



**Banadir Gate Business Solution Limited & 2 others v Gulf African Bank Limited (Insolvency Cause E023 & E024 of 2020 (Consolidated))  
[2022] KEHC 10701 (KLR) (Commercial and Tax) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10701 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E023 & E024 OF 2020 (CONSOLIDATED)**

**DAS MAJANJA, J**

**MAY 31, 2022**

**BETWEEN**

**BANADIR GATE BUSINESS SOLUTION LIMITED ..... 1<sup>ST</sup> PETITIONER**

**AHMED ABDULKADIR HASSAN ..... 2<sup>ND</sup> PETITIONER**

**ABDULKADIR HASSAN ..... 3<sup>RD</sup> PETITIONER**

**AND**

**GULF AFRICAN BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Before the court for determination are three petitions dated November 2, 2020 filed by the petitioners seeking to have themselves liquidated and/or adjudged bankrupt by an order of this court on the ground that they are unable to pay their debts.
2. In response to the petitions, the creditor has filed replying affidavits all sworn on April 19, 2020 by its legal officer, Lawi Sato. The petitioners further responded to the same through the depositions sworn on May 18, 2021 by the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners. The petitions were set down for hearing. The Petitioners were cross-examined and the parties filed written submissions.
3. For context, the 1<sup>st</sup> petitioner (“the company”) is a limited liability company incorporated under the Companies Act (Repealed) with the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners as its directors. In 2009, the company obtained a loan of kes 18,950,736.00 from the creditor (“the bank”) to finance one of its businesses by purchasing two trucks. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners also agreed to guarantee the loan facility.
4. In due course, the company’s account fell into arrears prompting the bank to file a recovery suit; Milimani CMCC 4754 of 2016, Gulf African Bank Limited v Banadir Gate Solutions Limited &



4 Others seeking judgment for, *inter alia*, kes 18,994,083.15 together with profit at the rate of 22% per annum and default damages at the rate of 20% per annum from June 28, 2016 which was to be computed in accordance with the bank's commercial rates until payment in full. The subordinate court entered default judgment on October 6, 2016 in favour of the bank and against the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners as the guarantors for kes 20,234,887.95 plus costs in the sum of kes 413,383.00.

5. The company seeks a liquidation order while the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners seek a bankruptcy order as they are unable to pay the debt.

### **The petitioners' case**

6. The petitioners state that the trucks which they acquired through the facility were in the business of transporting relief food to South Sudan. Unfortunately, one of the trucks was captured by the South Sudan Militia when war broke out and the second one later broke down and could not be repaired due to insecurity. The petitioners claim that they wrote to the bank requesting for a restructure of the facility as they were no longer in business but the bank declined the request. They further state that their claim for compensation was declined by Takaful Insurance Company, a company referred to them by the bank.
7. The petitioners aver the bank declined to accommodate them hence they had to borrow further loans to sustain the civil suit and the loans. The petitioners have produced the company's statement of financial position declaring that its assets have no realizable value. They also admit their indebtedness to the bank. They reiterate that the company is insolvent and/or unable to pay its debts and thus pray for a liquidation order.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners admit the debt. They maintain that they are unable to pay the debt as they are only worth about kes 310,000.00 and kes 130,000.00 respectively. They urge the court to adjudge them bankrupt.

### **The bank's reply**

9. The bank impeaches the petitioners claim that the company's trucks were captured by militia by stating that from their defence in the suit before magistrates' court, they did not submit any evidence to indicate that they had lodged a complaint to the authorities on the loss of the trucks. That they did not tender any evidence of tracking to show that indeed the trucks had left the Country. The bank further states that company did not produce any evidence to show that it demanded compensation and/or whether it was compensated and if it was indeed declined, no evidence exists of any attempt to file a suit seeking for indemnity.
10. The bank states that it instructed a private investigator to establish the petitioners' financial capability. According to the investigation report, the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are men of means operating businesses within Nairobi. That Ali Abdulkadir Hassan, one of the directors, founded Bixo Marketing Agency in October 2015 and deals in online marketing and immigration consultancy. That he is also a founder of a 'pick and drop' company which deals in marketing and courier services. That the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners have an office at the Green House, 2<sup>nd</sup> Floor Room no 16 along Ngong Road as general traders.
11. The bank avers that the petitioners have deliberately presented an inaccurate statement of affairs as the company has not exhibited its entire statement of accounts that it holds at Stanbic Bank and that no evidence exists to support the averments of the alleged loans borrowed by the company.



