



REPUBLIC OF KENYA



**In re Yusuf Abdiwahab Ali (Insolvency Cause E012 of 2023)
[2024] KEHC 11148 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

INSOLVENCY CAUSE E012 OF 2023

PM MULWA, J

SEPTEMBER 19, 2024

IN THE MATTER OF YUSUF ABDIWAHAB ALI

RULING

1. The applicant, Yusuf Abdiwahab Ali has approached this court through the Notice of Motion dated 23rd February 2024, filed under a certificate of urgency and brought under Section 32(4) of the *Insolvency Act*, and Sections 1A and 3A of the *Civil Procedure Act*. The applicant seeks a stay of execution proceedings in HCCOMM No. E260 of 2019, pending the hearing and determination of this petition. He also seeks leave to publish the bankruptcy petition in a newspaper with nationwide circulation which is spent as evidenced by the newspaper excerpts of 21st March 2024.
2. The application is premised on the supporting affidavit and supplementary affidavit of the applicant sworn on 23rd February 2024 and 26th April 2024 respectively. Yusuf asserts he and his father are the directors of GarGar Construction Company Limited which on 10th July 2017 obtained an unsecured finance facility from Gulf Africa Bank Limited for the sum of Kshs. 20, 000,000.00. He further avers that the directors of the company signed personal guarantees, the loan fell into arrears prompting the bank to institute a suit on 22nd November 2019 in HCCOMM E260 of 2019 - Gulf African Bank Limited v Gar Gar Construction Limited and 2 others for the principal amount of Kshs. 21,979,452.27 and a judgment was issued.
3. He asserts the debt has ballooned to a sum of Kshs. 47,000,000.00 which the company and the directors are unable to pay. He states that he holds no assets to his name.
4. Lawi Sato, the legal officer of Gulf African Bank Limited opposed the application by a Replying Affidavit sworn on 8th March 2024 and contended that the applicant had failed to defend the suit and an interlocutory judgment was entered, thereafter the applicant filed several applications seeking stay of execution of the decree. He deposes that the sole purpose of the application herein is to thwart the process of execution and defeat justice. According to Lawi, the applicant is a man of means with a



- decent income and running businesses in Nairobi. He states that the petition fails to comply with the mandatory provisions of Regulation 18 of the *Insolvency Act*.
5. The application was disposed through written submissions. The applicant filed submissions dated 26th April 2024, and the creditor/respondent filed submissions dated 13th June 2024.
 6. I have read the affidavits in support and in opposition, alongside the written submissions and the main issue for consideration is whether the application is merited.
 7. The procedure for instituting bankruptcy proceedings by debtors is provided under Section 32 of the *Insolvency Act* 2015 which states thus:
 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 be 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.
 8. The above provisions set out the conditions to be met by a person applying for bankruptcy, one of them being publication of the petition in a newspaper in circulation within the region. The respondent argues that the applicant has not complied with this condition. A perusal of the documents annexed reveals that the advertisement was done in the Daily Nation on 21st March 2024, and to this end that condition has been complied with.
 9. Sub-section 3 allows the court to reject a statement of the debtor's financial position if it is of the opinion that the same is incorrect or incomplete. In the instant case, the financial statement provided belongs to GarGar Construction Company, which is not sufficient to prove that Yusuf is unable to pay the debt owed. To the mind of court, the applicant ought to attach a copy of his financial statement and not that of the company as proof that he is unable to pay the amount due.
 10. At this stage, I am careful not to interrogate the merit or otherwise of the petition but rather endeavor to determine the issue of stay of execution.
 11. Section 48 (1) and (2) of the *Insolvency Act* gives guidelines on what ought to happen upon the institution of bankruptcy proceedings.
 - (1) When a bankruptcy order commences—



- a. all proceedings to recover the bankrupt's debts are stayed; and
 - b. the property of the bankrupt (whether in or outside Kenya), and the powers that the bankrupt could have exercised in respect of that property for the bankrupt's own benefit, vest in the Official Receiver.
- (2) Despite subsection (1), the Court may, on the application by a creditor or other person interested in the bankruptcy, allow proceedings that had already begun before the bankruptcy commenced to continue on such terms as the Court considers appropriate.

12. The above provision is intended to ensure that when a bankruptcy order commences all proceedings to recover the bankrupt's debt are stayed to avoid a multiplicity of applications. This position was reiterated in *In re Akbarali Karim Kurji (Debtor)* [2017] eKLR where this Court came to the same conclusion and held that:

“As to whether an order of stay can issue before the making of a bankruptcy order, the respondents cited Sections 41 and 48 (1) (a) of the *Insolvency Act* to support their argument that it is only when a bankruptcy order commences that proceedings to recover the bankrupt's debts can be stayed. I would agree entirely with the respondents' argument that: ‘...when a bankruptcy order commences all proceedings to recover the bankrupt's debts are stayed.’ So that, it is no longer necessary to file an interlocutory application for a stay along with a petition for bankruptcy as used to be the case under Section 11 of the repealed *Bankruptcy Act*, Chapter 53 of the Laws of Kenya.”

13. Guided by the provisions of Section 48 (1) of the *Act*, therefore, I find it is in the interest of justice that the applicant Yusuf having filed the petition which is pending determination before this court, the same may be rendered irrelevant unless a stay of execution is issued.
14. The result is that the Notice of Motion application dated 23rd February 2024 is merited. The prayer for advertisement has since been overtaken by events. Consequently, there is granted a stay of execution of the execution proceedings in HCCOMM No. E260 of 2019 pending the hearing of the petition herein. The costs of the application shall be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Angaya for petitioner/applicant

N/A for creditor (Gulf Bank)

Court Assistant: Carlos

