



**Ng'ang'a v Synergy Industrial Credit Limited; Kingdom Bank Limited
(Formerly Jamii Bora Bank) (Interested Party) (Insolvency Cause 19 of 2018)
[2024] KEHC 11075 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE 19 OF 2018
FG MUGAMBI, J
SEPTEMBER 20, 2024
IN THE MATTER OF THE INSOLVENCY ACT NO.19 OF 2015
IN THE MATTER OF**

BETWEEN

DANIEL WAGUCHU NG'ANG'A DEBTOR

AND

SYNERGY INDUSTRIAL CREDIT LIMITED CREDITOR

AND

**KINGDOM BANK LIMITED (FORMERLY JAMII BORA
BANK) INTERESTED PARTY**

RULING

Introduction and Background

1. Before the court is the creditor's Notice of Motion application dated 3/3/2023 filed inter alia under section 3, 272, 274 and 698 of the *Insolvency Act* No.18 of 2015. The applicant seeks to rescind and annul the bankruptcy order issued against the estate of the debtor on 24/1/2019 (the bankruptcy order). In the alternative, the applicant seeks to have the insolvency petition herein heard de novo as if no bankruptcy order had been made against the debtor's estate.
2. The application is premised on the grounds that the applicant is one of the creditors of the debtor by virtue of a decree issued in Synergy Industrial Credit Limited V Daniel Waguchu Ng'ang'a & Lucy Njeri Waguchu, Milimani HCC&T Civil Case No. 389 of 2015. He contends that the decree has never



- been settled nor challenged in any court of law and that the bankruptcy order herein was sought so as to defeat the decree.
3. The creditor contends that the debtor obtained the bankruptcy order through fraud, misrepresentation and concealing material facts. The applicant takes issue with the debtor for failure to provide full discovery of the assets he owned within five (5) years prior to the date of initial bankruptcy in his statement of affairs.
 4. In particular, that the debtor failed to disclose that he was a shareholder and a director in a company named Dagenfreight Limited which is a going concern whereby he owns over 90% of the ordinary shares in the said company. Additionally, the debtor did not disclose ownership of two motor vehicles, registration numbers KAH 901T and ZC 7596, which he deliberately concealed. As a result, the creditor has been unable to locate, repossess, or sell these vehicles, which were held as security for the credit facilities extended to him.
 5. Further the creditor averred that the first meeting of creditors has never been convened to date and if the same has ever been held, the creditor herein has never been invited to attend the same or informed of the resolutions made thereat.
 6. The applicant contends that the liability of the debtor as an automatically discharged bankrupt to pay the creditors' debts should be revived as the bankruptcy orders ought not to have been made in view of the foregoing. In addition, it is the applicant's case that there has been a substantial change in the debtor's financial affairs as he is engaged in trucking business between Kenya and Tanzania.
 7. The applicant accuses the Official Receiver of assisting the debtor to prepare his petition with the intention to defeat the execution of the decree. It also accuses the Official Receiver for failing to discharge their duty to send to the creditors at least one report of the insolvency proceedings and the state of the bankrupt's affairs during and after the commencement of the bankruptcy order.
 8. The applicant pleads that it is in the interest of justice that this application be allowed ex-debito justitiae to prevent the decree of this court from being rendered a 'paper decree' by the debtor by circumventing, abusing and misusing insolvency proceedings.
 9. Kingdom Bank Limited (the interested party) participated in the proceedings in support of the application. The interested party confirms that it is an unsecured creditor for the total sum of Kshs.11,340,859.40 as per the decree dated 8/6/2023. Like the applicant, the interested party equally contends that it was not aware of the bankruptcy proceedings until at the execution stage. They were also not given any notice of a creditor's meeting and therefore that the proceedings were defective. It is further contended that the bankruptcy orders were fraudulently obtained.
 10. In opposition to the application, the debtor filed grounds of opposition and a replying affidavit. He contends that the application violates sections 254 and 255 of the *Insolvency Act* and that the creditor was duly notified by the Official Receiver of the ongoing proceedings but chose not to participate. Additionally, the debtor contends that the applicant's claims regarding his alleged business activities and the existence of criminal proceedings are irrelevant to the current application.
 11. The debtor asserts that he was genuinely unable to settle the decretal sum issued against him and denies initiating bankruptcy proceedings to evade payment of the decree. It is his case that he filed the bankruptcy petition after he was unable to raise the decretal sum. He acknowledges being a director of Dagen Freight Limited but confirms that the company holds no assets.
 12. The debtor asserted that the mere fact of being adjudged bankrupt cannot be a reason to halt the course of his life, and that bankruptcy proceedings are intended to give a bankrupt individual a fresh start. He



further stated that the creditor had been indolent, as they had ample opportunity to raise the issues that are now being raised in the application but failed to do so. Therefore, the debtor argued, the current application should be dismissed with costs.

13. The Official Receiver also opposed the instant application terming it as frivolous and an abuse of the court process. The Official Receiver contends that the applicant was aware of the bankruptcy proceedings but negligently ignored to file its proof of debt form to be recognized as a creditor. Further, despite being aware of the bankruptcy proceedings, the creditor neglected to file an objection notice opposing the discharge of the debtor before his discharge on 24/1/2022.
14. The Official Receiver contends that the current application was filed after an inordinate delay, a year after the respondent was discharged and the bankruptcy had run its course. Further that the applicant has not tendered any evidence to prove that the debtor had any property registered in his name and that he was in a position to otherwise settle the decretal amount.
15. It is also the Official Receiver's position that the change of the bankrupt's financial position after they are discharged is irrelevant as bankrupt persons are allowed to have their tools of trade and the debtor herein is not in contravention of the *Insolvency Act* by being in possession of a licence from the Energy and Petroleum Regulation Authority.

