



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**INSOLVENCY PETITION NO.3 OF 2017**  
**IN THE MATTER OF THE INSOLVENCY ACT, 2015**  
**RE: SHAKHALAGA KHWA JIRONGO - DEBTOR**

**RULING**

[1] The Notice of Motion dated **16 October 2016** was filed herein by **Shakhalaga Khwa Jirongo**, the Debtor herein pursuant to **Article 159** of the **Constitution, Sections 3, 16(2) and (3), 30(1) and (2)(c), 272(2), 696 and 698** of the **Insolvency Act, No. 18 of 2015** as well as the inherent powers and jurisdiction of the Court. He thereby sought for the following orders:

- [a] That this application be certified urgent and be heard *ex-parte* in the first instance. (spent)
- [b] That pending the hearing and determination of this application, an Order be issued, *ex-parte* at the first instance, staying the execution and/or implementation of the Bankruptcy Order issued on **29 September 2017**;
- [c] That the Bankruptcy Order issued on **29 September 2017** that arose from the Decree in **HCCC No. 228 of 2014: Masole Limited & 7 others vs. Shakhalaga Khwa Jirongo**, be set aside and/or vacated.
- [d] That all the Orders and/or proceedings issued by this Court in relation to this Insolvency Petition be set aside *ex debito justitiae*;
- [e] That the Petitioner be ordered to serve the Statutory Demand upon the Debtor for a regular hearing to take place.
- [f] That the costs of the application be provided for.

[2] The application was premised on the grounds that this Insolvency Petition is based solely on the Decree dated **28 July 2014** obtained in **HCCC No. 228 of 2014: Masole Limited & 7 others vs. Shakhalaga Khwa Jirongo**, in which he challenged the Judgment and Decree as having been obtained on the basis of fraudulent Agreement and false declaration by Court Process Servers. The grounds were deposed to in the Applicant's affidavit sworn on **16 October 2017**, and in support thereof, Counsel for the Applicant, **Mr. Kiplagat**, adopted the submissions he made in respect of **HCCC No. 228 of 2014**.

[3] According to **Mr. Kiplagat**, the firm of **Rachier & Amollo Advocates**, having acted for both parties in respect of the Agreement that resulted in the Judgment and Decree of **HCCC No. 228 of 2014**, could not purport to act in this matter for one of the parties. Counsel relied on the case of **King Woollen Mills Ltd vs. Kaplan & Stratton Advocates [1993] eKLR**. Counsel further argued that the Applicant was afforded an opportunity to resist the Petition by reason of the fact that he was neither served with the Statutory Notice nor hearing notice. He accordingly urged for the stay or setting aside of the Bankruptcy Order.

[4] The application was opposed by the Creditor/Respondent, **Mr. Sammy Boit arap Kogo**. He relied on

his Replying Affidavit sworn and filed on **18 October 2017**. He was represented herein by the firm of **Rachier & Amollo Advocates**, and his Counsel, **Mr. Ligunya**, urged his case on his behalf in opposition to the application. His argument was that the Bankruptcy Order issued herein was founded on a clear proof of debt. **Mr. Ligunya** also invited both **Mr. Ambrose Rachier** and **Francis Olalo**, who are partners in the law firm of **Rachier & Amollo Advocates**, to the witness stand for cross-examination on the contents of their affidavits filed herein as annexures to the Replying Affidavit.

[5] It is manifest from the Statutory Notice and the Petition that the Bankruptcy application was hinged on the Decree issued in **HCCC No. 228 of 2014**, which was otherwise issued on the basis of a regular judgment of the Court. Having made a Ruling in **HCCC No. 228 of 2014** setting aside the *ex parte* judgment and decree in **HCCC No. 228 of 2014** to give the Applicant a chance to defend the claim therein, it would be superfluous to get into a consideration of the merits of the application herein. Accordingly, the orders that commend themselves to me are orders allowing the application dated **16 October 2017** for stay of the Bankruptcy Order made herein on **29 September 2017**, pursuant to **Section 26** of the **Insolvency Act, No. 18 of 2015**, pending the hearing and determination of **HCCC No. 228 of 2014**. It is further ordered that a copy of the Court's Ruling in **HCCC No. 228 of 2014** be filed herein for completeness of the record.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER, 2017**

**OLGA SEWE**

**JUDGE**