REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALITY DIVISION

THE INSOLVENCY ACT

IN INSOLVENCY CAUSE NO. 9 OF 2017

IN THE MATTER OF

JAMES KIMANTHI MBALUKA ....DEBTOR/APPLICANT

VERSUS

HON. RACHEL KAKI NYAMAI............. CREDITOR/RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated **30th June 2020** by which **JAMES KIMANTHI MBALUKA** (the Debtor/Applicant) seeks the following orders:-

> **1. SPENT**
>
> **2. THAT pending the hearing and determination of this application inter parties this Honourable Court be pleased to order the official Receiver having not advertised not to advertise the bankruptcy order and/or further execution of the adjudication order as per the decree dated 26th May 2020.**
>
> **3. THAT the Adjudication of Bankruptcy Order dated 28th February 2020 be annulled.**
>
> **4. THAT additionally and/or in the alternative, the Honourable Court be pleaded to order that the bankruptcy application should be reheard as if no bankruptcy order has been made.**
>
> **5. THAT there be no order as to costs.**

(2) The application was premised upon **Article 48** of the **Constitution of Kenya Section 272 and 274** of the **Insolvency Act 2015** and was supported by the Affidavit of even date sworn by the Applicant.

(3) The Creditor / Respondent **HON. RACHEL KAKI NYAMAI** did not file any Reply to the Motion. The application was canvassed by way of written submissions. The Applicant filed written submissions dated **17th August 2020** whilst the Creditor / Respondent relied on the written submissions dated **10th September 2020.**

BACKGROUND

(4) This application arises from a Ruling of this Court delivered on **28th February 2020**. In that Ruling the Court allowed the application dated **16th August 2017** filed by the Respondent and adjudged the Applicant Bankrupt and appointed the Official Receiver as Bankruptcy Trustee.

(5) The Applicant avers that the proceedings which resulted in his being adjudged bankrupt were conducted in his absence and that he had no knowledge of the said proceedings. The Applicant submits that no hearing notice was served upon his Advocate or himself and submitted that the Affidavit of Service filed in Court was defective as it was neither dated nor signed rendering the same of no legal effect.

(6) The Applicant deponed that he only came to learn of the matter through an article in the Standard Newspaper of **26th June 2020**. That

his Advocate did not inform him of the hearing date for the application and as such he was denied the right to be heard before the Court reached its decision. The Applicant goes on to dispute the debt being claimed by the Respondent. He states that he is a businessman of means and pleads that he stands to suffer irreparable loss and damage if the orders sought are not granted.

(7) On her part the Respondent submits that the Court ought to evaluate the conduct of the Debtor before deciding to exercise its discretion in her favour. It was submitted that the Applicant was fully aware of the Bankruptcy proceedings that his Advocate had attended Court over the matter severally and that the Applicant had even made proposals on how to clear the debt (which proposals he did not adhere to). That was not enough for the Applicant to blame his Advocate as the case belonged to him.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the application before me as well the written submissions filed by both parties. This is an application to set aside an Ex Parte Judgment. Under **Order 10 rule 11** of the **Civil Procedure Rules**, the general principle is that the Court has unfettered discretion to set aside an Ex parte Judgment on such terms as it deems fit and just. This principle was summarized as follows in **SHAH –VS- MBOGO AND ANOTHER [1967]E.A 116**:

> **"The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."**

(9) More recently the Court of Appeal in **RICHARD NCHAPAI LEIYANGU –VS- IEBC & 2 OTHERS CA CIVIL APPEAL No. 18 OF 2013 [2013]eKLR** stated as follows:-

> **"We agree with the noble principles which go further to establish that the Courts' discretion to set aside ex-parte Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."**

(10) The Applicant submits that the Affidavit of Service filed in Court on **11th March 2019** which was served on his Advocate was neither signed nor dated rendering the same of no legal value as it did not comply with the **Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya**. I have perused the said Affidavit of Service and note that indeed it was neither dated nor signed. However there has been no denial that service of Hearing Notice was indeed effected upon Counsel for the Applicant. The Hearing Notice dated **18th February 2019** bears the stamp of **K. K. Njenga & Associates** the firm who were at the time on record for the Applicant. That stamp has not been denied. The Hearing Notice was received by the Law firm on **20th February 2019** a full **two (2)** months **before** the hearing date of **2nd April 2019**. As such I find that the applicant was properly notified through his Advocate on record of the upcoming hearing. The defect in the Affidavit of Service does not negate the fact that the Hearing Notice was served upon and receipt of said Hearing Notice was acknowledged by the Advocates on record for the Applicant.

(11) The Applicant further submits that his failure to attend Court for the hearing on **2nd April 2019** was not deliberate but rather was occasioned by the failure of his Advocate to notify him of the hearing date. That he should not be penalized for mistakes of Counsel. However it is trite that the suit belongs to the Litigant (the Applicant herein) and not to the Advocate. The Applicant as the Litigant has the obligation to defend the suit against him and to follow upon the progress of the case. In **SAVINGS & LOAN –VS- SUSAN WANJIRU MURITU NAIROBI HCCC 397 OF 2002** it was held:-

> **"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant." [emphasis added]**

(12) The Applicant as a diligent litigant ought to have been continually checking with his Advocate to know the progress of his case. It is not enough for the Applicant to place the entire blame upon his Advocate (who in any event had notice of the hearing date) without demonstrating what steps he himself took to determine the progress / status of his case.

(13) The record clearly indicates that the Applicant's Advocate severally attended Court in respect of this matter. Similarly it is evident from the record that the Applicant engaged the Creditor / Respondent in negotiations with a view to settling the outstanding debt. To now deny the debt is an afterthought. Thus I am satisfied that both the Applicant and his lawyer were fully aware of the pendency of this matter and their lack of vigilance in pursuing the same cannot be excused.

(14) Judgment in this matter was delivered in favour of the Creditor. The Applicant was fully aware of the Judgment and Decree. It is not enough to deny the debt now. There is no evidence that the Applicant appealed the decision of the lower Court nor has the Applicant sought to set aside the Statutory Demand. The Creditor is entitled to the fruits of her Judgment. To allow this application will merely take the matter back to square one and engage the Court in adjudicating upon a debt which has already been admitted. **Section 46** of the **Insolvency Act** provides that:-

“46. A bankruptcy order becomes binding on the bankrupt and all other persons-

(a) On the expiry of the time within which an appeal may be lodged against the order.

(b) ….”

(15) Therefore given that to date no Appeal has been lodged the orders issued by this Court on **28th February 2020** have already come into effect.

(16) All in all I am not inclined to exercise my discretion in favour of the Applicant. I find no merit in the present application. The same is dismissed in its entirety and costs are awarded to the Creditor / Respondent.

DATED IN NAIROBI THIS 21ST DAY OF MAY, 2021.

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MAUREEN A. ODERO

JUDGE