



**Kagwima Kang'ethe & Company Advocates v Kochhar (Insolvency Petition E033 of 2021)  
[2023] KEHC 22638 (KLR) (Commercial and Tax) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22638 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E033 OF 2021  
EC MWITA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**KAGWIMA KANG'ETHE & COMPANY ADVOCATES ..... PETITIONER**

**AND**

**VISHAL KOCHHAR ..... RESPONDENT**

**JUDGMENT**

1. This is a petition by Kagwima Kang'ethe & Company Advocates, a firm of Advocates, (the petitioner), to adjudge Vishal Kochhar, the debtor, bankrupt. The petition is supported by affidavits and documents to prove the debt.
2. The petitioner asserts that the debtor is indebted to them in the sum of Kshs. 695,019 together with accrued interest at court rates that arose from representing the debtor in JR. No. 80 of 2014. The petitioner also states that the debtor owes Kshs. 3,000,000 in legal fees for professional services rendered in Criminal Case N0. 2 of 2010.
3. The petitioner's case is that the debtor has not paid the debt despite service of the statutory, thus he is unable to pay the debt and should, therefore, be declared bankrupt.
4. The debtor has opposed the petition through a replying affidavit. The debtor does not dispute the facts of the debt and the litigation giving rise to the debt. The debtor, however, states that instructions were given to his advocate to take steps and appeal against the decision of the Court of Appeal to the Supreme Court. The debtor therefore takes the view, that the petition is premature because there are active proceedings in the Supreme court.
5. The petition was disposed of through written submissions with oral highlights.



6. The petitioner argues that the petition satisfied section 17 (1)(2)(3) of the *insolvency Act*, (the Act), by demonstrating that the debt is due and owing; the amount owing, namely Kshs. 3,695,019 which exceeds Kshs. 25,000 specified in regulation 3; and the debt due is liquidated.
7. According to the petitioner, section 20 provides circumstances under which the court may issue a bankruptcy order, while section 25(1)(2) specify circumstances under which the court may decline to issue a bankruptcy order.
8. Regarding the debtor's argument that the petition does not comply with regulation 15 (2)(b), the petitioner relies on section 696 of the Act to argue that legal proceeding under the Act will not be invalidated or set aside because of a defect in a step unless the person is detrimentally affected. The court has also power to direct the party to correct the defect or proceedings to continue.
9. The petitioner relies on *East African Cables v SMB Bank Ltd* (IP No. E 171 of 2020) [2020] eKLR and *Noble Resources International PTE Limited v Kitimin Holdings Limited* (IP No. E 005 of 2020); [2020] eKLR, where the court applied section 696 to cure minor technical omissions.
10. The debtor has, on his part, argued that the petition does not comply with insolvent regulations, to wit; regulation 15(2)(b), which requires that a petition be accompanied by proof of the debt in form 5 in the First Schedule to the regulations.
11. The debtor also argues that the statutory notice that was served was ambiguous on the aggregate debt. The debtor takes the view, that the form of a petition is mandatory and failure to comply with the form makes the petition fatally defective.
12. The debtor again asserts that the petitioner has not complied with regulation 15(2)(c) as the petition is not accompanied with the application for appointment of a trustee in form 9 of the First Schedule. The respondent relies on *re: Ali Lillo Fallan* (Insolvency cause No. 6 of 2018 [2021] KEHC 8 (KLR) to support his position.
13. The debtor further relies on *Peter Kisembe Lubanga v Faulu Microfinance Bank Limited* [2021] eKLR, that regulation 18(3) requires a petitioner to disclose certain material facts.
14. The debtor again cites the decision in *Aggrey Muse Asatsa v Augustine Makokha* [2021] eKLR, that failure to comply with the *Insolvency Act* and regulations, the petition falls short of compliance rendering it untenable.

