



REPUBLIC OF KENYA



**Chitiavi v Khalimwa & 8 others (Commercial Case 2 of 2024)
[2025] KEHC 4995 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4995 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
COMMERCIAL CASE 2 OF 2024
S MBUNGI, J
APRIL 23, 2025**

BETWEEN

JOTHAM MASAYI CHITIAVI PETITIONER

AND

ERNEST AUKA KHALIMWA 1ST RESPONDENT

MOHAMMED OSMAN ABDALLA 2ND RESPONDENT

MOHAMMED AKOLO MUSA 3RD RESPONDENT

CARTHAGE MUKUNDA AMBUTU 4TH RESPONDENT

PATRICK MACHONI MURUTU 5TH RESPONDENT

EQUITY BANK LIMITED 6TH RESPONDENT

KENYA POWER AND LIGHTING COMPANY 7TH RESPONDENT

FAULU MICROFINANCE BANK LIMITED 8TH RESPONDENT

OFFICIAL RECEIVER OF THE REPUBLIC OF KENYA 9TH RESPONDENT

RULING

1. The petitioner/ debtor filed a notice of motion application dated 25th June 2024 seeking the following orders;
 - a. Spent
 - b. That pending the hearing and determination of this application interparties, this Honourable court be pleased to issue an order adjudging the petitioner/ debtor bankrupt



- c. That pending the hearing and determination of the main petition, this honourable court be pleased to issue an order adjudging the petitioner/ debtor bankrupt.
- d. That the costs of this application be provided for.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the petitioner.
3. He avers that he is a retired police officer and that during his lifetime, he accrued many debts and has been sued by many creditors who are claiming for their monies.
4. He further claims that he is struggling to make ends meet and he is suffering from serious chronic diseases which require serious medical attention/treatment.
5. He claims he has no other source of income or assets to dispose to settle his debts and he is now seeking protection from his creditors since he is unable to pay debts until further notice.
6. In their replying affidavit dated 14th October 2024, the credit manager of the 5th Respondent stated that the petitioner obtained a credit facility on 23rd November 2022 of Kshs. 870,000/= and used his pension from the National Treasury to secure the loan.
7. He claimed that the petitioner defaulted in the payment of his loan contrary to his offer letter and further that he has not come to court with clean hands and he has failed to disclose important facts to the court and that he has not produced any evidence to support their claim that he is unable to make ends meet.
8. They hold that the Applicant has failed to comply with the informational requirements of the [Insolvency Act](#) and the insolvency requirements before he can be declared bankrupt.

5th Respondent submission.

9. In its submission dated 4th November 2024, the 5th respondent objects to the application and states that it has failed to meet the requirements of section 32 (2) and section 32 (4) (a) of the [insolvency Act](#) and regulation 18 of the insolvency requirements where the petitioner is obliged to disclose particulars of his creditors, debtors and other liabilities and assets and further to publish a notice of the application for bankruptcy in a newspaper circulating within the region that the debtor resided.
10. It holds that the petition was made in bad faith and an abuse of the court's process for failure to observe the requirements of the [insolvency Act](#) and regulations. In support of his claim, it relied on the case of *Re James Maina Kabatha (debtor/applicant) [2020] eKLR*, where a petitioner failed to meet some of the requirements and the court failed to hear the petition.
11. It further in the case of *Stephen Nyaega Mose* where the court cautioned against the abuse of the bankruptcy laws which the court stated was not meant to protect people in debt because of their act of fraud or professional misconduct, but unfortunate people from the harsh business environment.
12. It submitted that the applicant has failed to provide evidence to support their assertion and the court should not be used to further an injustice by the petitioner.
13. It submitted that the petitioner has concealed material facts and evidence show that he was unable to pay his debt.
14. In conclusion it prays that the court dismisses the application dated 25/6/2024 with costs to the 5th Respondent.



Analysis and conclusion.

15. I have carefully considered and analysed the pleadings filed by the parties herein in support and opposition to the instant application together with the written submissions by Counsel for the 5th Respondent.
16. I am of the considered view that the issue that arises for determination is; whether this Court should issue a bankruptcy order to the Petitioner on grounds that he is no longer able to pay off his debts at this stage.
17. The petitioner herein has approached this court seeking to be declared bankrupt because he is currently a retired prisons officer and has no source of income or asset to clear the debt that he owes the respondents/creditors. He claimed that he is chronically ill and is currently undergoing medical treatment. He is in no position to settle his debts and prays that this court declares him bankrupt.
18. The 5th Respondent who is equity Bank has denied the petitioner/ debtor from being declared bankrupt and holds that they had entered into a contract with him where he was given a loan using his pension scheme as security and he defaulted. Further the Petitioner has no approached this court with clean hands for firstly he has not followed the correct procedure such as notifying all his creditors of his decision to be declared bankrupt and secondly that he has not provided any evidence of his assets and liabilities for the court to determine his financial capability.
19. I have perused the application before me and the law Section 32 (2) and Section 32 (4) of the *insolvency act* No. 18 of 2015 and the regulations thereof set out the requirements a petitioner has to meet for him or her to be declared bankrupt.
20. Section 32 of the *insolvency act* states
 - (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 prescribed by the insolvency regulations for purposes of this section.



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

Further regulation 6 of the Insolvency Regulations 2016 states;

1. Where the Act or these Regulations require a notice to be published in the Kenya Gazette, the notice shall contain the details set out in this part, in addition to any detail specifically required by the Act or any other provision of these Regulations.

“In addition , as per Regulation 18(4) , in addition to publication of a notice in a newspaper of regional publication as required under section 32(4) of the Insolvency Act, the debtor is also required to arrange for publication of his statement of financial position in the Kenya Gazette”

21. There is no evidence to show the financial position of the debtor, there is no evidence to show that a notice was placed in the local newspaper circulating in the region informing the creditors of his intention to be declared bankrupt or his inability to settle off his debts.

22. It is trite that he who alleges must prove, this maxim is founded on the provisions of Section 107, 108, & 109 of the Evidence Act Cap 80 of the Laws of Kenya.

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

23. Accordingly, the Petitioner bears the duty of proving and/or demonstrating the allegation that its liabilities outweigh his assets, and in the absence this, the court cannot confirm his inability to meet his financial obligations.

24. I therefore find that, the application is not supported by adequate evidence of the Debtors' inability to pay debts and I dismiss it as it is prematurely brought before court for the Petitioner has not complied with the requirements of the insolvency Act. Let him Comply.

25. The cost of Application be in cause.

26. Mention 12.5.2025 for directions on the hearing of the Petition.

27. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF APRIL, 2025

S.N MBUNGI

JUDGE



In the presence of :

Court Assistant – Albright Sunguti

Mr. Maoga for the 5th Respondent present online.

Mr. Munyendo for the petitioner present online.

Parties, absent.

