



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

IN THE MATTER OF INSOLVENCY ACT NO. 18 OF 2015

INSOLVENCY CAUSE NO. 15 OF 2018

IN THE MATTER OF RACHAEL WANGUI WACHIRA (DEBTOR)

RACHAEL WANGUI WACHIRA.....PETITIONER/RESPONDENT

VERSUS

JOHN CHEGE NJUGUNA & 92 OTHERS AS PER NAIROBI

COMM NO. 280 OF 2016.....CREDITORS/APPLICANTS

RULING

1. The subject application herein is a notice of motion application dated 4th March 2019, seeking for orders that the Honourable court be pleased to strike out the cause and/or irregular proceedings and the costs of this application and proceedings be borne by the Petitioner.
2. The application is brought under the provisions of Article 165 of the Constitution, 2010, Rules 10, 15 and 18 of the Insolvency Regulations of 2016 and Section 2,3 and 16 of the Insolvency Act, 2015. The Applicant is relying on the grounds on the face of the application and the affidavit sworn by John Chege Njuguna.
3. The Applicant avers that, there is no bankruptcy petition before the court for determination and therefore all the proceedings herein are irregular, incompetent and fatally defective. That the same have been filed for extraneous purposes and should be struck out. Further the instant cause and irregular proceedings have been brought in bad faith are frivolous, vexatious and an abuse of the court process and is intended to evade the creditors in the case HCCC NO. 280 of 2016, for a sum of Kshs. 311,727,195.00.
4. The Respondent was fully served with the application but did not oppose the same. Therefore, the application is deemed unopposed. Even then, I have considered the application in the light of the documents filed in this matter and I find that on 6th July 2010, the petitioner; Rachael Wangui Wachira filed a notice of motion dated 5th July 2018, under a certificate of urgency seeking for orders to stay the proceedings in the case HCCC No. 280 of 2016, and that a bankruptcy order be made against her in respect of her estate and she be adjudged bankrupt. She argued that she is already in civil jail and that she is a civil servant, working as a teacher with two young children aged 11 and 12 years to take care of, yet the debt stands at Kshs. 241.7.
5. On 17th August 2018, she filed a similar application 16th July 2010. That is thus a duplicate of the application dated 6th July 2010. Therefore the court ordered that the 2nd application be struck out for being an abuse of the court process. It is also noteworthy that, this 2nd application was filed by a firm of; Ahmed Mberere before filing a notice of appointment on 30th August 2018.
6. Subsequently the remaining application referred to herein was disposed of when the court ordered that, it be dispensed with and the main petition be fixed for hearing. The matter was stood over to 22nd January 2019 and then 27th February 2019.
7. I have considered the documents filed herein and I find that there is on record a document being Form No. 10, filed pursuant to Rule 18(1) of the "Insolvency Rules" and filed as "Debtors Petition" and signed by the Petitioner. In my considered opinion, it constitutes a proper petition. I equally note another document Form 11 filed pursuant to Rule 19(2) and 22(1), showing the statement of affairs of the individual person or bankruptcy and/or debtor. This too is valid. Finally there is a certificate of compliance issued by the Official Receiver dated 6th July 2018 on the record.

8. However, it is not clear whether these documents were ever served upon the Respondent as there is no affidavit of service on record. Be that as it were, the Respondent is now on record. Presumably then, they were served with these documents as they allude to the same by stating that they constitute “the irregular proceedings and be struck out.”

9. In conclusion, I find that although the Petitioner has not opposed this subject application, based on the grounds relied on for the alleged proceedings to be struck out as stated in the supporting affidavit of John Chege Njuguna at paragraph 7 and 8 that are not accurate. The said paragraphs state:-

(7) “on 27th February 2019, the matter came up to progress on filing the Petition and again the Petitioner had not bothered to comply and file the bankruptcy petition despite extensions of time to comply.”

(8) That to date, the Petitioner herein has never served us or our advocate on record with any bankruptcy petition as directed by court on 3rd December 2018.” (emphasis added).

10. He further states that, the cause is premature as the Petitioner has not considered other bankruptcy alternatives as required by Insolvency Act. This can only be an issue for trial. Having found there is a valid petition, the application on that ground. If it is for other grounds, evidence is required to prove the same. If it is for delay in prosecuting the petition, the application does not show the same as no provisions of the Civil Procedure Rules of the law for striking out the petition are invoked.

11. In that case, I order the petition be fixed for hearing and/or the court be properly moved for dismissal thereof for want of prosecution and/or striking out of the same. The application is thus dismissed with no orders as to costs.

12. It is so ordered.

Dated, delivered and signed in an open court this 28th day of January 2020

G.L. NZIOKA

JUDGE

In the presence of:

No appearance for the Petitioner/Respondent

No appearance for the Creditors/Applicants

Dennis -----Court Assistant