



**Ngoge t/a OP. Ngoge & Associates v Kerich (Insolvency Cause 20 of 2018)  
[2025] KEHC 5488 (KLR) (Commercial and Tax) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE 20 OF 2018  
BM MUSYOKI, J  
MAY 5, 2025  
IN THE MATTER OF THE INSOLVENCY ACT, 2015  
AND  
IN THE MATTER OF MILIMANI HIGH COURT MISC APPLICATION NO  
883 OF 2007**

**BETWEEN  
PETER O NGOGE T/A OP. NGOGE & ASSOCIATES ..... APPLICANT  
AND  
HON CHARLES KERICH ..... RESPONDENT**

**RULING**

1. This is an example of matters that clog our courts system for flimsy reasons and to say the least, caused by the games of delays, convolution and I dare say deliberate conduct of the parties intending to drag the justice system and keep the courts busy. What started as a simple application brought under certificate of urgency now, has unnecessary large volumes of documents. One would think that the volumes speak of and reflect complex legal issues from which the court must derive unprecedented and ground breaking decision.
2. This cause was commenced by a notice of motion dated 20<sup>th</sup> August 2018 against the 5<sup>th</sup> respondent only, shown to be brought under Sections 1A,1B and 3A of the *Civil Procedure Act* and Sections 12, 13, 14, 15, 16, 17, 29, 22, 23, 24 and 25 or the *Insolvency Act* 2015, under Articles 10, 22, 25, 27, 28, 29, 40, 43, 47, 48, 159 and 258 and chapter 6 of the *Constitution* of Kenya and all other enabling provisions of the law which asked the court to grant the following orders;



1. The application be certified as extremely urgent and Nairobi HC Misc. civil application No. 883 of 2007 be availed merged and heard together with this matter/cause.
2. A bankruptcy order be issued forthwith against the respondent/judgment debtor herein due to inability to pay his debts and/or satisfy the said valid judgment of this court to date; a duration spanning (7) years.
3. The costs of this application be borne by the respondent/judgment debtor herein.
3. Another application also seeking bankruptcy and some other order but against all the respondents herein was filed on 27<sup>th</sup> September 2018. On 29<sup>th</sup> August 2018, the 5<sup>th</sup> respondent filed an application dated the same day seeking the following orders;
  1. The Honourable Court be pleased to issue an order dismissing the creditors application dated 20<sup>th</sup> August 2018 for non-compliance in material respect with provisions of Sections 17 of *Insolvency Act*, Rule 15 of Insolvency Regulations 2016 as read with the Insolvency Amendment Regulations 2018.
  2. Costs of the application be provided for.
4. The above applications were followed by several others without any of them being heard. The parties kept going back and forth and failed to guide the court with result that, what started as a straight forward and simple application took a camouflage of a complex issue which led to dragging of the matter for many years. The 5<sup>th</sup> and 12<sup>th</sup> respondents appear to have forgotten that they had filed the application dated 29-08-2018 and have now brought the current application dated 25-07-2024 with one its prayers similar to the prayers in the former. The latter application has the following prayer;
  1. The Honourable Court be pleased to issue an order dismissing the creditor's application dated 20<sup>th</sup> August 2018 for noncompliance in material respect with the provisions of Sections 17 of the *Insolvency Act* 2017 and Rule 15 of Insolvency Regulations 2016 as read with Insolvency Amendments Regulations 2018.
  2. This Honourable Court be pleased to issue orders releasing the decretal sum of Kshs 140,834 deposited in court by the 5<sup>th</sup> and 12<sup>th</sup> respondents on 28<sup>th</sup> November 2018, 4<sup>th</sup> December 2018 and 26<sup>th</sup> March 2019 respectively to the 5<sup>th</sup> and 12<sup>th</sup> respondent herein.
5. This is the application before this court for ruling. In this ruling reference to the 'respondents' shall mean 5<sup>th</sup> and 12<sup>th</sup> respondents. The application is supported by affidavits of Charles Kerich and Kalekye Mumo sworn on 25<sup>th</sup> July 2024. The applicant in opposition to the application, filed a replying affidavit sworn on 25-07-2024. I have read the application, the supporting affidavit, the replying affidavit and submissions by both parties dated 11-09-2024 and 20-09-2024. I have also perused the court record and proceedings.
6. There is no doubt that for all intends and purposes, this is an insolvency cause which seeks to enforce decretal sum in High court miscellaneous civil application number 883 of 2007 which the respondent have failed to pay. The debt is not disputed. Insolvency proceedings are a form of enforcement of payments of debts and as such must follow the procedures provided for in the *Insolvency Act*. Despite the claims by the applicant that the respondents have violated his constitutional rights, the cause herein remains to be an insolvency cause seeking to have the respondents declared bankrupt for failure to pay their debts.
7. Section 17 of the *Insolvency Act* provides that;



