



**Bhatt v The Official Receiver (Insolvency Cause E003 of 2020)
[2023] KEHC 26099 (KLR) (Commercial and Tax) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

INSOLVENCY CAUSE E003 OF 2020

FG MUGAMBI, J

NOVEMBER 24, 2023

THE MATTER OF KAUSHIK SHASHIKANT BHATT

BETWEEN

DARSHNA KAUSHIK BHATT APPLICANT

AND

THE OFFICIAL RECEIVER RESPONDENT

RULING

Background

1. Before the court is an application dated 24th October 2022 brought under section 258, 262 and 267 (2) (e) of the *Insolvency Act*, Act Number 18 of 2015, regulation 10 (4) of the *Insolvency Regulations*, 2016 and section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. The application was supported by the affidavit and further affidavit sworn by Octavia Mambori, an Advocate of the High Court of Kenya, having conduct of this matter on behalf of the applicant. The applicant filed written submissions dated 3rd May 2023.
2. The application seeks to have the estate of Kaushik Shashikant Bhatt (the deceased), who was adjudged bankrupt by a decree of the Court issued on 6th July, 2021 be discharged from bankruptcy. Secondly, the applicant prays for orders that the estate of the late Kaushik Shashikant Bhatt pays to the applicant, the sum of Kenya Shillings Seven Million and Fifty-Seven Thousand (KShs.7,057,000/=) being the sum owed to the applicant by the deceased.
3. The bankruptcy proceedings herein are between husband (now deceased) and wife and the bankruptcy order was as a consequence of decrees issued in a series of matrimonial disputes. The Official Receiver was appointed as the trustee in bankruptcy for the estate. Upon the appointment the Official Receiver proceeded to request the debtor to file a statement of affairs.



4. Regrettably, at the time of the deceased debtor's death, the said statement had not been furnished. According to the applicant, the process stalled and not much had been done by the respondent to secure the deceased debtor's estate. The applicant seeks to have the deceased discharged.
5. The applicant proposes that the Bankruptcy Order had been overtaken by events. First because upon the demise of the debtor the Law of Succession Act, set in and the law provides that the deceased debtor's estate after payment of his just debts is to go to his two children in equal shares, absolutely.
6. Secondly, the applicant argues that she is legally entitled to half of the share of the deceased debtor's known immovable property and is also the sole known creditor of the deceased debtor. Finally, she argued that no action was being taken by the respondent to ensure that the deceased debtor's estate is collected and preserved.
7. The applicant by way of further affidavit averred that the said Parklands Court Limited was not a Landlord but a management company for the property known as Land Reference Number 209/80/4 (Parklands Court). The applicant submitted that the said property was registered in the deceased's bankrupt's name and that the applicant had a vested and beneficial interest as decreed by the Court in High Court Civil Suit Number 10 of 2016 (OS).
8. In a bid to demonstrate the inaction by the respondent, the applicant argues that the information requested for by the respondent to enable the respondent to initiate contact and ascertain the estate and take the necessary action was provided by way of a letter dated 16th December, 2021. The information was not acted upon. The applicant attached communication between the parties.
9. The application is opposed by the Official Receiver through a Replying Affidavit sworn by Korir Raymond, an Advocate of the High Court and an Assistant Official Receiver in the Office of the Official Receiver. Although the respondent confirms that no statement of affairs had been filed by the deceased prior to his demise, it is also confirmed that the known creditors of the estate are the applicant and Parklands Court Limited.
10. The respondent submitted that in the absence of the statement of affairs, it was unable to ascertain the status of the deceased bankrupt's estate including its total assets or liabilities. In the circumstances the respondent was of the view that the bankruptcy should proceed under Part V of the Insolvency Act. The respondent in addition to the Replying Affidavit filed written submissions dated 2nd June 2023.

Analysis

11. I have carefully considered the pleadings, submissions and evidence presented by the rival parties. In my view, three (3) issues arise for determination as suggested by the respondent. That is:
 - i. Whether the applicant has the capacity to bring the present application before this Honourable Court;
 - ii. Whether the respondent has failed in the duties of a Bankruptcy Trustee;
 - iii. Whether the orders sought in the present application can be granted.

Whether the Applicant has capacity to bring the present application before this Honourable Court

12. The respondent argued that under sections 258, 262 and 267 (2)(e) of the Insolvency Act, which the application had been brought, it is the bankrupt and not any other person who may apply for the orders sought. The respondent further noted that under the said section, for the application for discharge of a bankrupt to be successful, the court must hear the application in the manner prescribed under Section



180 of the Act; which section requires the public examination of the bankrupt. For these reasons the respondent argued that the application was defective.

13. Section 258 of the Insolvency Act provides that:

“A bankrupt may at any time apply to the Court for an order of discharge from bankruptcy.” (emphasis mine).

14. What is meant to be achieved by this section is a new opportunity in life and a fresh start to honest but unfortunate debtors saddled by the pressure of debt. Consequently, bankruptcy protection being an extraordinary relief whose objective is also to protect creditors and ensure optimal payment to them where possible, a public examination must be held before the debtor’s discharge. Section 258 of the Act is therefore very clear that the power to apply for discharge from bankruptcy is only exercisable by the bankrupt.

15. In circumstances such as the present one where the bankrupt is deceased, the personal representative of the bankrupt may apply for the discharge. The respondent is not a personal representative to the deceased debtor and is therefore the wrong person to bring an application under section 258. For these reasons this prayer fails.

Whether the respondent has failed in the duties of a Bankruptcy Trustee

16. The Official Receiver acts as an officer of the court in carrying out functions under the Insolvency Act. That being the case, the Official Receiver acts under the supervision of the Court and may apply for directions on any issue arising from the insolvency proceedings as provided for under section 70(1) of the Insolvency Act. Another avenue for the Official Receiver to account to the Court is through section 79 of the Act.

