



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**INSOLVENCY CAUSE NO. 10 OF 2018**

**ASHWIN SHAH.....APPLICANT/CREDITOR**

**-VERSUS-**

**MUKESH HARAKHCHAND BID.....RESPONDENT/DEBTOR**

**RULING**

1. This ruling is in respect to the application dated 10<sup>th</sup> December 2020 wherein the Applicant/Creditor seeks the following orders: -

**1. Spent.**

**2. That pursuant to the Ruling made by this Honorable court on 3<sup>rd</sup> December 2020 annulling the Bankruptcy Order made to the respondent on 2<sup>nd</sup> December 2019, this honourable court be pleased to issue warrants of attachment and sale to the applicant as against the respondent for the amount of Kshs 147,000,000 together with interest at court's rate owed to him by the respondent.**

**3. That this Honourable Court be pleased to grant an order directing the Officer Commanding Station (OCS) Nakuru Central Police Station and Kisumu Central Police Station to offer security to the Applicant when enforcing the warrants prayed for in this application.**

**4. That this Honourable Court be pleased to grant such orders as it may deem just and expedient in the circumstances.**

**5. That the costs of this application be in the cause.**

2. The Application is supported by the affidavit of the debt collector one **Festus M. Obare** and is premised on the grounds that: -

**1. That on 3<sup>rd</sup> December 2020 this Honourable Court made a Ruling on the Applicant's application dated 17<sup>th</sup> November 2020 annulling the Bankruptcy Order issued to the Respondent on 2<sup>nd</sup> December 2019.**

**2. That the Applicant intends to execute the orders extracted from the above stated Ruling in order to recover the loan amounts of Kshs 147,000,000/- given to the Respondent in various installments, however, the same was inordinately left out in the prayers sought in the application dated 17<sup>th</sup> November 2020.**

**3. That it has come to the Applicant's attention that the Respondent is disposing some of his assets and in a plan to run away from this honourable court's jurisdiction in a bid to curtail the Applicant's attempts to recover the loan amounts advanced to him.**

**4. That due to the urgency of the matter, the Applicant is apprehensive that the Respondent will dispose all his assets and/or run away from this Honourable court's jurisdiction before the Applicant obtains the necessary orders to recover his loan amount of Kshs 147,000,000/- from the Respondent.**

**5. That no prejudice will be occasioned to any party if the orders sought herein are granted.**

**6. That the interests of justice will be best served by granting the orders sought herein.**

3. The respondent did not file any response to the application and when the matter came up for mention on 17<sup>th</sup> December 2020, **Mr. Khisa**, learned counsel for the creditor urged the court to grant the orders sought.

4. I have perused the affidavit of service dated 16<sup>th</sup> December 2020 and I am satisfied that the Debtor was duly served with the application. I have carefully considered the prayers sought in the application and I note that it seeks orders for warrants to execute for specific sum of Kshs 147,000,000 together with interest even though there has been no judgment entered by any court for the said amount.

5. My humble view is that the mere fact that this court annulled the Bankruptcy Order issued to the Debtor on 2<sup>nd</sup> December 2019 does not automatically entitle a party claiming monies against the Debtor to obtain warrants of attachment especially where the alleged debts have not been established. My take is that the proper approach that the applicant ought to have adopted, upon the lifting of Bankruptcy Order, should have been to sue the Debtor for the claimed amount and to obtain a judgment for the same before seeking warrants of execution. Alternatively, the applicant could still institute a suit against the Debtor and apply for attachment before judgment under Order 39 Rule 5 of the Civil Procedure Rules citing his apprehension regarding the Debtor's intention to escape from the court's jurisdiction as has been alleged in the instant application.

6. In the circumstances of this case, I find that the applicant has jumped the gun by seeking warrants of attachment before obtaining a judgment or orders for attachment before judgment. For the above reasons, I find that the instant application is premature and misconceived. I therefore strike it out with no orders as to costs.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 14<sup>th</sup> day of January 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Khisa for the applicant.

Court Assistant: Sylvia.