### **Determination**

15. I have considered the petition, the response and submissions by parties. I have also considered the decisions relied on. The issue before the court is whether the debtor is unable to pay the debt and should, therefore, be adjudged bankrupt.
16. There is no denial that the debt is due. The debtor's argument though, is that the petition is premature because the debtor has lodged an appeal in the Supreme Court. The other objection is based on the argument that the petition does not comply with regulations and is, therefore, defective.
17. To counter this, the petitioner states that the debt is not denied; the petition is not premature and failure to comply with regulations is not a ground for holding the petition defective because the law gives the court discretion to either give the petitioner time to comply or proceed with the petition.
18. Section 17 of the Act gives circumstances under which a bankruptcy order may be made. Under subsection (2) a bankruptcy order will be made where: the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level; 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; 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 there is no outstanding application to set aside a statutory demand in respect of the debt or debts.
19. There is no doubt that the debtor owes Kshs. 3,69,5,019; the debt has not been paid and the debtor does not say that he is willing to pay the debt, how and when, and there is no evidence that an application for setting aside that statutory notice is pending.
  20. The debtor argues that there is an appeal before the Supreme Court making the application premature. I do not think that argument is sustainable. Any appeal or proceedings before another court do not affect the debt since there is a valid decree and the court before which proceedings may be pending, has not stayed that decree.
  21. Once a statutory notice is served, the debtor had an option to apply to set aside that statutory notice. That would be the only way this court would consider the merit of such an argument. That having not been done, the statutory notice took effect and the duty of the insolvency court is to determine whether the petitioner has satisfied the law that the debtor is unable to pay the debt.
  22. The debtor again argues that the petition does not comply with regulation 15(2)(b) which requires that the application be accompanied with proof of the debt in form 5 in the First Schedule to the regulations. The objector further argues that the petition does not also comply with regulation 15(2) (c) since the petition is not accompanied with the application for appointment of a trustee in form 9 of the First Schedule.
  23. I have perused the regulation as well as section 696 of the Act. The section under the heading “Legal proceeding under this Act not to be invalidated or set [aside]because of a defect unless person detrimentally affected”, provides:
    1. A proceeding under this Act may not be invalidated or set aside for a defect in a step that is required to be taken as part of, or in connection with, the proceeding, unless a person is detrimentally affected by the defect.
    2. The court may order the defect to be corrected, and may order the proceeding to continue, on such terms as it considers appropriate in the interests of everyone who has an interest in the proceeding.

(3) In this section, "defect" includes a misdescription, misnomer or omission.
  24. The objection advance by the debtor falls in my view, within the ambit of subsection (1) namely; a “defect” being an omission which would not invalidate the proceedings.
  25. The debtor has not argued that the omission or defect of not complying with the regulations detrimentally affects him and show how. In any case, subsection (2) grants the court discretion to order the defect to be corrected, or the proceeding to continue, on such terms as it considers appropriate in the interests of all those who have an interest in the proceeding.
  26. The issue of the defect was not taken up at the earliest opportunity so that the debtor did not challenge the competence of the petition for reason of non-compliance with regulations. That way, the court would have given directions either for the petitioner to comply, or order the petition to proceed as the court may deem fit. The debtor opted to proceed with the petition as filed, thus he is estopped from complaining at this late stage.



27. Moreover, the debtor has not shown that the defect or omission detrimentally affects him in so far as the petition to adjudicate him bankrupt affects his right to defend himself in these proceedings.
28. *In Re: Kipsigis Stores Limited* ML HC IP No. 14 of 2016 [2017] eKLR, where the court was dealing with an application to strike out a statutory demand, the court stated that If no injustice flows from the consequences of non-compliance, then it would serve no purpose to set aside a statutory demand and to cause the statutory demand to be served again at cost.
29. In *Hon. Lemanken Aramat v Harun Meitemei Lempaka and 2 others* [2014] eKLR, the Supreme Court stated:
- (123) A court dealing with a question on procedure where jurisdiction is not expressly limited in scope...may exercise a discretion to ensure that any procedural failings that lends itself to cure under article 159, is cured. We agree with the learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before the court, without in any way affecting Courts' jurisdiction to entertain it. A court so placed, taking into account the pertinent facts and circumstances may cure such defects; and the Constitution requires such exercise of discretion in matters of a technical character.
30. I agree with the position taken in the above decisions, that if no injustice flows from the consequences of procedural non-compliance, then it would serve no purpose to dismiss a matter which otherwise complies with the law save the minor procedural infraction. I therefore find no merit in the debtor's argument that the petition is defective for non-compliance with regulations when not injustice is caused by such defect or omission.
31. In any event, one of the prayers sought in the petition is for appointment of the Official Receiver the Bankruptcy Trustee of the debtor. Similarly, the statutory notice served contained the amount of the debt which has not been denied. Compliance with the regulations would not add anything that is not in the petition. Non-compliance has not been shown to have adversely or detrimentally affected the debtor's right to a fair hearing.
32. In the end, having considered the petition, the response, arguments, evidence and the law, I am satisfied that the petitioner served a statutory notice and more than twenty-one days have passed since the statutory notice was served but there is no prospect of the debtor paying the debt. The petitioner thus satisfies the requirements for making a bankruptcy order.
33. Consequently, the petition succeeds and is allowed. The debtor, Vishal Kochhar is hereby adjudged bankrupt. The Official Receiver is appointed as the bankruptcy Trustee of Vishal Kochhar's property.
34. Costs of the petition to the petitioner, to be paid out of the assets of the debtor, Vishal Kochhar.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023**

**E C MWITA**

**JUDGE**

