



REPUBLIC OF KENYA



Eliud v Wekesa (Suing as Widower and Legal Representative of Grace Nabangala Wekesa - Deceased) (Civil Appeal E079 of 2022) [2023] KEHC 20323 (KLR) (18 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E079 OF 2022
REA OUGO, J
JULY 18, 2023**

BETWEEN

KIMANI ELIUD APPLICANT

AND

**JOSEPH WAFULA WEKESA (SUING AS WIDOWER AND
LEGAL REPRESENTATIVE OF GRACE NABANGALA WEKESA -
DECEASED) RESPONDENT**

RULING

1. This ruling relates to the respondent's preliminary objection and statement of grounds of opposition both dated September 16, 2022.
2. A brief background is that the applicant herein has a memorandum of appeal against the ruling of the subordinate court in Kimilili PMCC No 129 of 2016. Contemporaneously filed with the appeal is the Notice of Motion dated September 8, 2022 seeking the following orders:
 1. Spent
 2. Spent
 3. That the Honourable court be pleased to stay execution in respect to Kimilili civil case no 115 of 2016, 129 of 2016, 127 of 2016, 128 of 2016 and 24 of 2017 being civil case no. 129 of 2016 is the lead file pending the hearing and determination of this appeal.
 4. That the Honourable court be and is hereby pleased to stay and/or stop the continuance of execution of the decree in respect to Kimilili no 115 of 2016, 129 of 2016, 127 of 2016, 128 of 2016 and 24 of 2017 pursuant to provision of section 41 and 48 (1) of the *Insolvency Act* No 18 of 2015.
 5. Costs be provided for.



3. The application is premised on grounds that he is no longer a man of means after he sold everything he owned to meet his debt obligations, some emanating from the road traffic accident. He avers that he was formally declared bankrupt following the issuance of a bankruptcy order. The respondent has commenced process of execution against the applicant by issuing a proclamation. The applicant immediately filed an application dated June 2, 2022 before the subordinate court and the respondent opposed the application by filing a preliminary objection. The trial court allowed the preliminary objection. He avers that it is trite law that all execution and/or continuance of further execution against the debtor declared bankrupt shall be suspended. Pursuant to section 22 (a), 23 (1) 41 and 48 (1) of the [Insolvency Act](#) No 18 of 2015 this court ought to stay all execution against a party declared bankrupt. Further the provisions of section 41 and 48 (1) of the [Insolvency Act](#) provide that when a bankruptcy order commences, all proceedings to recover the bankrupt's debts are stayed.
4. The respondent has filed a preliminary notice of motion against the applicant's notice of motion and memorandum of appeal on grounds that the appellant having been declared bankrupt and as such has no locus standi to institute the appeal and the application before the court. He also filed statement of grounds of opposition on grounds that the application and appeal were in violation of Order 24 Rule 6 of the [Civil Procedure Rules](#). The respondent maintains that the pleadings ought to have been filed through the official receiver and or the trustee and or the manager of his estate.
5. The respondent has made submissions in support of the preliminary objection. He submits that both the memorandum of appeal and the applicant's application dated September 8, 2022 are for striking out on the grounds that the appellant having been declared bankrupt as admitted under paragraph 5 of his affidavit in support sworn on September 8, 2022, has no locus standi to institute the appeal and application.
6. The applicant submits that the issue before the court does not concern section 304 and 305 of the [Insolvency Act](#) and cited the court's decision in *Re Joyce Wanjiku (Debtor) [2020] eKLR*. The applicant argues that section 22 (1) of the [Insolvency Act](#) 2015 gives locus to any creditor or debtor to bring an order stopping the execution process. Section 22 (1) provides that 'after a creditor's application has been made, the debtor or any creditor may apply to the relevant court for an order stopping the issue or continuance by any other creditor of an execution process against the debtor in respect of the property of the debtor'. He submits that by virtue of the said section he has locus to move the court. He submits that the preliminary objection is without merit and the same should be dismissed.
7. The respondent filed further submissions and argued that the appellant had failed to address the issue raised in the preliminary objection.
8. After considering the preliminary objection and the submissions by the parties, the only issue is whether the appellant has locus standi to file and prosecute the instant application and appeal before this court. In [Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva \(Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased\) \[2016\] eKLR](#) the court observed as follows:

' Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such



a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.'

