Section 17(2) of the [Insolvency Act](#), 2015, which states as hereunder –

“Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made-

- a. the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;
- b. the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the applicant creditors, either immediately or at some certain, future time, and is unsecured;
- c. the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and
- d. there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts.”

31. The debtor submitted that he has various projects that he has undertaken including University Towers and substantial construction projects in the DRC Congo. In addition, he claims to have several assets worth over Kshs.1 Billion hence he is not only able to pay the debt herein but he also has reasonable prospects for being able to pay save for the disputed amounts being reconciled and agreed upon. My finding is that this argument by the debtor has no weight to be attached to it, since he has not tendered any evidence before this Court in support of the said assertion.

32. The debt in issue has been due and owing to the creditor from the debtor since 7th October, 2011 when the judgment on taxation was delivered. The debtor was served with a statutory demand on 15th December, 2021, but to date he has not made good the said demand. The debtor has not at the very least demonstrated that he paid and/or attempted to pay the undisputed amount and or submitted a payment plan proposal for consideration by the creditor and the Court, so as to show this Court his willingness and/or ability to pay the debt in issue. In the case of Pride inn Hotels and Investments Limited v Tropicana Hotels Limited MSA CA Civil Appeal No. 98 of 2017 [2018] eKLR, Visram JA., reading the majority judgment of the Court stated thus –

“This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the [Insolvency Act](#) or the [Companies Act](#), which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options



under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.”

33. In the circumstances of the petition before me, it is my finding that the creditor has satisfied the pre-requisites set out under Section 17(2) of the *Insolvency Act*, 2015 which have here before been reproduced in this ruling. Further, on the basis of affidavit evidence, I find that there is sufficient evidence that the debtor is unable to pay his debts. I do not find any compelling reason to deny a bankruptcy order against the debtor.
34. The upshot is that the petition dated 15th July, 2022 is allowed in the following terms -
- i. Engineer Austin Salmon Kitololo t/a Kitololo Consultants Services is hereby adjudged bankrupt and a bankruptcy order is made against his estate;
 - ii. The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed to be the Bankruptcy Trustee in respect of the debtor’s property; and
 - iii. Costs of the petition shall be borne out of the debtor’s estate.

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 29th day of September, 2023. Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Njoroge h/b for Mr. Mereka for the petitioner/creditor

Ms Okello for the respondent/debtor

Ms B. Wokabi – Court Assistant.

3 NJOKI MWANGI, J

