



**Rajan v Samuel Nginyo t/a Sams Meat Supplies (Insolvency Cause E012 of 2019)
[2021] KEHC 173 (KLR) (Commercial and Tax) (28 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E012 OF 2019
WA OKWANY, J
OCTOBER 28, 2021**

BETWEEN

MUBINA KARIM RAJAN APPLICANT

AND

SAMUEL NGINYO T/A SAMS MEAT SUPPLIES RESPONDENT

JUDGMENT

1. Through a bankruptcy Petition filed on 5th August 2019 the Petitioner herein, Mubina Karim Rajan, moved this court seeking to be declared bankrupt. The Petition is supported by the affidavit sworn on 2nd August 2019 wherein the Petitioner avers that she is unable to settle the debts that accrued from the business operated by her late husband, Karim Rajan who died in February 2019.
2. The Petitioner explains that a decree was passed against her late husband's business in Highridge Butchery Limited in CMCC 940B of 2015 Samuel Nginyo T/A Sam's Meat Supplies vs Highridge Butchery Ltd, Karim Rajan (hereinafter "the Lower Court Case") wherein orders were made lifting the corporate veil thereby making her liable for the said debt.
3. She further states that a warrant of arrest has been issued against her in the lower court case and that she is also indebted to other creditors to the tune of Kshs 9,195,019.82. She further avers that she is unemployed at the moment and is therefore unable to meet her financial obligation.
4. The Petitioner also filed an application dated 29th August 2019 seeking an interim order to stay of all further proceedings in the lower court case pending the hearing and determination of this petition.
5. On 30th August 2019, this court, differently constituted, granted the interim orders of stay of proceedings before the lower court pending the inter partes hearing of the application.



6. The respondent/creditor herein, Mr. Samuel Nginyo, opposed the petition and the application through the replying affidavit sworn on 19th September 2019 and 25th October 2019 respectively.
7. In opposition to the petition he states as follows: -
 1. That the Debtor is not insolvent as she alleges and what she has presented to this Honourable court are mainly lies.
 2. That the Debtor was a director of the company sued in Chief Magistrate's Civil Suit No. 940 of 2015 and after they wantonly sold proclaimed goods after judgment had been issued by the lower court in 2017, the Honourable Magistrate E.A. Nyaloti issued an order for lifting of the veil of the company and held the directors personally liable to satisfy the decree of the court in 2017, which is less than three years to the time she filed her Insolvency Petition. Attached herein and marked SN-1 is a copy of the proclaimed goods.
 3. That this therefore means that the Debtor has had assets which should have been reflected in her statement of affairs.
 4. That at all materials times in the lower court when execution proceedings were ongoing, the debtor did not indicate to court even when cross examined by the court that she was insolvent. She instead told the court that she was willing to pay the debt and required to be given time. I request this honourable court to order and peruse the lower court file and confirm the same.
 5. That the Debtor is able to meet her financial obligations for she has been working and well off and filing of the petition was a move meant to shield her from honouring court's judgment.
 6. That the Debtor benefitted immensely in tune of millions of shillings from the supplies I made to their business which has cost millions of shillings and it's only fair that she pays or makes a proposal to pay debt incurred.
 7. That the Debtor is a person of means and even at one point in court she requested to pay by issuance of post-dated cheque but her advocate refused.
 8. That it means she is able to pay and as she constantly was advised by her advocate that Chief Magistrate's Civil Suit No. 940B of 2015 (execution) was a war which he was ready to fight and win clearly means that the debtor and her advocate are willing to do everything possible to evade payment which they clearly have shown by filing this petition and lying to this honourable court that she is insolvent.
 9. That the Debtor up to today still drives and operated motor vehicle Toyota Hilux KBB 828T double cabin which vehicle I very well know it belongs to her and the late co-director and which she and the late co-director used for business and which vehicle the late co-director drove to court several times and which she has been driven to court with. She has said nothing about that to court.
 10. That as supplier who incurred loss in my business by dint of the debtor and the co-director not paying for my supplies yet they made profits from them, it's only fair and just that the debtor be made to pay and not being given a blanket leave not to pay.



