REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO.15 OF 2016

HON. ROBINSON NJERU GITHAE..APPLICANT/DEBTOR

VERSUS

MAE PROPERTIES LIMITED..RESPONDENT/CREDITOR

RULING

1. This ruling is in respect to the Applicant/Debtor's application dated 11th March 2020 wherein he seeks orders that:

> ***A. Spent***
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> ***B. That the ruling delivered on the 27th of February 2020 by the Honourable Lady Justice W. A. Okwany dismissing the Debtor's application dated 30th December 2016 for non-attendance and; allowing the Creditor's petition dated 27th February 2017 be reviewed and set aside, and that the said application be heard and determined on merit.***
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> ***C. That the bankruptcy order made against the Debtor be set aside.***
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> ***D. That costs of this application be provided.***

2. The application is supported by the Debtor's advocates affidavit dated 11th March 2020 and a further affidavit filed on 22nd May 2020. It is premised in the grounds that:

> ***1. That this matter arose from a consent judgment entered between the Debtor and the Creditor per the decree dated 30th of September 2014 with a mutual understanding that the creditor shall afford time to the debtor to pay the decretal sum.***
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> ***2. That the debtor has settled a total of Kshs 6,881,000 which amounts however has not been credited in the bankruptcy proceedings before this honorable court, but which amount has been acknowledged in the correspondence between the creditor's advocates and debtor's advocates as demonstrated in the affidavit of Francis Njanja who has been Debtor's advocate as annexure 'FN2, and the balance owing is not the Kshs 40,000,000 shown on the petition.***
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> ***3. That the debtor has all along informed the creditor that the balance owing will be paid up upon liquidation some assets of the debtor through sale of properties and which assets are well-known to the creditor as can be verified in paragraph one of the Creditor's petition.***
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> ***4. That this being a case where the debtor has known assets that are valued high above the remaining decretal sum, this case is in law not a proper case for bankruptcy proceedings because it is less costly to execute any decretal sum by way of attachment of the debtor's known assets than going through an expensive and tedious bankruptcy process.***
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> ***5. That it is the law that bankruptcy proceedings should be used as a last resort where a debtor has no known valuable assets.***
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> ***6. That when the creditor issued a Statutory Demand Notice to the debtor, the debtor filed an application to set aside the said notice per the debtor's application dated 30th of December 2016 as can be verified from the Court Record.***

7. That the objection to the statutory demand notice was on the basis that this was not a proper case of bankruptcy proceedings because the debtor had known valuable assets that the creditor was fully aware of, the creditor having been the former employer of the debtor.

8. That the debtor also filed a creditor's petition dated 27th February 2017.

9. That the two applications, one by the debtor and the other by creditor as aforesaid came for the directions before the court and the court directed that procedurally, the application by the debtor seeking to set aside the Statutory Demand Notice should be heard first because it was seeking to forestall the creditor's petition.

10. That the court further directed that once the Debtor's application is heard and determined, the creditor's application would then be heard and determined.

11. That further the Debtor's advocate informed the court that there had been deliberations on how to settle the claim and the court encouraged the parties to find a way of settling the same, and possibly come to record a settlement consent.

12. That on the 20th November 2019, the Debtor's advocates requested for a further 30 days within which they were confident that the matter would have been settled because the debtor was raising monies through a property sale which was being done through his advocate, Francis Njanja since the Debtor is a Diplomat based at Vienna, Austria.

13. That as of that date there was a property sale transaction going on and the debtor's advocates were optimistic that the sale proceeds would have come through in 30 days and the outstanding balance be paid off.

14. That the honourable court then set the hearing date for the application for the Debtor as 27th of January 2020 as per the court record. However, the counsel representing the debtor in court that day, Ms. Kiteng'e entered in her diary the hearing date as the 27th February 2020, instead of 27th January 2020 as is demonstrated by a copy of the Debtor's advocate's Diary in the affidavit of Francis Njanja advocate.

15. That consequently the debtor's advocates did not appear in court in the 27th of January 2020 which was the actual hearing dated as per the Court's Diary and only appeared in court on the 27th of February 2020 by which date the case was not listed in the daily cause list stated that Lady Justice W. A. Okwany was not sitting and that she was away on official duties, and further that all matters that were to cone before her ladyship were to be mentioned on Monday the 2nd of March 2020 for the new dates.

16. That on 2nd of March 2020, the Debtor's advocates went to the Court Registry to get a new hearing date for the case, only to be informed by the Judge's Court Assistant, Sylvia that the case came for hearing a month ago and that there was even a judgment delivered on the matter dismissing the debtor's application for non-attendance.

17. That the debtor's advocates were shown the court file and true to what had been said there was a ruling dated 27th February 2020, by the Lady Justice Honourable W. A. Okwany dismissing the Debtor's case, and granting the Creditor's case.

18. That this was baffling because the debtor's advocates had mistakenly, by human error, diarized the hearing date as 27th of February 2020, instead of 27th January 2020.

19. That further it was surprising that the ruling was delivered on the 27th of February 2020, yet the cause list stated that the honourable Lady Justice W. A. Okwany was not sitting that day.

20. That the ruling delivered by this honourable court is this one that has been made without hearing the debtor, not because of willful refusal by the debtor or his advocates to attend court but because of the counsel's human error of misdiarizing the hearing date, and putting the wrong hearing date.

21. That because of that human error the debtor's application was dismissed and more profound, the creditor's application was allowed unopposed.

22. That it had been the discretion of the trial court that the Creditor' case was to be heard after the debtor's case, and thus, with the absence of the Debtor's advocates the creditor's case went in unopposed.

