



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

INSOLVENCY CAUSE 17/18 OF 2018

(MISC APP CASE 283 OF 2019)

IN THE MATTER OF PATRICK MAINA WANJAU DEBTOR

EQUITY BANK.....CREDITOR

FAMILY BANK.....CREDITOR

FAULU BANK.....CREDITOR

K-REP BANK.....CREDITOR

RULING

PETITION

The Debtor/Petitioner filed Bankruptcy Petition on 10th July 2018 and attached the statement of Affairs outlining assets, liabilities and their values.

The Petitioner deposed that the reasons for Insolvency were adverse legal action, excessive interest payments, inability to collect debts due, disputes, faulty work and bad debts, liabilities due to guarantees and excessive use of credit. The Petitioner also deposed that his businesses were subject to competition and harsh economic conditions which led to an increase in costs.

The Petitioner sought that Official Receiver be appointed as Trustee of his property in bankruptcy.

The Petitioner deposed/disclosed that he is defendant in Civil Suit **188 of 2018 & 481 of 2017** in Milimani Law Courts where his properties are sought to be sold to recover outstanding debts and is in fear of being committed to civil jail. The charged properties are on the verge of being auctioned

He was also charged in **Criminal Case 4222 of 2016** for issuance of a bad cheque.

The Petitioner tried to have the financial institutions reschedule the debts/loan repayments and he hit a dead end.

The Petitioner attributed the escalating debt to being outmuscled by larger franchises in the transport business in the taxi sector which came along and took control of the market and his business was pushed out. The Petitioner annexed all the loan facility documents to the Petition.

Therefore, in the interest of justice, he should be adjudged bankrupt.

REPLYING AFFIDAVIT

Family Bank, one of the Creditors, filed Replying Affidavit sworn by Mr Anthony Ouma of the bank, deposed that the Petitioner has come to Court with unclean hands and therefore he was not deserving of the remedies sought from Court.

The Petitioner' aim is to thwart the Creditor from realizing the security as per the Charge attached out of Petitioner's default in servicing the loan facility.

The Petitioner charged **LR NAIROBI BLOCK 105/7046 CAPITAL AREA NAIROBI** as per copy of charge attached. The Creditor's claim is the subject of **High Court Civil Case Number 481 of 2017- Patcab Ltd & Patrick Maina Wanjau Vs Family Bank Ltd & Leakey Auctioneers**. These proceedings are before a Court of competent jurisdiction and are pending and have not been stayed.

The Creditor annexed a copy of the Loan Account Statement to confirm that the Petitioner is truly indebted to the bank.

The Creditor deposed that the Petitioner initiated various legal proceedings in different Courts and none of them have ended the matter. This application is part of multiplicity of cases filed, a method used by a belligerent borrower.

By ruling of this Court of 5th February 2019, the Court granted the Petitioner in compliance with **Section 32 of the Insolvency Act 2015** to serve ALL Creditors and the Official Receiver to investigate the financial status of the Petitioner and file Report within 30 days.

The Petitioner by Supporting Affidavit of 27th February 2019 sought an opportunity from the Court to negotiate with Creditors which was granted.

The debtor prepared a Proposal to the Creditors for Voluntary Arrangement filed in Court on 1st April 2019.

The Official Receiver was to facilitate negotiations on the Petitioner's proposal on repayment of the debts outstanding. The creditors attended meetings called by the Official Receiver and the Creditors declined the Petitioner's Proposal.

The Official Receiver filed Report of 3rd September 2019 and 20th November 2019 that disclosed that assets were valued at Ksh 22,260,000/- against Liabilities of Ksh 55,490,000/-

On 10th February 2020, when the matter was for hearing inter partes, the parties failed to file pleadings and the matter had been mentioned severally, the Court granted orders of execution.

The Petitioner by certificate of urgency filed on 14th February 2020, sought setting aside of the Court's order of 10th February 2020 as the Petition for bankruptcy was not heard and determined and was pending thus execution could not proceed.

