



REPUBLIC OF KENYA



**Bowen v M-Oriental Bank & 8 others (Insolvency Cause
1 of 2019) [2022] KEHC 11212 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
INSOLVENCY CAUSE 1 OF 2019
EKO OGOLA, J
JULY 27, 2022**

BETWEEN

JEREMIAH KOSKEI BOWEN DEBTOR

AND

M-ORIENTAL BANK & 8 OTHERS CREDITOR

RULING

1. By a Petition filed herein on April 8, 2019, the petitioner herein sought to be adjudged bankrupt. However, in the course of proceedings the 8th creditor raised a preliminary objection dated December 6, 2019 on the following grounds;
 1. The debtors' bankruptcy application is defective as it contravenes the provisions of section 32 of the *Insolvency Act*, 2015 as read together with regulations 10 & 18 of the *Insolvency Regulations*, 2016.
 2. The debtors' bankruptcy application is irredeemably defective for non-compliance to section 32(4) of the *Insolvency Act*, 2015 as read together with regulations 6 & 9(1) of the *Insolvency Regulations*, 2016, that requires mandatory publication of notice.
 3. The debtors' bankruptcy application to some extent apparently relies on the *Bankruptcy Act* cap 53, Laws of Kenya (repealed).
2. In the aforesaid petition, the petitioner avers that he was the director of Lomsons Enterprises Limited, and as a result of several suits against him as a director, he claimed to have accrued a debt of over kshs 287,000,000/-. This led to his bankruptcy application.



Creditor's case

3. The creditors supported the objection and submitted that the debtor failed to comply with the law and especially the provisions on the issuance of statutory notices as provided under section 32(4) of the *Insolvency Act* and rule 9(1) of the *Insolvency Regulations*, 2016 on notices relating to a bankruptcy. In those provisions, the law is couched in mandatory terms as to the publication of the notice in a newspaper with nationwide circulation failure to which the petition for adjudging one bankrupt fails unconditionally. Citing Bungoma Misc Bankruptcy Case no 2 of 2018 – *Jonatban Cheruiyot & Another vs Bungoma Chemist Limited* (2019) eKLR and Nakuru Bankruptcy Case Number 1 of 2016 *In Re Mary Nduta Mungai* (2017) eKLR, the 1st creditor submitted that the same settled ground no.1 of the Preliminary Objection.
4. Citing section 32 of the *Insolvency Act*, regulation 18 (4) and 6 (1) of the *Insolvency Regulations*, 2016, the 1st creditor submitted that it is clear that the debtor failed to disclose and serve all the creditors and neither had he disclosed his financial position and caused the publication of the same as per rule 18. The creditor relied on Chuka Bankruptcy case no 1 of 2018 (Formerly Meru High Court Bankruptcy no 2 of 2018) Kenneth Kinyua Ephantus vs Insolvency Act (2018) eKLR and submitted that the same settled ground no 2 of the preliminary objection.
5. The submissions on behalf of the other creditors echoed the sentiments of the 1st creditor and therefore I shall proceed to settle the substantive issues raised in the preliminary objection.
6. The case of *Mukisa Biscuits Manufacturing Co Limited vs West End Distributors Ltd [1969] EA 696* defined a preliminary objection in law as:-

“A preliminary objection in law is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
7. The issues arising for determination are; Whether the debtor's bankruptcy application complied with the law Whether this court can strike out the bankruptcy application
8. Bankruptcy petitions are governed by the *Insolvency Act* and the *Insolvency regulations*. Section 32 of the *Insolvency Act* states;
 - (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 be 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.

Further, regulation 6 of the *Insolvency Regulations* 2016 states;

- (1) Where the Act or these Regulations require a notice to be published in the Kenya Gazette, the notice shall contain the details set out in this part, in addition to any details specifically required by the Act or any other provision of these Regulations.

9. *In re James Maina Kabatha* (debtor/pplicant) [2020] eKLR it was held;

In addition, as per Regulation 18(4), in addition to publication of a notice in a newspaper of regional publication as required under section 32(4) of the *Insolvency Act*, the debtor is also required to arrange for publication of his statement of financial position in the Kenya Gazette. This has not happened here.

The debtor herein has not placed before this court any proof that he complied with the provisions of the *Insolvency Act*. Section 32(4) of the Act is couched in mandatory terms and therefore in failing to comply with the same this court has no option but to decline to hear the petition on these grounds.

10. Pursuant to the provisions of section 32 (5) of the *Insolvency Act*, I find that this court cannot continue to hear the petition. The preliminary objection is merited.

The petition dated April 17, 2019 and filed herein on April 18, 2019 is hereby struck out with costs to the creditors.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH JULY 2022.

E K OGOLA

JUDGE