1. One or more creditors of a debtor may make an application to the Court for a bankruptcy order to be made in respect of the debtor in relation to a debt or debts owed by the debtor to the creditor or creditors.
2. Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made-
  - a. the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;
  - b. the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the applicant creditors, either immediately or at some certain, future time, and is unsecured;
  - c. the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and
  - d. there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts.
8. Regulation 15(1) and (2) of the Insolvency Regulations provides as follows;
  1. The creditor's application for bankruptcy order shall be in form of a petition in Form 3 set out in the First Schedule and shall be accompanied by the following documents-
    - (a) verifying affidavit which shall be in Form 4 set out in the First Schedule;
    - (b) proof of the debt which shall be in Form 5 set out in the First Schedule; and
    - (c) the application for appointment of trustee which shall be Form 9 of the First schedule.
  2. The petition shall be preceded by a statutory demand and shall be in Form 6 set out in the First Schedule.
9. It is clear from the above provisions that for one to properly move the court to have someone declared bankrupt, they must first issue a statutory demand and can only bring and file the application for insolvency if either the debt remains unpaid or the debtor makes an application to set aside the statutory demand. The application should also be brought by way of a petition.
10. The court's jurisdiction can only be properly invoked where a party approaches the court through the right procedure. Where the law provides the method or mode through which a party should approach the court, there is no room for diversion or deviation from the said procedure. In *Maganlal Motichand Chandaria & 6 others v Paresh Kumar Dodhia* (2017 KEHC 7219 (KLR)) it was held that;

“The accepted legal principle is that where there is a clear procedure for redress of a grievance prescribed by Parliament through the Constitution or Act of Parliament the procedure is to be strictly followed.’
11. I have no reason to depart from the above position in law and I agree with the respondents that this cause was not properly commenced and the same is inevitably incompetent as it was brought by way of a notice of motion and not a petition and the same was filed without statutory demand having preceded it.
12. The respondents have also prayed that the money they deposited in court on 29-11-2018, 5-12-2018 and 26-03-2019 be released to them. Having gone through the proceedings herein, it appears to me



that the said money was deposited voluntarily as there was no court order compelling the respondents to do so. On 22-11-2018, the advocate for the respondents told the court that they were ready to pay what they deemed was their debts and asked the court that they be allowed to deposit the same in court. The court allowed the request following which the respondents deposited the money on the afore stated dates.

13. On 12-03-2020, the advocate for the respondents told the court that they had filed an application dated 6-03-2020 to have them discharged from the application owing to the fact that they had deposited the money which application was never heard. In my view, this was an admission and acknowledgment of the debt owed to the applicant.
14. The applicant approached this court for enforcement of his right to receive decretal sum in a matter decided by a competent court of law which decree remains unsatisfied. In these circumstances, it is my opinion that it will be unfair and a hindrance to access to justice if this court were to return the money to the respondent and keep it away from the person to whom it is due. I hold the view that it will serve the interest of justice if the money is released to the applicant.
15. The upshot of my above analysis is that the application dated 25-07-2024 succeeds in part and I hereby make the following orders;
  - a. The applicant's application dated 20-08-2018 is hereby struck out for being incompetent for noncompliance with the provisions of the Sections 17(1) and (2) of the *Insolvency Act* and Regulations 15(1) and (2) of the Insolvency Regulations. Consequently, all the other pending applications in this cause are considered spent.
  - b. Kshs 140,834.00 deposited in court by the 5<sup>th</sup> and 12<sup>th</sup> respondents on 28-11-2018, 5-12-2018 and 26-03-2019 shall be released to the applicant Peter O. Ngoge trading as O.P. Ngoge and Associates.
  - c. There shall be no orders as to costs in respect of this matter.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in absence of the applicant and in presence of Mr. Ojienda for the 5<sup>th</sup> and 12<sup>th</sup> respondents.

