



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E159 OF 2019

CORAM: D. S. MAJANJA J.

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

JITESH DHIRAJAL MALDE (A DEBTOR)

JUDGMENT

Introduction and Background

1. The Petition dated 27th August 2019 was lodged by **JITESH DHIRAJAL MALDE SHAH** seeking a bankruptcy order against himself and his estate. It is supported by his affidavit sworn on 27th August 2019. The petition is accompanied by the Official Receiver's Certificate of Compliance dated 30th August 2019.
2. The Petition is also supported by Peterson Karimi Gakuru, the 5th Creditor, through his affidavit sworn on 24th November 2020. It is opposed by the 4th Creditor, Kamau Wanganga, through the Grounds of Opposition dated 27th February 2020 and by Tabitha Tatua and Erastus Tatua Gicheha, the 17th and 37th Creditors respectively through the Grounds of Opposition dated 12th November 2019
3. The Petitioner depones that he is the proprietor of *Vikat* Millers, a business involved in the milling of dry maize for *unga* or maize meal. He explains that the business has been experiencing difficulties and exponential loss of income leading to substantial debts owed to creditors who have taken him to court. He states that at the time of filing the petition his business was operating at a loss position and was on the verge of shutting down. The Petitioner urges the court to appoint a Trustee to manage his affairs and carry on his business including bringing or defending any legal proceedings by or against him and to apply to court to sell or otherwise deal with his property and business or assets.

The 5th Creditor's Reply

4. The 5th Creditor supported the petitioner. He deponed that the petitioner with his partner Bhavisha Murji Arjan Halai contracted him to supply dry maize. Under the agreement, he supplied 564 bags of dry maize in February 2018 and raised an invoice for payment dated 23rd February 2018 for Kshs. 1,629, 773.60 inclusive of transport costs.
5. The 5th Creditor states that the petitioner and his partner issued him with two cheques; No. 000410 dated 27th March 2018 for Kshs. 765,700.00 and No. 000411 dated 29th March 2018 for Kshs. 813,000.00 which were dishonoured and he was surcharged Kshs. 4,400.00 on the unpaid cheques. Thereafter, the Petitioner and his partner paid Kshs. 650,930.00 leaving a balance of Kshs. 978,843.00 together with Kshs. 4,400.00.
6. In order to enforce further payment, the 5th Creditor filed a complaint with the police leading to commencement of criminal proceedings against the petitioner; **Makadara Criminal Case Number 1134 of 2018** which case is still pending hearing and final determination. He also filed **Milimani CMCC No. 7002 OF 2018** seeking judgment for Kshs. 983,243.00 plus interest and costs. The court entered summary judgment against him and a decree was issued for Kshs. 1,024,620.02 together with costs in the sum of Kshs. 111,425.00 making a total of Kshs. 1,136,045.02. The 5th Creditor therefore states that it is false for the petitioner to claim in the petition that the amount in debt is Kshs. 952,843.00.
7. The 5th Creditor states that Petitioner filed an application seeking to settle the debt by monthly instalments of Kshs. 20,000.00 but the application was declined by the court. He made a further application to make a lump sum payment of Kshs. 300,000.00 out of the amount he

had deposited as cash bail in the **Makadara Criminal Case Number 1134 of 2018** and thereafter settle the balance in instalments of Kshs. 50,000.00 but the application was also dismissed.

8. The 5th Creditor claims that the Petitioner has concealed his assets therefore frustrating the auctioneers' efforts to recover the decretal sum

The 4th Creditor's Reply

9. The 4th Creditor opposes the petition on the grounds that the amount of Kshs. 262,710.00 stated by the Petitioner as the debt owing to him is incorrect and that the correct sum ought to be Kshs. 272,700.00. The 4th Creditor further states that the petition ought not to proceed without full and thorough investigations of the petitioner's financial dealings during and before the filing of the petition.

10. The 4th Creditor accuses the Petitioner of non-disclosure as he has not given his current financial position and operations as he is operating a similar business in Kitengela; that in **Milimani Commercial Court Civil Case No. 175 of 2019**, he has denied owing any money and; he has not disclosed all his assets, bank accounts and or businesses. The 4th Creditor contends that the petition is only meant and calculated to deny the creditors the fruits of their sweat and to insulate the Petitioner from paying his debts.