17. The said section 79 provides an avenue for redress by other interested persons including creditors to approach the court in respect of the administration of the estate. Section 79 provides as follows:

“(1) If, in relation to the bankruptcy trustee in respect of a bankrupt’s estate, a person (including the bankrupt or a creditor of the bankrupt) is dissatisfied with any act, omission to act or decision of that trustee, the person may apply to the Court for an order under subsection (2).

(2) On the hearing of such an application, the Court may—

(a) confirm, reverse or modify the act, omission or decision concerned; or

(b) give the bankruptcy trustee directions; or

(c) make such other order as it considers appropriate.”

18. In my view the provisions of section 79 are wide enough to encompass various orders which the court may grant as appropriate. The court is also empowered to remove a bankruptcy trustee from office by dint of section 75(1) of the Act. It provides as follows:

“Except as otherwise provided by this section, a bankruptcy trustee appointed in respect of a bankrupt’s estate may be removed from office only by—

a. an order of the Court; or ...”



19. I note that the application before this Court is not one for removal of the trustee in bankruptcy. The essence of pointing out these provisions is to nonetheless demonstrate the powers that this Court exercises over any trustee in bankruptcy in the administration of a debtor's estate. This is an option that this Court may pursue when there is sufficient cause to interfere with the administration. Against this background I shall now consider whether the court is entitled to make an order under section 75 of the *Act*.

Whether the respondent has failed in the duties of a Bankruptcy Trustee

20. This Court will generally not intervene or interfere with the trustee's discretion in an administration as a matter of course unless there is evidence that the bankruptcy trustee was acting unreasonably. Broadly speaking the duty of a trustee in bankruptcy must be understood within the context of the duty to ensure a maximum and ratable distribution of the bankrupt's estate amongst the creditors.
21. The duties of the bankruptcy trustee would include taking appropriate steps to recover any property for the benefit of the estate; taking possession and control of the bankrupt's property as soon as possible and dealing with and managing the property or assets belonging to the bankrupt.
22. The bankruptcy order in this case was issued on 6th July 2021. It is evident from the record that the respondent had issued a notice of the said appointment to the general public. It is also clear from the record that the respondent thereafter wrote to the bankrupt on 6th September 2021 and 29th October 2021 requiring him to provide a Statement of Affairs with respect to his estate. When this was not forthcoming, the Official Receiver failed to take any further action.
23. What followed was a series of correspondence between the applicants and the respondents, with the applicant mainly following up on the progress of the administration of the estate on 9th March 2022 and again on 8th April 2022. On 2nd December 2021 the applicant wrote to ask the respondent to convene a creditors meeting. This does not appear to have been done.
24. I do not find credible the submission by the respondent that the applicant failed to cooperate with the respondent. It is evident from the record that the applicant went out of her way to provide information that was within her knowledge on the estate of the debtor as evidenced by the letters of 27th July 2021 and 16th December 2021.
25. By March 2022, over one year into the administration, the respondent was yet to confirm by way of searches, the properties whose details had been supplied by the applicant and take possession of the same. The respondent failed to manage the property of the bankrupt despite the applicant providing sufficient information on the tenants to two (2) of the properties occupied by tenants of the deceased.
26. It is therefore understandable that by May 2022, one year into the administration, the respondent was apprehensive about the slow pace of administration of the estate. From the evidence presented before the Court, I am not satisfied that the respondent acted efficiently and expeditiously. The respondent had the opportunity to seek the assistance of the Court under section 70 of the *Act* with whatever difficulty that was being faced so as to ensure that the estate was not wasting away.
27. The respondent's argument is that the present application was brought before the application was made before Court. In my view, this was a long time coming. The application ought to have been made sooner and the anxiety by the applicant is therefore justified. I find that the Official Receiver has not conducted this administration with untold efficiency.



Whether the orders sought in the present application can be granted.

28. Both parties have confirmed that the only other known creditor of the deceased is Parklands Court Limited. It is obvious that the said creditor has not been served with the present proceedings so as to make any representation before the Court. While I have seen the Judgment of the Court in which the applicant was declared to have a beneficial interest in the property managed by the said creditor, this ownership does not absolve the need to serve the creditor.
29. That said, it is for this Court to make such further orders that will see to it that
- “the real substantial, honest interests’ of the process, and to the purpose for which the office holder is appointed ... are upheld, as was held in *Doffman & Isaacs v Wood & Hellard*, [2011] EWHC 4008 (Ch) (as per Proudman J).”
30. Having declined to discharge the debtor, and noting the observations made by this Court on the administration, I am convinced that ultimately the assessment is whether the removal of the Official Receiver as trustee in bankruptcy as an alternative is in the interests of the bankruptcy process as a whole. I am not convinced at this point that such removal will be beneficial to the creditors considering that the Court has not had the benefit of hearing the other known creditor in the matter.

Determination

31. In the light of the foregoing, invoking the court’s inherent jurisdiction and exercising the court’s discretion I find and direct as follows:
- i. That the application for the discharge of the deceased from bankruptcy cannot be allowed as the applicant lacks locus to apply for the said order.
 - ii. That in order to allow for an expeditious and orderly administration of the estate, and considering the interests of the other creditor(s) in addition to the applicant, I will defer my decision on the other prayers and instead direct that the Official Receiver proceeds with the administration of the bankrupt’s estate without any further delay.
 - iii. That the Official Receiver shall appear before this Court to give a report on the progress of the administration in the next 60 days of this ruling, on a date to be determined by the parties.
 - iv. In default of any progress being made the Court shall take further appropriate action and issue such further orders.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF NOVEMBER 2023.

F. MUGAMBI

JUDGE

