



**Atsatsa v Makokha & another (Insolvency Cause 6 of 2019)  
[2024] KEHC 5349 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5349 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
INSOLVENCY CAUSE 6 OF 2019  
REA OUGO, J  
APRIL 5, 2024  
IN THE MATTER OF THE INSOLVENCY ACT**

**BETWEEN**

**AGGREY MUSE ATSATSA ..... PETITIONER**

**AND**

**DENNIS AUGUSTINE MAKOKHA ..... 1<sup>ST</sup> RESPONDENT**

**REMA AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before the court is a notice of motion dated 10/11/2023. The application is brought under section 3A, 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 45 rule 1(1), Order 40 Rules 1, 2,3, 4 and 10 of the *Civil procedure Rules*. The applicant seeks the following reliefs:
  1. Spent
  2. That pending the hearing and determination of this application and petition the court do order a temporary stay of execution of the imminent sale of goods attached by the 2<sup>nd</sup> respondent.
  3. That pending the hearing and determination of this application the court do reinstate the bankruptcy proceedings in respect of my estate.
  4. That the court do make an order to adjudge me bankrupt having complied with the ruling of Justice S.N Riechi delivered on the 26<sup>th</sup> October 2021.
  5. The costs of this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
2. The application is premised on the grounds of the face of the application and further grounds were enumerated in the affidavit of Aggrey Muse Atsatsa dated 10/11/2023. He avers that the 2<sup>nd</sup> respondent has attached properties that belong to third parties (his family members) in satisfaction of the decree in



Bungoma Chief Magistrates Court Civil Suit No 846 of 2011. He avers that he is a man of no means having applied for bankruptcy orders and has also complied with the requirements stipulated under section 32 of the *Insolvency Act*.

3. The application was opposed by the respondents who filed a replying affidavit dated 21/11/2023. They contend that the application is frivolous, vexatious and an abuse of the due process of the court. The petitioner was granted 45 days to regularize his petition and in default it stood dismissed. The petitioner's case stood dismissed on 11/12/2021. The petitioner has not offered any explanation why it took more than 2 years to bring his application. It was averred that the application was filed upon the auctioneers having attached the petitioner's property. The petitioner has no locus to apply for stay of execution on behalf of the objector, furthermore, the petitioner negotiated with the auctioneer and fully settled the costs hence the order of stay is just academic.

### **Submissions by the Parties**

4. Mr. Oira, counsel for the applicant argued that the applicant seeks review of the ruling of Riechi J. dated 26/10/2021. He contends that at the time the decision was made, the applicant was in the process of complying with Regulation 18 of the *Insolvency Act*. He relied on provisions of Order 45 and argued that the application was filed based on the discovery of new evidence. They argue that the delay in getting the publication was on the government printers. On the issue of stay, he submitted that the petitioner is a man of no means and that they had filed a declaratory suit.
5. Counsel for 1<sup>st</sup> respondent, Mr. Bw'Onchiri, made oral submissions and also relied on his written submissions filed on 21/11/2023. In his submissions, he argues that the petitioner has failed to lay a basis as to why this cause should be reinstated after 2 years. He cited the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR where the court laid down the principles that govern the exercise of discretion in applications for extension of time.

### **Analysis And Determination**

6. The application before the court is on review. The Court is guided by Order 45 of the *Civil Procedure Rules* which provides as follows:
  - “ 1. Any person considering himself aggrieved—
    - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



7. The grounds were reiterated by the Court of Appeal in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR as follows:

“The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”

8. Upon thorough examination of the application and the supporting affidavit, I note that the application is not based on the grounds set out in Order 45 of the *Civil Procedure Rules*. In fact, the applicant has not at all referred to any of the grounds required for an application for review. The applicant in his submissions attempts to raise the ground on which the application is based, that is, it is rooted in the discovery of new and important matters. However, parties are bound by their pleadings and pleadings cannot be amended through submissions.

9. I have also carefully read the ruling of the court on 26/10/2021 where the applicant was directed to comply with the provisions of section 32 of the *Insolvency Act* and Regulation 18 of the *Insolvency Regulations* 2016 within 45 days. The application reveals the applicant's failure to adhere to the court orders within the specified timeframe, which cannot constitute a valid basis for review.

10. It is my considered view that in the light of the foregoing, the application for review is not merited. The application is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 5TH DAY OF APRIL 2024.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Applicant – Absent**

**Mr. Bwonchiri For the Respondent**

**Wilkister - C/A**