12. The bank contends that the petitions are an amalgamation of hearsay, half-truths and innuendos. It avers that it is entitled to the enjoy the fruits of its judgment and accuses the petitioners of filing the petitions to delay the executions as warrants of arrest have been issued against them. It prays that the petitions be dismissed.

### **The petitioners' response**

13. In response to the bank, the petitioners deny that their petitions are meant to stifle the execution of the decree in Milimani CMCC 4754 of 2016; Gulf African Bank Limited V Banadir Gate Solutions Limited & 4 Others. They state that the subordinate court made a judgment without hearing or considering the evidence that they had in respect to the amount claimed by the bank and dismissed their application to set aside the interlocutory judgment.
14. The petitioners state that in an attempt to pay up the loan, they had requested the bank for a restructure. They requested to pay kes 200,000.00 every month instead of kes 400,000.00 in view of the loss of their truck in South Sudan. They stress that the second truck broke down in South Sudan after the bank had denied their request and that it could not be repaired in situ due to the hostile environment and even their driver, who had been captured, was only released after they paid a ransom. The state that they reported the incident at Pangani police station and an O B number issued.
15. The petitioners explain that these developments were communicated to the insurance agent through the bank as it is the bank agent who secured the insurance policy for them but the insurance company declined to compensate them. The petitioners contend that the Bank and the insurance company are one and the same and that they were issued with a policy by GAB Takaful Insurance Agency Limited which is a subsidiary of the bank, which after declining to compensate them, proceeded to sue them.
16. The petitioners aver that the investigation report is full of falsehoods as the directors listed are not those of the company and that if at all the investigation company conducted investigations, it would have captured, at the very least, the directors' correct names. They further state that they no longer operate any business at Green House as the company was unable to stay afloat and their lease was terminated due to outstanding rent arrears amounting to the sum of kes 632,745.00. The company thereafter delivered vacant possession of the said premises to the landlord, Wise Way Logistics Limited, on September 24, 2015. The company states in light of the foregoing circumstances including its managing director's illness, the suit by the bank, it could not stay afloat hence the petition.
17. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners deny that Ali Abdulkadir Hassan is associated with the company and that they have never been directors of a company called 'pick and drop' and Bixo Marketing Agency Limited. They state that the only Bixo they know is owned by a friend. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners insist they are not men of means as alleged nor do they operate any business within Nairobi. They state that the statement of affairs as contained in the petition and the depositions are true and they urge that the petitions be allowed as prayed.

### **Analysis and determination**

18. The main issue for determination is whether the bankruptcy and liquidation petitions should be allowed, the company liquidated and the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners adjudged bankrupt.
19. I do not think it is in dispute that under section 425(1)(a) of the *Insolvency Act*, 2015, a company or its directors can apply to the court for liquidation of the company. Further, that under section 424 (1)(e) of the *Insolvency Act*, 2015 a company may be liquidated by the court if it is unable to pay its debts.