This Court set aside the orders of 10th February 2020 and parties were to file submissions to the Petition.

The petition is thus for consideration.

DETERMINATION

The issue for determination is whether the Petition for bankruptcy should or should not be granted.

The Petitioner submitted that he relied on **Section 32(1) of Insolvency Act** and **Section 17(3) (b) of Insolvency Act** the debtor has proved that he is unable to pay any of his debts and as such he should be declared bankrupt. The debtor gave a true and full inventory of his creditors and liabilities and assets.

The Petitioner/Applicant relied on ***In the matter of Stephen Nyaega Mose (2018) Eklr***, Hon J.A. Makau, warns of the abuse of bankruptcy law proceedings in the following words:

“Bankruptcy laws were never meant to protect people like the debtor herein, who are in debt because of their own act of fraud or professional misconduct; but are meant to protect genuine people who have unfortunately found themselves in debt out of innocent factors such as harsh business environment and unavoidable business calamities, but not fraudsters. 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”. I have no doubt to state that would be blatant abuse of the court process for a debtor to defraud members of the public and when judgment is issued against him, and ordered to pay his creditors, the court allows him to obtain bankruptcy order, so as to escape justice. That would be wrong for courts if they would allow themselves to be used to protect fraudsters from being forced to pay for their criminal acts by being issued with bankruptcy orders.”

Equity bank submitted that the Petitioner's debts outweigh the assets and maybe adjudged bankrupt and relied on the case of **High Court Civil Case Number 481 Of 2017- Patcab Ltd & Patrick Maina Wanjau Vs Family Bank Ltd & Leakey Auctioneers**; the Trial Court upheld the Bank's claim and right of statutory power of sale over the charged suit property. So, by the same analogy it relied on this decision to fortify its right of statutory power of sale with regard to charged suit property **LR Nairobi/Block 105/7047**.

However, the outstanding balance surpassed the value of the charged property and the Bank will become an unsecured Creditor for the balance thereof.

Family bank relied on the outcome of the case of **High Court Civil Case Number 481 of 2017- Patcab Ltd & Patrick Maina the Wanjau vs Family Bank Ltd & Leakey Auctioneers**;

Trial Court upheld the Bank's claim and right of statutory power of sale over the charged suit property. The bank as a secured Creditor has priority over the charged property; **LR NAIROBI BLOCK 105/7046 CAPITAL AREA NAIROBI** is beyond other Creditors unless there is a surplus.

This Court considered the Petitioner's Petition for bankruptcy brought under **Section 32 of Insolvency Act**. The Debtor has outlined the assets available for settlement of debts *vis a vis* the debt portfolio and the assets far outweigh the debts outstanding. The Petitioner attached the facility documents executed with Creditors. There are both secured Creditors and unsecured Creditors.

With regard Secured Creditors they are as follows;

- 1) Equity Bank charged suit property **LR Nairobi/Block 105/7047 for loan facility Ksh 7,232,000/- for business and Ksh 3,281,000/- development loan**. The loan facility documents/charges are duly executed by both parties and annexed to Debtor's petition.
- 2) Family Bank charged suit property **LR Nairobi Block 105/7046 Capital Area, Nairobi for loan facility 23,000,000/-**The Loan facility document and charge duly executed by both parties is annexed to Replying Affidavit.
- 3) The other Creditors failed to appear in Court or send representative(s), file pleadings and/or submissions, therefore this Court will not consider at this stage their claims.
- 4) For the Secured Creditors Equity & Family Bank, This Court concurs with submissions of the claims and proposal as evidenced by documents of their respective claims.

