



**Osman v First Community Bank & 2 others (Insolvency Petition E037 of 2020)
[2022] KEHC 13825 (KLR) (Commercial and Tax) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13825 (KLR)

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

INSOLVENCY PETITION E037 OF 2020

EC MWITA, J

SEPTEMBER 23, 2022

IN THE MATTER OF THE INSOLVENCY ACT, ACT NO. 18 OF

2015

AND

IN THE MATTER OF GULED OMAR OSMAN

BETWEEN

GULED OMAR OSMAN PETITIONER

AND

FIRST COMMUNITY BANK 1ST CREDITOR

FAMILY BANK LTD 2ND CREDITOR

EQUITY BANK LTD 3RD CREDITOR

JUDGMENT

1. Guled Omar Osman (Osman) filed a bankruptcy petition dated November 30, 2020, as a debtor, asking this court to make a bankruptcy order and adjudge him bankrupt. The petition is supported by an affidavit sworn on November 30, 2020, certificate of compliance from the official receiver, an application for trustee and a statement of affairs. Osman also filed written submissions dated February 16, 2022. Although Osman averred that the petition was advertised in the Kenya gazette of June 4, 2021, no copy was annexed.



The Evidence

2. The petition was deposed of by way of oral testimony. Osman testified that in he started transport business in 2012 within Nairobi and its environs. He began with one truck but as business grew, he acquired 8 more trucks that operated across Kenya.
3. Sometime in 2014, the business began to suffer due to logistical challenges including huge expenses from weigh bridge fines and other costs. As a consequence, some of the trucks were either repossessed or sold by financiers leaving only three trucks. At the same time, a creditor, Reyhan Petroleum limited served him with a demand for Kshs 915,000 for fueling the trucks which amount he had not been able to pay.
4. Osman further stated that in 2014, First Community Bank (First Community) offered him a facility of Kshs 9,500,000 to purchase one prime mover (Mercedes Benz Actros) truck Registration No KBW 075J from Hayes Cargo and Trucks Import Company Ltd. In 2016, he relocated his business to Juba, South Sudan. Three weeks after, civil war broke out in Juba and the three trucks were completely burnt down and no compensation was received because the trucks were on third party insurance covers. This forced him to close down the business and returned to Kenya.
5. Osman stated that even though he indicated that he owned motor vehicle registration number KBV 484M Toyota Allion, the vehicle was repossessed by First Community. First Community had filed civil suit CMCC No 5108 of 2016 against him and obtained default judgment for Kshs 15,706,733.63 without being served with summons to enter appearance, but was only served with the decree through whatsapp on November 25, 2020 for Kshs 18,532,399.68. Osman asserted that he was apprehensive that the creditors would seek to have him committed to civil jail as a means of executing that decree.
6. According to Osman, the total amount owed to the creditors is about Kshs 21,447,339.68 as at November 30, 2020; First Community bank Kshs 18,532,339.68; Reyhan Petroleum limited Kshs 915,000; Nayal Karan Enterprises Kshs 2,000,000; Family Bank limited Kshs 500,000 and Equity Bank limited Kshs 5,000,000
7. Osman relied on section 32 of the *Insolvency Act* to support his petition for bankruptcy. He also relied on *re James Mwangi Nderitu t/a Jajo Enterprises (a debtor)* [2020] eKLR to argue that he should be adjudged bankrupt because he has proved that he is unable to pay any of his debts. Osman maintained that he had given a full and true inventory of his assets and liabilities which prove that his financial position is unable to satisfy his accruing debts at the date of filing this petition as the debts far outweigh the assets.
8. Osman again relied on *Stephen Nyaega Mose* [2018] eKLR for the proposition that bankruptcy laws are meant to protect genuine people who have unfortunately found themselves in debt out of innocent factors and not because of fraud or professional misconduct.
9. According to Osman, the creditors are unsecured because they have already exercised their statutory power of sale over the recoverable motor vehicles and he had little assets left. Osman further contended that whenever there are no charged assets as is the case here, and there is little or no assets and revenue to settle the outstanding debt, courts are ordinarily inclined to adjudge one bankrupt. For this proposition, Osman relied on *re Patrick Maina Wanjau (debtor)* [2021] eKLR where the court adjudged the petitioner bankrupt on the unsecured debt because there was very little in terms of assets or revenue to settle outstanding debts while also allowing the creditors to exercise their statutory power of sale over the charged assets. Osman urged the court to allow the petition.