9. The respondent in their submission argued that the applicant did not have locus and placed reliance on the case of *Samuel Kamau Macharia & 2 others v John Kamau & 2 others [2021] eKLR*. The court in the *Samuel Kamau Macharia & 2 others v John Kamau & 2 others* (supra) held that:
 22. Bankruptcy commences on the date and time the bankruptcy order is made as provided in section 41 of the Act which provides;
 41. A bankruptcy under this Act commences on the date and at the time when a bankruptcy order is made in respect of the debtor.
 23. The said bankruptcy order is only binding on the bankrupt on expiration of the time within which to appeal or if the appeal has been made within such time and the same is withdrawn or the appellate court confirms the order. This is in pursuant to section 46 of the Act which provides that.
 46. A bankruptcy order becomes binding on the bankrupt and all other persons-
 - (a) On the expiry of the time within which an appeal may be lodged against the order; or
 - (b) If an appeal is lodged in respect of the order within that period and the Court later confirms the order or the appeal is later withdrawn-on the confirmation of the order or the withdrawal of the appeal, and the order can no longer be questioned on the ground that it was invalid or that a prerequisite for making it did not exist.
 25. My perusal of the judgment of the High Court *Purity Gathoni Gitbae & another v Oceanfreight Transport Company Limited [2011] eKLR* and *Samuel Kamau Macharia & another v Ocean Freight Transport Company Limited [2019] eKLR* confirms that indeed the first bankruptcy order against the 1st Plaintiff was made on January 28, 2011 and confirmed by the Court of Appeal on February 22, 2019 respectively and further formalized vide a receiving order dated September 16, 2020.
 26. The suit against the Defendants was filed on June 5, 2020. At the time of filing suit, the 1st Plaintiff had not filed the application for leave to appeal to Supreme Court of Kenya. The 1st Plaintiff was therefore, bound by the bankruptcy order and as such had no locus standi to institute the suit and the application therein.
10. In this application it is not in dispute that Kimaru J. in Bankruptcy Cause No 1 of 2021 declared the applicant bankrupt. Upon issuance of a bankruptcy order all proceedings to recover the bankrupt's debts are to be stayed. Under section 22 of the *Insolvency Act* the debtor can make an application notifying the relevant court, i.e, the court in which execution is pending, to stay execution. Under section 22 of the *Insolvency Act* the application can be made by the debtor and in my view the issue of locus standi as raised by the respondent does not arise. I agree with the finding of the court in re *Richard Mwangi Machira (Debtor) [2017] eKLR* that considered an application seeking stay of a decree in the subordinate court (Kajiado SPM Civil Case No 7 of 2015) in which the debtor was required to show cause why he should not be arrested and committed to civil jail for failing to satisfy the Decree.



The application was brought under the provisions of section 22 (1) of the [Insolvency Act](#) and the court stated:

' the relevant court, for purposes of Section 22(1) of the [Insolvency Act](#) would be Kajiado SPM's Court, granted the definition thereof in Section 2 of the [Insolvency Act](#). That definition is to the effect that:

'Relevant court' in relation to a matter other than one that is specifically entrusted to the High Court by a provision of this Act, means the court exercising or having responsibility for exercising jurisdiction in respect of that matter.'

(5) It is apparent therefore that the application is misconceived. Indeed for the purposes of a Debtor, it is sufficient that a Bankruptcy Order be issued, for Section 48 of the [Insolvency Act](#) recognizes that:

'(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.'
- (6) *In In re Akbarali Karim Kurji (Debtor) [2017] eKLR* 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 granted the provisions of Section 48(1)(a) that:

' When a bankruptcy order commences all proceeding to recover the bankrupt's debts are stayed.'

So that, it is no longer necessary to file an interlocutory application for 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.'

11. In my considered view bankruptcy order made by Kimaru J in Bankruptcy Cause No 1 of 2021 was intended to protect all creditors and an order staying execution aims at safeguarding the interests of all creditors, and the implementation of an order to suspend execution serves as the most effective means to protect all creditors involved.
12. In the end, I find no merit in the notice of preliminary objection dated September 16, 2022 and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 18TH DAY OF JULY 2023.

R.E. OUGO

JUDGE

In the presence of:

Applicant/ Appellant- Absent



Miss Wanyama For the Respondent

Wilkister - C/A