20. In *Matic General Contractors Limited v The Kenya Power and Lighting Company Limited* [2001] LLR 4837 (CAK), it was held that liquidation of a company is a draconian step as it amounts of 'corporate execution' and that no order can be made until a debt is proved, where there is a bonafide dispute, as to its existence. It is also trite law that if the court sees a petition to liquidate a company which is not brought in good faith, it would apply its legal mind to dismiss it with costs.
21. In this case, the debt owed by the company to the bank, being a judgment debt, is not disputed. The company maintains that it is unable the debt. The bank does not believe the company is unable to pay it and impeaches the reasons it has advanced for failure to pay the debt. It also decries the lack of disclosure. The principle of full disclosure is fundamental in insolvency proceedings. *In Re James Maina Kabatha (Petitioner/Applicant)* NKR Insolvency Cause No. 4 of 2019 [2020] eKLR, Prof. Ngugi J, stated that "The twin goals of consumer or individual bankruptcy law are to protect creditors and ensure optimal payment to them where possible; and the provision of shelter and a "fresh start" to individual petitioners overburdened by debt." The learned judge added that:
  3. The "fresh start" goal is accomplished through the bankruptcy discharge, which usually releases the petitioner from personal liability from certain debts and prevents creditors from taking any action against the petitioner to collect those debts.
  4. Consequently, bankruptcy protection being an extraordinary relief, one of the corollaries to these seemingly conflictual twin goals of bankruptcy law – the protection of creditors and the provision of fresh start for the honest but unfortunate petitioner -- is that an individual seeking bankruptcy protection is required to scrupulously demonstrate that he is acting in good faith and disclose all his financial information.
  5. It is only upon meeting this double threshold – demonstration of good faith and full disclosure of all financial information – that a petitioner can become entitled to a bankruptcy order. The architecture and structure of the *Insolvency Act* and Insolvency Regulations, 2018 reinforce these double threshold for individual petitioners.
22. It must be remembered that a person has the burden of proving facts that are peculiarly within its knowledge as provided by section 112 of the *Evidence Act* (chapter 80 of the Laws of Kenya) which states that, "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
23. I agree with the bank that the petitioners' claims are without proof and cannot be verified. There is no evidence of any complaint filed with the South Sudanese government over the alleged capture. In as much as the petitioners deposed that they had reported the incident to Pangani police station no reference number or evidence of such a record was adduced.
24. There is also no evidence that the company lodged a complaint or claim with the insurance company, Takaful, as alleged as such a claim and subsequent correspondences between them and the company must have been in writing. Thus, it should not have been hard for the petitioners to produce such evidence of a claim or rejection by the insurance company. Even as the Company claims that it does not operate an office any more, it has not produced any evidence of any rent demand, eviction notice or proclamation or even surrender of the lease.
25. The petitioners also admitted that they have not provided any statement of income and expenses in respect of the company and that they had not provided a statement of all financial transactions by the company in the last three years preceding the filing of the petition.



26. During the hearing, the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners admitted to receiving some income from the government of the United Kingdom by way of relief and payments from commission-related jobs. They never disclosed these incomes in their petition. The 3<sup>rd</sup> petitioner also admitted that they did not provide the court with all the income they earn as they thought it was not much and thus, was not important to inform the court. As the Court of Appeal stated in *Ngei v Official Receiver* NRB Civil Appeals Nos. 51 of 1981 & 3 of 1982 [1982]KLR, a petition for bankruptcy must be made in good faith and there should be no material nondisclosure. It is not for the petitioner to determine what amounts to significant or insignificant income, they have to disclose all information in respect of their income, assets and liabilities and leave the rest to the court.
27. I have no doubt that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are guilty of material nondisclosure and coupled by the fact that there are no verifiable statements of their income and expenses, the court cannot come to a conclusion that they are not men of means and thus unable to pay their debts. I therefore reject their petitions to be adjudged bankrupt.
28. In light of the insufficiency of the company's insolvency, I can only conclude that its petition is not made in good faith and lacks merit.

### **Disposition**

29. For the reasons I have set out above, I dismiss the petitions. The petitioners shall pay costs of the creditor.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2022.**

**D S MAJANJA**

**JUDGE**

**Court assistant: Mr M Onyango**

**Ms Njagi instructed by Sang Chambers and Partners Advocates for the petitioners.**

Mr Kithinji instructed Wamae and Allen Advocates for the respondent.

