



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwatha & 9 others v Ndirandu (Insolvency Cause E004 of 2021)
[2022] KEHC 16116 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E004 OF 2021
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

**ISAAC NGARE MWATHA 1ST CREDITOR
PETERSON MAINA MUHORO 2ND CREDITOR
EDWARD MACHARIA W 3RD CREDITOR
EDWIN KARANJA NJAU 4TH CREDITOR
FLORENCE MBINYA MULWA 5TH CREDITOR
BEATRICE WANJIKU MUGWIMI 6TH CREDITOR
ANASTACIA WANJIRU 7TH CREDITOR
NANCY WAMBUI KAMANDE 8TH CREDITOR
CYPRIAN ONDIBA TONGI 9TH CREDITOR
PATRICK MUNYUI KIURA 10TH CREDITOR**

AND

LABAN KARONJI NDIRANDU DEBTOR

RULING

1. The Debtor/Petitioner herein, Laban Karonji Ndirangu, filed the Insolvency Petition dated 10th March 2021 seeking to be declared bankrupt on account of his inability to pay his debts. The petition is accompanied by the Debtor's supporting and verifying affidavits wherein he explains reasons and circumstances that led to his inability to pay his debts.



2. In response to the petition, the Creditors herein filed the Preliminary Objection dated 7th June 2021 wherein they listed the following grounds:-

1. That the petitioner has not met the requirements of the law in filing this petition and more particularly the provisions of Section 306(1) of the [Insolvency Act](#) (No. 18/2015).
2. That this petition offends the provisions of the Insolvency Regulations, 2016 and more particularly Regulations 45.
3. That the Debtor/Respondent has failed to include a list of his bank accounts, assets or/and his current financial position or even include a proposal and we pray that this honorable court does not excuse these mandatory requirements.
4. The application is bad in as the Debtor/Respondent has neither filed a statement of account, nor a statement of his income nor included in the statement of income his itemized statement of expenses.
5. That this petition ought not to proceed without full and thorough investigations of the petitioner's financial dealing during and before the filing of this petition.
6. By the reasons of the non-disclosure complained of, the Debtor/respondent has not disclosed or evidenced inability to repay debts owed to his creditors.
7. The application is invalid and bad in law for reasons that there is material non-disclosure which goes to the root of the matter.
8. The application is made in bad faith, an abuse of the court process and that it is only meant and calculated to deny the creditors the fruits of their sweat and to insulate the petitioner from paying his debts.
9. That the bankruptcy petition is incurably defective and ought to be struck out for deliberate failure to comply with the provisions of the [Insolvency Act](#) 2015 and the Regulations made thereunder.
10. That it is in the best interest of justice that this honorable court dismisses this bankruptcy cause with costs.

3. The Preliminary Objection (PO) is the subject of this ruling.

4. Parties canvassed the Preliminary Objection by way of written submissions.

5. The creditors submitted the petition does not meet the requirements set out under the [Insolvency Act](#) and Regulations especially Section 32(2), 32(4) and 46 thereof. It was also the Creditor's case that the petition falls short of the requirements of Regulation 18(3) of the Insolvency Regulations that require the Debtor to furnish detailed information regarding his financial position, statement of his liabilities and how they were incurred.

6. In a rejoinder, the Debtor submitted that the Preliminary Objection is not based on pure points of law but instead invite the court to assess if the evidence placed before it is adequate to adjudge the Debtor bankrupt. According to the Debtor, an analysis of the adequacy of the Debtor's evidence can only be conducted after a full hearing it was submitted that the Preliminary Objection cannot be used as a substitute for what would ordinarily be canvassed through a formal application.



7. I have carefully considered the Preliminary Objection, the Debtor’s response and the parties’ respective submissions. The issue that presents itself for determination is whether the Preliminary Objection is merited.

8. What constitutes a Preliminary Objection was discussed in the oft cited case of *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd* [1969]EA 966 where it was held:-

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.

Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and on occasion, confuse the issue. This improper practice should stop.”

9. In the instant case, the Creditors contend that the Insolvency Petition does not fulfil the requirements of Section 32(2), 32(4) and 46(2) (c) of the [Insolvency Act](#).

10. The said Sections require the Debtor to furnish the court with certain information as a prerequisite to the hearing of the petition. The Sections stipulate as follows:-

“Section 32 (2) of the [Insolvency Act](#) No. 18 of 2015 states, 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.”

“Section 32 (4) of the [Insolvency Act](#) No. 18 of 2015 entails 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.”

“Section 46(2) (c) of the Insolvency Regulations 2016 states clearly that the debtor has to include particulars of the bankrupt’s debts including the manner in which it was incurred. Paragraph 21 of the debtor’s supporting affidavit lacks the manner in which the amount the debtor owes to the creditors was incurred apart



from NCBA Bank which clearly states it was a loan and this questions the accountability and transparency of the same.”

11. The question that the court has to grapple with is whether, even assuming for argument’s sake, that the Debtor did not provide the information required under the aforesaid Sections, this court can go ahead and strike out or dismiss the petition as suggested by the Creditors.
12. My finding is that, firstly; the issues raised by the Creditors are ideally contested facts that do not meet the test of pure points of law required in a Preliminary Objection as was stated in the Mukisa Biscuits case (supra). I say so because the points listed by the Creditors in the Preliminary Objection will require this court to go through the affidavit evidence presented by the Debtor to establish if he complied with the law and furnished the court with the particulars of his statements of accounts, list of Creditors and liabilities, if he published a newspaper advertisement of the petition among other requirements.
13. Secondly, even assuming that the Debtor did not comply with the requirements listed in the Preliminary Objection, which was also denied, I find such non-compliance would not automatically result in the dismissal of the petition since Section 16(2) of the *Insolvency Act* grants the court the power to stay the Insolvency proceedings to give room for compliance. (See *in Re James Maina Kabatha* [2020] eKLR.)
14. My further finding is that the instant petition meets the basic requirements of a petition as it was accompanied by supporting and verifying affidavit besides being certified as compliant by the Official Receiver.
15. For the above reasons, I find that the Preliminary Objection dated 7th June 2021 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Kiiru for Thuita for petitioner

Mr. Nziuku for creditors

Court Assistant- Sylvia

