



**In re Jai Prakash Mishra (Insolvency Cause E007 of 2021)  
[2022] KEHC 11075 (KLR) (Commercial and Tax) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11075 (KLR)

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

**INSOLVENCY CAUSE E007 OF 2021**

**EC MWITA, J**

**JULY 29, 2022**

**IN THE MATTER OF JAI PRAKASH MISHRA**

**RULING**

1. The applicant, Jai Prakash Mishra (Mishra), has approached this court through a notice of motion dated 15<sup>th</sup> November 2021 under section 32(4) of the *Insolvency Act* (the Act), sections 1 A and 3A of the *Civil Procedure Act*, and inherent jurisdiction of the court. The application seeks stay of execution of the decree issued by the Chief Magistrate's court, Nairobi in Milimani CMCC No. 4882 of 2011, pending the hearing and determination of this Petition. Mishra also seeks leave to publish the Bankruptcy Petition in a newspaper with nationwide circulation.
2. Mishra states that the Bankruptcy Petition was filed on 10<sup>th</sup> of February 2021 and is yet to published because the Newspapers declined as there was no court order to that effect. Mishra further states that although he is desirous of having the petition progress further, a warrant of arrest has been issued against him in CMCC No. 4882 of 2011, Sai Office Supplies v the Aryans Limited, after the court lifted the corporate veil of incorporation in that matter. According to Mishra, he genuinely lacks means to settle the decree in that suit amounting to Kshs. 2,094,794 together with costs and interest.
3. Mishra asserts that he was one of the directors of Aryans Ltd when it was dealing with Office Equipment Ltd but that company, Aryans Ltd, is no longer in business. Sai Office Supplies Ltd had sued Aryans Ltd and obtained a decree for Kshs. 2,094,794. Thereafter, Sai Ltd filed an application to have him bear the liability which application was allowed on 21<sup>st</sup> March 2018.
4. On 25<sup>th</sup> May 2018, he filed an application seeking to liquidate the decretal amount by instalments and in a ruling delivered on 6<sup>th</sup> February 2019, the court ordered him to pay Kshs. 500,000 within 30 days from that date and to pay the balance in equal instalments of Kshs. 100,000 each by 5<sup>th</sup> of each month, beginning March 2019. In default of any one instalment, execution was to issue.



5. Mishra asserts that he is not able to honour the terms of that order because he is not in gainful employment or income generating business. Mishra states that he was once arrested for failing to satisfy the decree but he still genuinely lacks means to pay.
6. Sai Office Supplies Ltd (Sai office) has opposed the application through grounds of opposition dated 25<sup>th</sup> January 2022. Sai Office states that section 23 of the *Insolvency Act* applies only if execution process is issued by a court other than the High Court. According to Sai Office, execution sought to be stayed was commenced by the Chief Magistrate’s court and, therefore, this court lacks power to stay execution of that decree.
7. Parties agreed to have this application disposed of through oral arguments. Mr. Kabue, learned counsel for Mishra, submits that this court has jurisdiction to grant the orders sought, and that section 23 which falls under Division 2 of the Act, is inapplicable to this application. According to learned counsel, Division 2 falls under the heading “application by creditor” while the application is by a debtor and not one by a creditor.
8. It is Mr. Kabue’s case, that the applicable part of the Act is Division 3 under the heading “Bankruptcy application by debtors” which covers sections 32 through 35. Mr. Kabue argues that Division 3 has no provision prohibiting a debtor from approaching the court as Mishra has done. For that reason, the inherent powers of the court to make orders that meet the ends of justice have not been limited by Division 3 (sections 32 to 35) of the Act. Mr. Kabue asserts that had the Legislature intended that section 23 should apply to the situation at hand, it would have expressly done so. He urges the court to allow the application.
9. Mr. Mwhuri, learned counsel for Sai Office submits in opposition to the application, that only the court that issued the decree can stay execution. Mr. Mwhuri relies on the decision in *James Mwangi Macharia v Gerald Ochoki* [2019] eKLR to that effect. According to Mr. Mwhuri, the decree having been issued by the Chief Magistrate’s court, that that is the only court that can stay execution.
10. Mr. Mwhuri further submits that Division 1 of the Act begins from section 12 and that section 23 falls within this Division and, therefore, the application lacks merit and should be dismissed.
11. In a brief rejoinder, Mr. Kabue contends that Division 1 covers sections 12 to 16, Division 2 covers sections 17 to 31 while Division 3 runs from sections 32 to 35. Mr. Kabue maintains that Mishra’s case is not premised under section 23 because that section is in Division 2 which is not applicable to the application. Mr. Kabue argues, therefore, that the decision relied on by Mr. Mwhuri is distinguishable.

## **Determination**

12. I have considered the application, the response and arguments on behalf of the Parties. I have also considered the decision relied on by the respondent. The gist of the application is that whereas Mishra has filed for bankruptcy before this court, there is a decree issued by the Chief Magistrate’s court at Milimani, Nairobi whose execution is imminent. Mishra has therefore come to this court praying those execution proceedings be stayed pending the hearing and determination of the petition, and an order that the petition be advertised in a newspaper.
13. Sai Office argues that the application cannot be granted because the decree was issued by the Chief Magistrate’s court and only that court can stay those proceedings. In the view of Sai Office, the provisions relied on, namely, section 32 of the Act does not apply to the application as it is in the wrong Division.