The 17th and 37th Creditors' Reply

11. The 17th and 37th Creditors are owed Kshs. 152,000.00 and Kshs. 650,000.00 respectively and oppose the petition on the ground that the petitioner and his partner, fraudulently changed the particulars of the *Vikat* Millers' partnership with the intention of defeating the creditors and that this change was effected sometime in August 2019 before the filing of the petition. The Creditors thus urged the petition not to proceed without full investigation of Bhavisha Murji Arjan Halai's statement of accounts.

Analysis and Determination

12. The main issue for determination is whether the petition for bankruptcy ought to be granted. As observed by Prof Ngugi J., ***In re James Maina Kabatha (Debtor/Applicant) NKR Insolvency Cause No. 4 of 2019 [2020] eKLR***, '*The twin goals of consumer or individual bankruptcy law are to protect creditors and ensure optimal payment to them where possible; and the provision of shelter and a "fresh start" to individual debtors overburdened by debt.*' The learned judge adds that:

3. The "fresh start" goal is accomplished through the bankruptcy discharge, which usually releases the debtor from personal liability from certain debts and prevents creditors from taking any action against the debtor to collect those debts.

4. Consequently, bankruptcy protection being an extraordinary relief, one of the corollaries to these seemingly conflictual twin goals of bankruptcy law – the protection of creditors and the provision of fresh start for the honest but unfortunate debtor -- is that an individual seeking bankruptcy protection is required to scrupulously demonstrate that he is acting in good faith and disclose all his financial information.

5. It is only upon meeting this double threshold – demonstration of good faith and full disclosure of all financial information – that a Petitioner can become entitled to a bankruptcy order. The architecture and structure of the Insolvency Act and Insolvency Regulations, 2018 reinforce these double threshold for individual Petitioners.

13. The 17th and 37th Creditors' opposition to the petition is based on fraud on the part of the petitioner and his partner with the intention to defeating the creditors. However, this has not been demonstrated by evidence and remains an allegation. The same can be said of the 4th Creditor's opposition to the petition on the ground of non-disclosure. I am satisfied that the petitioner has made sufficient disclosure in the circumstances. He has given an inventory of his assets and liabilities as per his Statement of Affairs annexed to the petition and without any other evidence I am unable to conclude that he has not made full disclosure. In fact, the 5th Creditor, who has a judgment against the Petitioner in his favour, has been able to demonstrate that despite all efforts to execute the decree, the petitioner had been unable to satisfy the debt.

14. In my view and on the basis of the evidence, I find that there is sufficient evidence that the Petitioner is unable to pay his debts. As stated before, it is trite that in order for a debtor to be shielded through a bankruptcy order, the petition must be made in good faith and there should be no material nondisclosure (see ***Ngei v Official Receiver NRB Civil Appeals Nos 51 of 1981 & 3 of 1982 [1982] KLR***). I do not find any reason to conclude that there has been material non-disclosure.

15. Under **section 32(1)** of the ***Insolvency Act, 2015***, a debtor is entitled to apply to be adjudged bankrupt on the grounds that he or she is unable to pay his or her debts. I have considered the statement of affairs filed by the Debtor and it shows that the only assets he has are his personal effects worth **Kshs. 7,000.00** while the aggregate debt due to the creditors is **Kshs. 19,520,613.28** and which includes judgments against him.

Conclusion and Disposition

16. From the totality of the evidence, I am satisfied that the Debtor is unable to pay his debts. I do not find any compelling reason to deny the order of bankruptcy against the Petitioner. I allow the Petition dated 27th August 2019 by making the following orders:

(a) **JITESH DHIRAJILAL MALDE SHAH** be and is hereby adjudged bankrupt and a bankruptcy order is made against his estate.

(b) The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed to be the Bankruptcy Trustee in respect of the Debtor's Property.

(c) Cost of the petition shall be borne out of the Debtor's estate.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **MARCH** 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Kalande instructed by Mungai Kalande and Company Advocates for the Petitioner/Debtor.