Response

10. First Community bank, Family bank and Equity bank (creditors) opposed the petition through replying affidavits sworn on April 22, 2021, March 15, 2021 and May 31, 2021 and written submissions dated February 25, 2022, February 24, 2022 and February 28, 2022, respectively.
11. First Community bank asserted that Osman was advanced Kenya shillings five million, five hundred and fourteen thousand and six hundred (Kshs 5,514,600) on various dates between October 17, 2010 and February 13, 2014 to purchase motor vehicle KBV 484M and a truck. The vehicles were registered in the joint names of Osman and First Community bank and a chattels mortgage created over the vehicles.
12. First Community bank stated that due to default in paying the loan, it instituted CMCC No 5108 of 2016 and obtained judgement and decree for Kshs 18,532,339.68 which amount is still owing to it as a secured creditor. First Community asserted that according to investigations, Osman has not fully disclosed in his statement of affairs that besides motor vehicle KBV 484M, he owns motor vehicles: KCA021A- KCA 023A 2540, KBV 648E KBV 918V and KBR 042T- Toyota Pick-up. Other assets include; trailer ZE 3273, trailer ZE 4935, trailer ZE 7700, trailer ZE 7702 and trailer ZE 8385.
13. Family Bank stated that it advanced Osman Kenya shillings one million six hundred and eighty thousand (Kshs 1,680,000) in 2014 to purchase a vehicle isuzu elfu NPR81 which was registered in the joint names of both parties. Osman defaulted in repayment leading to repossession of the motor vehicle which was sold through public auction. The amount realized left a loan balance of Kshs 418,910.74 which continues to attract interest.
14. Equity bank on its part stated that Osman was advanced Kenya shillings fifteen million one hundred and thirty-six thousand eight hundred (Kshs 15,136,800) to purchase trucks registration Nos KCA 021 A and KCA 022A, with trailer registration Nos ZE7760 and ZE776 respectively. The trucks were registered in joint names of the parties and chattels mortgages created over two trucks. Osman defaulted in repayment leading to commencement of recovery process for Kenya shillings ten million two thousand seven hundred and forty-three and twenty cents (Kshs 10,002,743.20).
15. The creditors were of the view that that Osman filed this petition with the sole intention of avoiding to pay his debts. The creditors relied on on *re James Maina Kabatha (debtor/applicant)* NKR Insolvency Cause No 4 of 2019 [2020] eKLR and *the matter of Paul Mutisya Muswii* [2010] eKLR to contend that Osman does not deserve bankruptcy protection for failure to demonstrate good faith and full disclosure of all his financial information and inventory of creditors, assets and liabilities. The creditors further contended that Osman failed to publish a notice of his application as required by section 32 (3) of the *Insolvency Act*.
16. The creditors relied on section 107 of the *Evidence Act* and the decision on *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR, to argue that Osman did not discharge the burden of proof to meet the threshold for an order for bankruptcy. In particular, the creditors contended that Osman failed to prove the alleged relocation to Juba or the burning of the trucks. They also faulted Osman for failure to settle any of the debts despite having Kshs 70,000 cash at hand and earning about Kshs 20,000 per month as a taxi driver.
17. The creditors again faulted Osman for failing to provide evidence to support allegations that out of the ten trucks three (3) were burnt down, five (5) repossessed by various banks and two (2) sold by a supplier (Mohammed Rashid). The creditors pointed out that although Osman claimed that he



was not served with summons to enter appearance in CMCC 5108 of 2016, he confirmed during the hearing of the petition that the postal address used to serve summons.

18. The creditors pointed out that Osman operated other business in the name of Rafiki Hardware limited but he failed to disclose this in his pleadings and did not provide annual returns, declaration of assets and liabilities and VAT returns for that company.
19. The creditors argued, therefore, that Osman did not come to court with clean hands and is undeserving a bankruptcy order. The creditors cited the decision in Stephen Nyaega Mose (*supra*) where the court emphasized on the importance of honesty by the petitioner as a consideration in allowing a bankruptcy petition. They also cited the case of *Ali Jillo Fallan* (Insolvency cause 6 of 2018) [2021] eKLR.

Determination

20. Osman sought a bankruptcy order arguing that he had no means or resources to pay his debts. Osman asserted that some of his trucks had been repossessed by the creditors while others were burnt in the Republic of South Sudan and therefore he had no assets to enable him pay for the liabilities.
21. The three creditors on their part argued that Osman did not discharge the burden of proof that he had no assets and means to pay the debts. According to the creditors, Osman did not account for the trucks he had and that there was no proof that he had travelled to the Republic of South Sudan. Further that he had not come to court with clean hands since he admitted that he had Kshs 70,000 in the bank and was earning Kshs 20,000 from taxi business, but no attempt was made to pay the debts.
22. As I understand the creditors, their arguments are first, that Osman did not discharge the burden of proof that he was unable to pay debts and, second, that the petition was not published as required by law. In that respect, the issues that arise for determination are; whether Osman proved inability to pay the debts and whether the petition was published as required by law.