In **Re Hi-Plast Limited ML HC IP E001 & 19 of 2019 (Consolidated) [2019]eKLR** (*supra*), this Court observed and held as follows;

“Where the chargor fails to discharge the debt, the bank is forced to look to its security for repayment of the advance. The rights of the secured creditor are derived from the registered charge whose validity was/has not been contested. In the absence of the charger servicing the debt or exercising the right of redemption on completion of the loan repayment and there is discharge of charge; the secured creditor ranks in priority over the security/collateral beyond all other Creditors, be they 2nd Chargee/Mortgagee, Trade Creditors, Floating Charge holders Preferential Creditors and Unsecured Creditors etc.”

In the case of **Kenya National Capital Corporation Ltd vs Albert Mario Cordeiro & Anor [2014] eKLR** the Court of Appeal held;

“The Appellant by virtue of being a debenture holder ranked in priority to all other creditors claiming against the 2nd Respondent and this included 1st Respondent.....Subsequently, and in light of the privileged position of a secured creditor, this Court cannot interfere with the suit property by upholding the decision to grant specific performance against Appellant in favor of the 1st Respondent, an unsecured Creditor in this case.”

The Court went on to state that; -

“The rights of the Secured Creditor under the charge are intact. These rights are subject to the legal regime that regulates the processes of executing these rights. The secured Creditor is held accountable in the exercise of rights under the registered charge. In order to exercise statutory power of sale, the Secured Creditor does not require the Court's intervention. In the circumstances this Court cannot grant orders to impair the exercise such rights unless the Court's jurisdiction is triggered by procedural non-compliance of mandatory statutory provisions of relevant legislation or if the validity of the registered charge that confers priority rights is challenged.”

The parties duly executed charge documents and their validity has not been contested and Secured Creditors' rights accrue from the said charges. This Court shall say no more on Secured Creditors rights over charged suit properties in default of servicing loan/overdraft facilities by debtors except that;

The Court notes that the High Court in **High Court Civil Case Number 481 of 2017- Patcab Ltd & Patrick Maina the Wanjau Vs Family Bank Ltd & Leakey Auctioneers** upheld the Creditors right over the charged suit property.

This is a decision of a Court of equal competent and concurrent jurisdiction with this Court. Until and unless the Court order is successfully appealed against, set aside or varied, it remains a valid, regular and legal order of the Court and shall be enforced. This Court lacks Appellate jurisdiction to exercise over the order of the Court.

Section 23(1) Insolvency Act applies if an execution process has been issued by a Court other than the High Court. So, the part of declaring an individual bankrupt where execution has been ordered by the High Court, bankruptcy is not applicable. Where High Court orders against the Petitioner have been issued with regard to specific charge(s) as security to loan/credit facilities bankruptcy cannot apply with regard to the secured properties.

With regard to unsecured Creditors, the debtors was/is candid as to assets available to service/apportion to settle debts. The Debtors Proposal was not accepted. This Court finds that apart from secured Creditors attached properties, there is very little in terms of assets /revenue to settle outstanding debts. To the extent, the Petition is partly allowed and Official Receiver may take over the assets as trustee.

DISPOSITION

- 1. The Debtor's petition is partly upheld with regard to unsecured and other Creditors.**

2. The Official Receiver is hereby appointed Trustee over the remaining assets for payment, settlement and/or payment to Unsecured Creditors.

3. The Secured Creditors Equity and Family Banks Respectively shall be at liberty to exercise their right of statutory power of sale; according to the law, over the charged suit properties to settle outstanding debt by Debtor.

4. To the extent of Secured Creditors realizing their debts, the charged suit properties are available for settlement of debts; so there are assets to settle debts and the bankruptcy petition to that extent fails.

5. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH FEBRUARY 2021 (VIDEO CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

WAWERU KIHARA ADVOCATES FOR THE DEBTOR – N/A

MUCHEMI & CO. ADVOCATES FOR THE 1ST CREDITOR – N/A

MAINA & ONSARE PARTNERS ADVOCATES FOR 2ND CREDITOR -N/A

COURT ASSISTANT - TUPET