11. That the Debtor's statement of affairs is false meant to hoodwink this honourable court in thinking she is unable to pay when she is in a position.
12. That I am advised by my advocates on record that a statement of affairs is supposed to indicate assets disposed of in the last three years which statement if truthfully done would reflect the assets disposed of by the debtor with the late co-director in 2017 when a proclamation for sale had been done. Therefore, the statement of affairs presented to this honourable court is false.
13. That in August 2017 after a stay of execution in the said civil suit Chief Magistrate's Civil Suit No. 940B of 2015 was granted, the Debtor wantonly sold off the proclaimed goods capable of satisfying the said judgment and vandalized the place to defeat justice. This clearly shows that the Debtor should not be protected by any court from meeting her financial obligations.
14. That further, the debtor was employed as at the time of filing her petition but she outrightly lied. That as of September she was working at an office in Parklands and even one time when the court bailiffs were effecting arrest found her working as she herself confirmed to the lower court after her arrest. I urge this Honourable court to refer the lower court proceedings.
15. That further, going by the market value of houses around Parklands and Highridge, the value of the house the Debtor has owned all along can satisfy the decretal amount awarded in Chief Magistrate's Civil Suit No. 940 of 2015.
16. That the debtor and co-director operated business accounts which she has not presented to this honourable court.
17. That the Debtor has not tabled her assets for the last three years as required by the law nor was there any proposed supervisor from whom I could establish the veracity of the debtor's petition or arrangement.
18. That the Debtor alongside the late co-director did not account for the monies collected in their business up until they disposed of it to prove her allegation that there was any decline of profits if any, which is denied.
19. That the Debtor signed for all supplies and jointly operated their business with the late co-director and she wholly participated in the disposal of the assets, disposal of their business and should therefore not be given refuge not to pay her debts.
20. That in February 2018 when a threat for committal to civil jail was eminent, payment of Kshs 500,000 was done. In July when committal to civil jail for the debtor herein was eminent, she was ready to issue a cheque but her advocate declined.
21. That the debtor does not come to court with clean hands as per the dictates of equity.
22. That the Debtor/Applicant filed this petition in bid to evade honouring a judgment of the court in Chief Magistrate's Civil Suit No. 940 of 2015 yet she has capacity to pay.



8. Parties canvassed both the petition and the application by way of written submissions which I have considered.
9. When the matter came up for hearing on 17th March 2021, parties agreed to shelve the hearing of the application and urged the court to give a verdict on the main petition.
10. The main issue for determination is whether the petitioner has made out a case for this court to adjudge her bankrupt.
11. From the pleadings filed by the parties herein, it is clear that the instant petition has been filed as a reaction to the execution proceedings initiated by the Creditor against the Debtor pursuant to the decree issued in the lower court case. It is also clear that the said execution process had been ongoing for quite a long time as shown in a proclamation dated 17th October 2016 marked as annexure SN-1 to the respondents replying affidavit.
12. It was not disputed the petitioner made numerous but unfulfilled promises to settle the decretal prior to the initiation of execution proceedings before the Lower Court. The respondent argued that the instant petition is not merited as its sole intention is to evade the execution process that had been initiated against the Petitioner in respect of the decree before the lower court which decree the debtor had fully acknowledged.
13. My finding is that the Petitioner has not made out a case for the granting of the orders sought in the Petition. The history of this case and the proceedings that took place before the Lower Court, which resulted in the lifting of the corporate veil and the finding that the Petitioner is liable to settle the court's decree, lends credence to the respondent's position that these proceedings are a last ditch attempt by a judgment debtor to avoid settling the court's decree. The Creditor has shown that the Petitioner has regular income from somewhere as she was able to issue cheques but he has no intention of repaying the debts. The court can only adjudge a debtor bankrupt if there is demonstrated inability to pay.
14. In this petition, I am convinced of Petitioner's ability to pay. I am convinced that the Petition was filed to evade paying just debts that are due.
15. For the above reasons, I find that this Petition is not merited and I therefore dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 28TH DAY OF OCTOBER 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 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Kagoi for Njanja for the Respondent/Creditor

No appearance for petitioner.

Court Assistant: Margaret.