14. This application is brought under section 32(4) of the Act, sections 1A and 3A of the *Civil Procedure Act* and inherent powers of the court. Section 32(4) is in Division 3 of the Act under the heading: “Applications by Debtors.”
15. Section 32 provides as follows:
- (1) A debtor may make an application for an order adjudging the debtor bankrupt only on the grounds that the debtor is unable to 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.
16. Mishra has moved this court under the provisions in Division 3 of the Act and not division 2. Indeed, section 32 allows a party to file an application for bankruptcy which Mishra has done. Section 32(4) requires an applicant to publish the application for bankruptcy in a newspaper in circulation within the region. According to Mishra, a petition for bankruptcy has been filed but has not been advertised because newspapers have declined to do so without a court order. That is why this application has been brought seeking an order of this court to advertise the petition. In the meantime, Mishra prays that execution against him be stayed.
17. The argument by Sai office that Mishra has come to court under wrong division is not correct. This is so because section 32 under which this court has been moved, is the correct provision that allows a debtor to move the court. Whether the court would allow the petition is a different matter as the section is clear on how the application (petition) is to be made.
18. Regarding stay of execution proceedings pending before the Chief Magistrate’s court, Mishra argues that this court has inherent jurisdiction to do so. On the other hand, Sai Office contends that only the court which issued the decree can stay execution proceedings. To this end, Sai Office cites the decision in *James Mwangi Macharia v Gerald Ochoki* (*supra*).
19. I have read the decision in the above case. It is clear that the court was dealing with section 23 of the Act and not section 32. In that case, the court stated that debtor had invoked section 23 of the Act, which states:



- (1) This section applies if an execution process has been issued by a court other than the High Court.
- (2) If it is proved to the issuing court that an application for a bankruptcy order in respect of the debtor has been made to the High Court, that court may either –
  - (a) stay the execution on such terms as it considers appropriate; or
  - (b) permit the execution process to continue on such terms as it considers appropriate.

20. After considering that section, the Court dismissed the application stating:

- (4) A plain reading of section 23 of the Act shows that the provision applies where the execution process is issued by any other court other than the High Court. Further, the court empowered to stay any execution is the court that issued the process hence the use of the phrase “issuing court”. In this case the execution process was issued by the Bomet Magistrates’ Court and it is to that court that the Debtor must look to for relief.

21. Section 23 falls under Division 2 which covers applications by creditors for bankruptcy of a debtor which is a different provision from those in Division 3 which applies to applications by debtors as opposed to creditors. To put section 23 into perspective, one has to look at section 22 under sub head “Power of relevant court to stay execution processes by other creditors or allow them on terms.” Section 22 provides:

- (1) After a creditor's application has been made, the debtor or any creditor may apply to the relevant court for an order stopping the issue or continuance by any other creditor of an execution process against the debtor in respect of the property of the debtor.
- (2) On the hearing of an application under subsection (1), the Court may make an order—
  - (a) stay the execution process on such terms as the Court considers appropriate; or
  - (b) allowing the execution process to continue on such terms as the Court considers appropriate (emphasis).

22. It is clear from the reading of section 22 that after a creditor has filed insolvency proceedings, otherwise called creditor’s application, the debtor or any other creditor may apply to stop continuance of execution proceedings against the property the subject of the creditor’s application by other creditors. In other words, what is to be stopped or stayed is execution by other creditors against the same debtor that is the subject of the bankruptcy proceedings. That, in my view, is different from the position in the case at hand where it is the debtor who has applied for bankruptcy and seeks to stay execution by the creditor who has a judgment against him.

23. The view I take is that sections section 23 applies to applications in Division 2 and has to be read together with section 22 for full appreciation of its intent and purport.

24. I have perused the provisions in Division 3 of the Act where the applicant falls. I have not seen a provision the equivalent of sections 22 and 23. In the circumstances, this court retains inherent powers to issue orders that are necessary and intended to meet the ends of justice.



25. In *Equity Bank Ltd v West Link Mbo Ltd* [ 2013] eKLR, Msinga, J. A, stated with regard to inherent powers of the court:

(59) Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the *Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate. In *Seth Lookasan Sethiya v. Ivan E. John* AIR [1975] ALL 113, it was held that power means authority, whether any discretion is left or not and whether any direction is imperative or directory relates to the manner and exercise of the power and not to the basic ingredient of the authority itself. Inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.

26. Having considered the application responses and applicable law, the conclusion I come to is that Mishra having filed a petition which is pending, and there being imminent execution by the creditor who is the decree holder in that case, this petition will be rendered irrelevant if the orders sought are not granted. Consequently, the application dated 15<sup>th</sup> November 2021 is allowed and the following orders hereby issue.

1. Leave is hereby granted to the applicant to publish the Bankruptcy petition filed herein in a newspaper with a nationwide circulation within Thirty (30) Days.
2. Execution of the decree issued in CMCC No. 4882 of 2011 in the Chief Magistrate's court at Milimani, Nairobi is hereby stayed pending the hearing and determination of this petition.
3. No order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2022**

**E C MWITA**

**JUDGE**

