



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**

**BANKRUPTCY CAUSE NO. BC 57 OF 2008**

**PETER KABIARU**  
**KABUNGU.....PETITIONER**

**AND**

**IN THE MATTER OF BANKRUPTCY ACT CHAPTER 53 LAWS OF KENYA**

**JUDGMENT**

This judgment is delivered in the debtor's petition dated 31<sup>st</sup> October 2008, presented to this court on 25<sup>th</sup> November 2008, subsequent to which a receiving order was issued by the court on 28<sup>th</sup> November 2008, constituting the Official Receiver of the Republic of Kenya Receiver of the debtor's estate.

A public examination of the debtor was held and concluded on 17<sup>th</sup> May 2011 in the absence of the sole creditor in respect of whose debt the petition was filed. An Affidavit of Service, deponing that both debtor and the creditor had been served by registered post on 7<sup>th</sup> June 2011, was filed on 14<sup>th</sup> June 2011, indicating that the creditor had been served through his legal representative Grace Kamungu & Company Advocates of P. O. Box 2890, Nairobi.

The debtor testified on oath and told the court that he had been condemned to pay damages of KShs. 453,497 in a personal injury claim, **SRMCC No. 57 of 2005** filed against him by his farm hand, Julius Muhia Rwai. In execution of the decree the debtor was committed to Civil Jail and served three months of

the sentence before being released after his family sold his properties and raised KShs. 220,000/= which was paid to the Decree Holder's Advocates. He has paid a further KShs. 72,000/= through the Attorney General (Official Receiver) by way of installments which he says is no longer able to do having lost his permanent job and now works as a casual labourer (a driver) earning KShs. 500/= per trip. He testified that he makes an average of two trips which earn him KShs. 1000/= but without specifying whether daily, weekly monthly or for what periods.

Stating that his wife takes care of his children's upkeep while his father finances their education, the debtor asked the court to give him time to reorganize his life and get stable employment through which he can earn a steady income and clear the debt. He told the court that he would need about one year to do so.

The law recognizes the enactment of bankruptcy legislation as a clear intention, on the part of legislature to provide and sanction a process by which a debtor, in a proper case, may relieve himself of the pressure of possible penal sanction by way of a committal order, by obtaining an adjudication in bankruptcy against himself. Thus, the mere fact that a debtor is unable to pay his debts is considered sufficient ground to validly support a debtor's petition to be adjudged bankrupt, provided that no grounds exist for the court to find that the filing of the petition is an abuse of the process of the court.

The object of bankruptcy law being, firstly, to ensure the realization and distribution of the bankrupt's estate among his creditors by the trustee in bankruptcy, and; secondly, to relieve the bankrupt of the unpaid balance of his liabilities, there must be an admission of insolvency (inability to pay the debt), whereby the petition filed, must contain a statement that the petitioner is unable to pay his debts and a request that a bankruptcy order be made against him. The petition must be accompanied by a Statement of Affairs, verified by an affidavit containing, inter alia, the particulars of the petitioning debtor's creditors, particulars of his debts and other liabilities, as well as particulars of his assets.

Although the affidavit filed with the present petition seeks to verify the Statement of Affairs sworn on 31<sup>st</sup> October 2008, in which only the judgment in **SRMCC No. 57 of 2008** is stated, other debts, said to be owed to individuals and institutions are mentioned in the affidavit but no particulars thereof have been. Considering the debtor's testimony at the hearing, I am led to believe that the affidavit in support of the petition was lifted from a standard form, without appropriate alterations being made to suit his circumstances. Guided by **Article 159 (d)** of the **Constitution of Kenya 2010**, I am inclined to overlook the anomaly and proceed to administer substantive justice.

The judgment debt is the only debt appearing in the interim report filed by the Official Receiver herein, with the Official Receiver stating the following in regard thereto.

**"The Petitioner is keen to compensate the (Judgment Creditor?) if only he can be given a chance to stabilize in terms of employment. In his preliminary examination with the Official Receiver he has stated that he is willing to come up with a proposal once he gets a job"**. (insertion by this court)

The above statement is confirmed by the petitioner's testimony that he has made attempts to settle the debt by way of installments paid through the Attorney General's Office even after all his assets and properties were sold and proceeds paid to the creditor's advocates to secure the petitioner's release from civil jail.

All facts considered, the petitioner's testimony demonstrates *bona fides* on his part and I am satisfied that the matters stated in his petition are true. I am of the considered opinion that the ends of justice will be served and the interests of the creditor herein better taken care of if the burden of the outstanding debt is placed on the shoulders of the trustee in bankruptcy. I therefore allow the petition and hereby adjudge the petitioner, PETER KABIARU KABUNGU a bankrupt. In view of the fact that the petitioner has

requested for a reprieve of only one year, I make an order that he shall apply for a discharge after 3 years of this order.

The official Receiver is hereby appointed Trustee in Bankruptcy in respect of the bankrupt's estate.

**DELIVERED** and **SIGNED** at **NAIROBI** this **12<sup>TH</sup>** day of **SEPTEMBER 2011**.

**M. G. MUGO**

**JUDGE**

In the presence of:

No Appearance

For Official Receiver

No Appearance

Debtor

DELIVERED: In open court in the absence of the parties due notice having been issued twice.

**M. G. MUGO**

**JUDGE**