23. That this is a serious case of bankruptcy which deserves to be heard and determined on the technicality that one party was not in court through the operation of a human error.

24. That the consequences of that human error is profound in that condemns the debtor into bankruptcy and thus literally destroy the life of a man.

25. That a bankruptcy order is commended where a debtor's financial situation is so dire, and the debtor has no valuable assets, that only a bankruptcy order can suffice. This is not the situation in this case since the debtor has known valuable assets, and has been paying the debt.

26. That nowhere in the creditor's petition have they demonstrated the debtor's financial position for the last three years or at all, which facts are necessary to be shown to the court to enable the court gauge the financial viability of a debtor.

27. That further the actual balance owing from the debtor is not Kshs 40,000,000 as alleged in the petition, because the Kshs 6,881,000 has not been credited.

28. That these facts would have been brought forth in a proper hearing if the debtor was given a chance to be heard if the debtor's counsel had not diarized the wrong hearing date.

29. That these are issues that were to be canvassed by the debtor but which however was not the case because on the hearing date of the matter, the debtor and his counsel were absent, not by willful refusal but by error.

30. That it will be unjust to punish and condemn the debtor on the counsel's mistake.

31. That the debtor's counsel deeply regrets the error and pleads with the honorable court not to condemn debtor on account of the counsel's mistake.

32. That the debtor has valuable assets as mentioned hereinabove, and has been liquidating the same to pay up the decretal sum herein and has, severally made offer to the debtor to take one of those properties in lieu of the debt, and which offer the creditor declined.

33. That it is met and just to have the debtor's application heard on merit and thereafter have the creditor's application also heard on merit.

34. That the case herein having being partly settled is in law and equity not a proper case for bankruptcy proceedings because nothing had been demonstrated by the creditor to the required standard that the debtor had been unable to meet his financial obligation as to necessitate such a draconian measure as a bankruptcy order.

35. That the debtor has liquidatable assets known as the creditor as a former employer of the debtor, and thus the debt herein has cheaper ways of being recovered other than the expensive and lengthy recovery by bankruptcy.

3. The respondent/creditor opposed the application through the replying affidavit of Gladys Mwema sworn on 12th May 2020 wherein it is averred that the applicant does not deserve the granting of the orders sought herein as he has not disclosed his assets thus implying that he has no known assets. She further states that the applicant has not filed any response to the petition 3 years after it was filed and neither has the applicant fulfilled an undertaking that it made on 30th October 2017 to settle the balance of the decretal sum.

4. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the Debtor is entitled to the orders to set aside the impugned orders of 27th February 2020 and to have the Insolvency Cause heard on its merits. The Debtor provided several reasons for seeking the set aside of the impugned but I find that the most relevant reason, for the purposes of this application, is that the Debtor was condemned unheard as his advocate did not attend court on 27th January 2020 when the matter was fixed for hearing due to the fact that the hearing date was misdiarized to read 27th February 2020. In support of this position, the Debtor's advocate attached their diary to the supporting affidavit as annexure FN3. It was the applicant's case that the mistakes of his advocate should not be visited on him as the said mistake was in any event, not deliberate but was due to human error.

5. To further fortify their position, the Debtor's advocate averred that he indeed attended court on the mediatized date being 27th February 2020 only to learn that hearing of matter had proceeded in their absence thus prompting him to file the present application.

6. The decision whether or not to set aside orders is in the discretion of the Court and like any other judicial discretion, must be exercised upon reason and not capriciously of spitefully. In ***CMC Holdings Limited v Nzioki*** [2004] 1 KLR 173 it was held that:

> ***"That discretion must be exercised upon reasons and must be exercised judiciously...... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate."***

7. Courts have taken the position that the mistakes of an advocate should not be visited on their client. The question that arises is whether the Debtor has offered sufficient reason to persuade this Court to exercise its discretion in his favour. It is true that where the justice of the Case mandates, mistakes of Advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. In the Case of ***Lucy Bosire v Kehancha Div. Land dispute Tribunal & 2 Others*** [2013] eKLR Odunga J held as follows: -

> ***"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74."***

8. I have perused the court proceedings from 11th April 2017 when the parties first appeared in court and I note that at no time did the Debtor's advocate fail to attend court when the matter was scheduled for hearing or mention save for 27th January 2020 when the matter proceeded in their absence. I have also perused the Debtor's advocate diary attached as annexure FN3 and I note that indeed the hearing date was diarized as 27th February instead of 27th January 2020.

9. Going by the Debtor's advocates previous diligence in attending court whenever the matter was listed for hearing, I am satisfied that the Debtor's explanation for failure to attend court on 27th January 2020 is plausible and that such failure was due to human error in making the entry of the hearing date in the diary.

10. It did however escape the attention of the court that the Debtor has repeatedly indicated that he is ready able and willing to settle the decretal sum in dispute. I note that on 20th November, 2019, the Debtor's counsel on record sought an adjournment for 30 days to enable the Debtor settle the decretal sum. Indeed, the Debtor has in this application categorical stated that it has liquidatable assets that can adequately settle the debt in question. This court is of the humble view that in order to balance the scales of justice, it will just and fair to direct that the applicant herein to indicate to this court, within 2 weeks from this ruling, the definite manner in which it intends to settle the debt so as to bring this long standing dispute to an end.

11. In the circumstances of this case, I am satisfied that the application to set aside the orders of 27th February 2020 is merited and I therefore allow it with orders that the Creditor will be paid thrown away costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 18th day of June 2020 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:

Mr. Njanja for the applicant.

Mr. Kahura for the respondent

Court Assistant: Sylvia