



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

IN THE MATTER OF THE INSOLVENCY ACT 2015

RE: IN THE MATTER OF HON. SAMWEL KAZUNGU KAMBI

THE INSOLVENCY CAUSE NO. 3 OF 2020

CORAM: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocates for the Judgment Debtor

Gicharu Kimani Advocates for the Creditor

RULING

On 18.6.2020 the petitioner **Erastus Gicharu Kimani** filed a bankruptcy petition against **Samwel Kazungu Kambi** accompanied a statement of affidavit showing the indebtedness of the claim totaling to Kshs.809,595/=.

Background

The creditor in his affidavit avers that the debtor was his client in an election petition in which he was retained to provide professional legal services. He further avers that the bill of costs was taxed by the Deputy Registrar and a Certificate of Costs dated 14.2.2020 for Kshs.1,404,595/= issued against the debtor. It followed that the debtor issued cheques towards settlement of the debt with one cheque of Kshs.300,000/= dated 30.4.2020 returned unpaid.

According to the petitioner, despite the debtor being given an opportunity to settle the balance of the debt he continues to neglect any payment rendering the current application under the Insolvency Act. The debtor, **Mr. Kazungu Kambi** on his part opposed the application vide a replying affidavit filed in Court on 10.7.2020, averred that at no time has he neglected to pay the outstanding bill of costs arising out of retainer on legal professional services offered by the petitioner.

That upon receiving the statutory demand the debtor avers that he took a step to issue cheques towards settlement of the taxed costs. The debtor further avers that the amount due and owing at the moment stands at Kshs.509,595/= which he is ready and willing to settle by equal monthly instalments. He averred that the petition lacks merit for reason that he is currently a commissioner with the National Land Commission earning a salary capable of settling the alleged debt. The petition was disposed off by way of written submissions from both counsels.

In brief, **Mr. Gicharu** Learned Counsel for the petitioner submitted that on the basis of Section 15 (1) and 17 (1) of the Insolvency Act he is entitled to the relief against the debtor. From the materials on record regarding the history of the debt, Learned counsel contents that the debtor has no commitment to settle the debt. In that context Learned counsel cited and placed reliance in **Invesco Assurance Company Ltd v Dama Charo Nzai & 57 Others {2019} eKLR, Re Lucton Kenya Ltd {1997} eKLR**. Grounded by the provisions of the Act and the principles in the cited authorities, Learned counsel urged the Court to grant the petition.

In the submissions presented by Learned counsel for the debtor **Mr. Wambua**, argued and submitted that a reading of Section 17 (3) of the Act has not been complied by the petitioner. In the respondent view the petitioners at this point has failed to bring himself within the ambit of Section 17 in order for the Court to take measures in dealing with a serious issue like declaring a debtor bankrupt.

The respondent counsel has also argued that the debtor is an employee of the National Land Commission with a theory capable of settling the debt way of equal monthly instalments. He has demonstrated good faith by the issuance of postdated cheques of Kshs.300,000/=, in possession of the petitioner.

It is also the contention of the respondent counsel that the petition if granted would prejudice and embarrass the debtor with irreparable consequences. He relied for this legal proposition on the decision of **Insolvency Cause No. 1 of 2017 Diamond v Cargill Kenya Limited {2019} eKLR**.

Determination

Having read the petition and submissions of the parties, the question which demands for an answer is whether the debtor has demonstrated sufficient cause for grant of the remedy under the Insolvency Act. The decisive factor for the Court on creditor's Bankruptcy application against a debtor as stipulated under Section 17 of the Insolvency Act is to specify the debt owed. That the debtor is unable to pay the debt. Under the law a debtor is presumed to be unable to pay a debt if he does not comply with or apply to set aside a statutory demand. After a statutory demand, demanding payment is served on a debtor and the debtor.

(a). Does not make payment within 21 days or

(b). Does not apply to the Court within the aforesaid period, if the statutory demand, was served on the debtor to set aside the statutory demand the creditor may proceed to file a creditors bankruptcy petition against the debtor.

This Court without more finds that the debtor is a commissioner with the National Land Commission, who went through a vetting legal process conducted by the National Assembly of Kenya pending appointment. In that case whether the debtor was fit to serve as a commissioner required of them to find from the facts presented the status of the debtor's liabilities and assets. Moreover, the only documentary evidence that the debtor furnished in support of the petition for bankruptcy order is one cheque of Kshs.300,000/= returned unpaid. While that may present prima facie evidence of inability to meet ones but I am reluctant to find as a fact that the act amounts substantially as a ground for a debtor to be declared bankrupt.

In furtherance of settlement of the debt, the petitioner has the power to apply for the sale of the real and personal property of the debtor by public auction or private treaty to settle outstanding debt.

Additionally, as the petitioner acknowledges that the debtor is a state officer with the National Land Commission he had the residual power to enforce the decree as outlined under Section 38 of the Civil Procedure Act necessary for the decretal sum to be satisfied. Liquidation or appointing a receiver without a doubt is the last remedy available to the petitioner for distressed debtor. As indicated in Order 22 rule 41, 42 and 48 of the Civil Procedure Rules the filter mechanism for execution of a decree with a combined effect to liquidate the debt is on attachment of salary or allowance, attachment of shares, movables and or attachment of immovable property. That must of course be balanced by a proper petition with the threshold on substantial grounds without ambiguity that there exist exceptional circumstances for the Court to take an unenviable choice against the debtor under the Insolvency Act.

It is my view that the Court in giving effect to a petition for bankruptcy order and appointment of a receiver ought to take into account the business realities of the situation and should avoid taking a narrow legalistic view that because a debtor is faced with a bounced cheque, he or she should be declared bankrupt. It is clear from the affidavit of the petitioner that something more-contingent on liabilities and assets of the debtor was necessary for the Court to reasonably exercise discretion of his inability to meet the liabilities as they fall due and owing to the creditors.

A careful considerations of the submissions made to the Court by the respective counsels leads one to conclude, that although the petitioner invoked the Insolvency Act to enforce the debt, it amounted to an unripened petition to secure the debt.

I appreciate how serious this matter is from the point of view of the petitioner having an interest in the bankruptcy order against the debtor and I would have been very glad for his sake to grant such an order consistent with the principle of fairness. However, on accumulative view of the conflicting affidavit evidence in the case, I find that there is nothing extraordinary about the experience of the bounced cheque to suggest to the Court the debtor is bankrupt.

Having thus given vent to the petitioners misgivings as well as dissatisfaction over the debtors conduct in delaying to restructure the debt and proceed to honor his obligations in the circumstances, I enlarge time for repayment for a further period of sixty days. That as I have said will open up leave for the petitioner to either attach the debtors salary or pursue other modes of execution of the decree before resorting to petition for a bankruptcy order.

As a consequence, the petition fails with an alternative order of limited period for instalment settlement of the debt with costs to the petitioner.

I hereby order so.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Gicharu advocate for the applicant
2. Ms. Kiponda holding brief for Mr. Wambua advocate for the respondent