Inability To Pay Debts

23. The law allows a person to apply for a bankruptcy order where he is unable to pay debts. To that end, section 32(1) provides that “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.”
24. The law is plain that a bankruptcy order may only be made if the person petitioning for a bankruptcy order proves that he is unable to pay debts. In that respect, proof of inability to pay debts is a statutory requirement if a bankruptcy order is to be made.
25. Osman does not deny his indebtedness to the three creditors. His case, however, is that he is not able to pay the debts for the reason that his assets in form of motor vehicles and some trucks were repossessed and sold while other trucks were burnt in Juba, South Sudan following civil strife in that country.
26. In his testimony, Osman asserted that he had about ten (10) trucks and one motor vehicle. Five trucks were repossessed by some creditors, three (3) trucks were burnt in South Sudan while the vehicle was also repossessed. Osman did not account for explain the whereabouts of the other two trucks. Osman did not also show through evidence that indeed he travel to South Sudan and when. That is, no passport was produced to show that he had travelled to South Sudan and when he came back. Osman did not also adduce evidence to show that three trucks actually went to South Sudan and when they crossed the border. Such evidence would have gone a long way to demonstrate that Osman’s claim that the vehicles went to South Sudan and were burnt there was true.



27. Inability to pay debts is a fact to be proved by evidence. It is not to be assumed that because the petitioner says that he is unable to pay debts the court should believe his word of mouth. A petitioner who wants to be adjudged bankrupt must lay before court concrete evidence to enable the court make a determination based on that evidence that indeed the person is bankrupt. The court cannot act as an aid instrument to allow a person run away from his financial obligation towards his creditors. This is so because once adjudged bankrupt, the debtor is tossed beyond his creditors' reach.
28. It must also be clear to any applicant that the purpose of bankruptcy proceedings is to protect the debtor from undue pressure from creditors, preserve fairness among the creditors, and discharge the debtor from his liabilities and enable him to start afresh. This favor should however go to a person who is genuinely bankrupt and unable to pay debts.
29. In *Stephen Nyaega Mose* [2018] eKLR, the court observed that Bankruptcy laws were never meant to protect people who are in debt because of their own act of fraud or professional misconduct. The laws are meant to protect genuine debtors who have unfortunately found themselves in debt out of innocent factors such as harsh business environment and unavoidable business calamities. "The aim is to give such people a fresh start in life to enable them 'get back to their feet and soldier on in life'."
30. In the present petition, Osman is evidently guilty of non-disclosure of material facts and failed to provide a full discovery of his assets in his statement of affairs filed in this court. Osman did not demonstrate to the satisfaction of this court that he is truly in debt due to harsh business environment and unavoidable business calamities; that he is truly unable to pay debts due lack of means to do so and that he is not deliberately running away from meeting his financial obligations.
31. Osman did not demonstrate his inability to pay the debts. Rather he stated that he has regular income from tax business and cash in the bank but had no intention of repaying the debts. Only where inability to pay debts is satisfactorily proved would the court adjudge a debtor bankrupt. I have no doubt in my mind, that the petition as presented was intended to evade paying just and due debts.

Whether Petition Was Advertised

32. The creditors also took issue with the petition arguing that it was not advertised as required by the law. Osman pleaded that the petition was advertised in the Kenya gazette of June 4, 2021, but a copy of the gazette notice was not attached to the petition or affidavits filed in support of the petition.
33. Section 32(4) requires that where an application (petition) for bankruptcy is filed, a notice of the application be published in a newspaper circulating within the region in which the debtor ordinarily resides; and in such other publications as may be prescribed by the insolvency regulations. A reading of section 32(4) is clear that a petition for bankruptcy has to be published in a newspaper circulating within the region where the debtor applicant resides and in "such other" publication as rules may require. Publication of the petition in a publication circulating in the region is a mandatory prerequisite requirement of the law and not an option. Kenya gazette is not a newspaper in terms of section 32(4) but an additional requirement.
34. In this respect, Osman did not show he had complied with the law in so far as publication of the petition was concerned. section 32(5) provides that the court may decline to hear the application if subsection (4) has not been complied with to its satisfaction. That is if the applicant has not shown that the petition was published in compliance with subsection (4) the court may decline to hear the application/petition. In other words, where the petitioner does not comply with the requirements on publication, the petition is not available for hearing and the court may decline to do so. This petition



would fall on that ground. However, as already seen with regard to the first issue, is petition would still have failed even if not because of non publication.

Conclusion

35. Having considered the petition, the statement of affairs, evidence by Osman and the response from the creditors, it is plain that Osman did prove that he is genuinely unable to pay debts and should be adjudged bankrupt. Since inability to pay debts is a fact to be proved, Osman bore that burden to be discharged on a balance of probabilities, a burden Osman did not discharge. In the premise, the conclusion I come to is that Osman has not demonstrated inability to pay debts. This petition was brought with the sole purpose of avoiding to pay just debts.

36. For those reasons, I am not satisfied that the petition has merit. It is dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

E C MWITA

JUDGE