Analysis and determination

16. The application was canvassed by way of written submissions which I have carefully considered alongside the pleadings, authorities and evidence in support of the respective parties' cases. The issue for determination is whether the court ought to annul the bankruptcy order issued on 24/1/2019.
17. A cursory look at the record confirms the debtor's bankruptcy petition dated 14/8/2018 and the bankruptcy order in which the Official Receiver was appointed as the bankruptcy trustee. A copy of the bankruptcy order is produced as 'JM-3' in the official receiver's replying affidavit.
18. I note that prior to the hearing of the petition, the debtor published the petition in The Standard newspaper on 26/09/2018. The purpose of publishing a petition under the *Insolvency Act* is to provide public notice and ensure transparency in the insolvency process. By doing so, interested parties, including creditors, debtors or potential investors are informed of the proceedings and given an opportunity to raise objections, file claims, or take other necessary actions.
19. In this case, the petition was advertised in a widely circulated newspaper, as required by law. This fact is undisputed, and I find that the publication served as sufficient notification of the petition to both the applicant and the interested party.
20. Subsequently the Official Receiver gazetted the bankruptcy order and the debtor filed a statement of affairs form listing his creditors, the applicant being among them. Vide a letter dated 24/4/2019 the official receiver notified the creditors that a bankruptcy order was issued against the estate of the debtor and informed them that the debtor would be automatically discharged on 24/1/2022 unless the discharge was opposed by the creditors or the Official Receiver.
21. This was in compliance with Sections 254, 255 and 256 of the *Insolvency Act* which provide respectively as follows:
 - "(1) A bankrupt is automatically discharged from bankruptcy three years after the bankrupt lodged a statement of the bankrupt's financial position in accordance with section 50, but may apply to be discharged earlier.



- (2) However, a bankrupt is not automatically discharged if-
- a. the bankruptcy trustee or a creditor has objected under section 256 and the objection has not been withdrawn by the end of the three-year period referred to in subsection (1);
.....
The automatic discharge of the bankrupt has the same effect as if the Court made an order for the bankrupt's discharge.
.....
- (1) The bankruptcy trustee, the Official Receiver (if not the bankruptcy trustee) or, with the approval of the Court, a creditor may object to a bankrupt's automatic discharge.
 - (2) An objection has no effect unless it is made in the manner and form prescribed by the insolvency regulations.”

22. The evidence on record shows that the applicant responded to the aforementioned letter vide a letter dated 12/6/2019 stating that it would file its proof of debt form under the [Insolvency Act](#) and inquired about the creditors' meeting.
23. Both the applicant and the interested party have taken issue with the Official Receiver for not informing them about the creditor's meeting. It should be noted that by dint of section 52(1) of the [Insolvency Act](#), a creditor's meeting is not a mandatory process. It provides that:
- “The Official Receiver shall, subject to subsection (5), convene the first meeting of the bankrupt's creditors within the prescribed period, unless the Official Receiver decides, in accordance with section 53, not to hold the meeting.”
24. Under section 53(2) of the [Act](#), in deciding whether the meeting should or should be convened, the Official Receiver is required to consider the bankrupt's assets and liabilities, the likely result of the bankruptcy and any other relevant factors.
25. Although it remains unclear whether the Official Receiver forwarded the debtor's statement of affairs to the creditors, along with an explanation for not convening the creditors' meeting, I also find the creditors at fault for failing to submit their formal claims to the Official Receiver. Under Section 217 of the [Insolvency Act](#), it is the filing of a proof of debt that grants a creditor the necessary locus standi to participate in bankruptcy proceedings, including creditor meetings.
26. By neglecting to file their proof of debt, the applicant and the interested party forfeited their right to actively engage in the process. Consequently, they cannot shift the blame to the Official Receiver for their own inaction.
27. Had the applicant and the interested party complied with the law, they would have had the proper forum to otherwise request a creditors' meeting, during which they could have examined the debtor on all the issues now being raised in this application. No explanation has been provided for their failure to adhere to the statutory requirements. At this stage, it is far too late to raise or reconsider the issues the applicant is now bringing forward. I agree with the Official Receiver's position that the bankruptcy process has run its full course.



28. It is also evident that the applicants were fully aware of the procedure for opposing the automatic discharge of the bankrupt. Yet, through their own inaction, they failed to utilize the proper forum where they could have presented the information they now bring before the court, enabling the Official Receiver to more effectively administer the estate. Alternatively, they could have sought to have the debtor charged with a bankruptcy offence under the Act.
29. In the absence of any formal objection, the debtor was automatically discharged on 24/01/2022. The application now before the court comes far too late to turn back the hands of time.
30. I agree with the submissions of the Official Receiver that the debtor is entitled to a fresh start after the discharge. This position was espoused by the court in case of Re James Maina Kabatha (Debtor/Applicant), [2020] eKLR, when it was held that:

“The twin goals of consumer or individual bankruptcy law are to protect creditors and ensure optimal payment to them where possible; and the provision of shelter and a "fresh start" to individual debtors overburdened by debt. There is no doubt that these twin goals run through the Insolvency Act, 2015 and the Insolvency Regulations, 2016.

The US Supreme Court explained the fundamental goal of bankruptcy law in *Local Loan Co. V Hunt*, 292 U.S. 234, 244 (1934) thus:

‘[Bankruptcy law] gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.’”

Disposition

31. Accordingly, I find that the bankruptcy orders of 24/1/2019 were procedural, that the bankruptcy had ran its course and that the debtor was automatically discharged in accordance with the Insolvency Act. The upshot of the foregoing is that the application dated 3/3/2023 is dismissed with costs to the debtor and the Official Receiver.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

