



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
BANKRUPTCY CAUSE NO. 3 OF 2019
IN THE MATTER OF THE INSOLVENCY ACT, 2015
RE: SHADRACK KIPYATICH J. KIBOR - DEBTOR

RULING

[1] The Notice of Motion dated **21 August 2019** was filed herein under a Certificate of Urgency pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 10 Rule 11 and Order 51 Rule 15 of the Civil Procedure Rules, 2010**, for the following orders:

[a] Spent

[b] That the Applicant herein be granted stay of execution of the Decree and Warrant of Arrest issued by the Co-operative Tribunal at Nairobi;

[d] That the Applicant be declared bankrupt as he was dismissed from his employment which was his only source of income.

[2] The application was based on the grounds that a Decree has already been obtained in a civil suit against the Applicant by **M. Kiveu, Advocate** and that he has proceeded to enforce execution by instructing the Co-operative Tribunal to issue a Notice to Show Cause which was served on **20 August 2019**. It was further the contention of the Applicant that he has no source of income to pay the outstanding debts amounting to over **Kshs. 2.3 million**, having been dismissed from his employment. He therefore prayed for stay of execution of the Decree and the Warrant of Arrest, as well as a declaration of bankruptcy; contending that it is in the best interest of justice so to do.

[3] The application was supported by the Applicant's affidavit annexed thereto, sworn on **20 August 2019** to which he annexed, *inter alia*, copies of the Warrant of Arrest issued by the Cooperative Tribunal, dismissal letter dated **7 December 2017** and demand letters written by various banks in respect of loans owed by the Applicant.

[4] Having given due consideration to this application, I would have no hesitation in holding that it is entirely misconceived. Firstly, the Notice of Motion dated **21 August 2019** appears to be the originating pleading. There is no other document initiating the Cause, which is also erroneously referred to as a Bankruptcy Cause as opposed to an Insolvency Cause; yet **Section 48** of the **Insolvency Act** presupposes the existence of a substantive Petition for bankruptcy for purposes of **Section 32** of the **Insolvency Act**, which provides that:

(1) A debtor may make an application to the Court for an order adjudging the debtor bankrupt only on the grounds that the debtor is unable to pay the debtor's debts.

(2) The Court may decline to deal with such an application if it is not accompanied by a statement of the debtor's financial position containing-

(a) such particulars of the debtor's creditors and of the debtor's debts and other liabilities and assets as may be prescribed by the insolvency regulations; and

(b) such other information as may be so prescribed.

(3) The Court may reject a statement of the debtor's financial position if of the opinion that it is incorrect or incomplete.

(4) A debtor who makes an application under this section shall publish a notice of the application in—

(a) a newspaper circulating within the region in which the debtor ordinarily resides; and

(b) in such other publications (if any) as may be prescribed by the insolvency regulations for the purposes of this section.

(5) The Court may decline to hear the application if subsection (4) has not been complied with to its satisfaction.

[5] It is manifest therefore that the Applicant has not only failed to commence this cause in the proper manner, but has also not complied with Subsections (2) and (4) of **Section 32** of the **Insolvency Act**. Secondly, **Section 48** of the **Insolvency Act** is explicit in terms. It provides that:

"(1) When a bankruptcy order commences--

(a) all proceedings to recover the bankrupt's debts are stayed; and

(b) the property of the bankrupt (whether in or outside Kenya), and the powers that the bankrupt could have exercised in respect of that property for the bankrupt's own benefit, vest in the Official Receiver."

[6] Accordingly, in In Re Akbarali Karim Kurji (Debtor) [2017] eKLR this Court came to the conclusion and held that:

"As to whether an order of stay can issue before the making of a bankruptcy order, the Respondents cited Sections 41 and 48(1)(a) of the Insolvency Act to support their argument that it is only when a bankruptcy order commences that proceedings to recover the bankrupt's debts can be stayed. I would agree entirely with the Respondents' argument granted the provisions of Section 48(1)(a) that:

"When a bankruptcy order commences all proceeding to recover the bankrupt's debts are stayed."

So that, it is no longer necessary to file an interlocutory application for stay along with a petition for bankruptcy as used to be the case under Section 11 of the repealed Bankruptcy Act, Chapter 53 of the Laws of Kenya."

[7] For the foregoing reasons, it is my finding that the Notice of Motion dated **21 August 2019** is incompetent. The same is hereby struck out, but with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF OCTOBER, 2019

OLGA SEWE

JUDGE