



**Ecobank Kenya Limited v Mwalyo (Insolvency Petition E043 of 2022)
[2024] KEHC 14386 (KLR) (Commercial and Tax) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E043 OF 2022**

MN MWANGI, J

NOVEMBER 14, 2024

IN THE MATTER OF JOSHUA MBITHI MWALYO

-AND-

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

-AND-

IN THE MATTER OF THE INSOLVENCY REGULATIONS, 2016

-AND-

IN THE MATTER OF THE INSOLVENCY (AMENDMENT) REGULATIONS, 2018

BETWEEN

ECOBANK KENYA LIMITED CREDITOR

AND

JOSHUA MBITHI MWALYO DEBTOR

JUDGMENT

1. The creditor filed the instant insolvency petition against the debtor vide a petition dated 2nd December 2022 seeking orders for the debtor, Mr. Joshua Mbithi Mwalyo to be adjudged bankrupt within the meaning of the *Insolvency Act*. The petition is premised on the grounds on the face of it, and it is supported by a verifying and a further affidavit sworn on 2nd December 2022 and 21st March 2024, respectively, by Caroline Mbenge, the creditor's Company Secretary and Head of Legal.



2. She averred that the defendant was sued as one of the defendants in HCCC No. 681 of 2012 - Eco Bank Kenya Limited v Seven Fourteen Limited, Joshua Mbithi Mwalyo and Margaret Wangui Mbithi, and in a ruling delivered on 5th November 2013, the defendants were held jointly and severally liable for Kshs.9,259,814.00, accruing interest at 12% per annum from 26th March 2011, until fully paid. She further averred that the debtor has conducted business in Nairobi within the past year, thus falling under this Court's jurisdiction. She stated that on 19th October 2022, the creditor served a statutory demand dated 18th October 2022 on the debtor and their former advocates on record, Rachier & Amollo Advocates LLP, requiring payment of the outstanding amount with accruing interest.
3. She stated that over twenty-one (21) days have passed since serving the statutory demand, yet the debtor has not settled the full amount owed. Further, there is no application to set aside the demand, and neither the creditor nor any of its representatives holds security over the debtor's assets for the sum owed. Ms. Mbenge stated that as at the date of filing this petition, the debtor owed the creditor Kshs.22,257,041.15, surpassing the bankruptcy threshold under the Insolvency Act, 2015 and the Insolvency Regulations, 2016. She further stated that this is indicative of the debtor's inability or lack of reasonable prospect to pay the sum owed, deeming him bankrupt as per the Insolvency Act, 2015.
4. In opposition to the application, the debtor filed a Notice of Preliminary Objection dated 26th February 2024 raising the following grounds –
 - i. That the creditor's insolvency petition dated 2nd December 2022 as instituted is unprocedural, frivolous, vexatious and an abuse of the Court process as the petitioners have (sic) filed an insolvency petition against a natural person contrary to Section 17 of the Insolvency Act, 2015;
 - ii. That the petition is incurably defective in that it does not tantamount (sic) to a bankruptcy application as defined in Section 12 of the Insolvency Act Cap 53 Laws of Kenya;
 - iii. That the Honorable Court lacks jurisdiction to entertain, hear and adjudicate on the current petition as it has not been made in accordance with Section 15(1) of the Insolvency Act, Cap 53. Accordingly, the invocation of the Honorable Court's jurisdiction is irregular unprocedural and cannot be countenanced;
 - iv. That the petition seeks to liquidate a natural person, a procedure that is unknown in law. The creditor failed and/or refused to institute a Bankruptcy Petition as provided in law including the Judicial Filing Forum; and
 - v. That the application is otherwise an abuse of the Court process which should be dismissed in limine and with costs to the debtor.
5. The debtor also filed a replying affidavit sworn on 4th March 2024, by Joshua Mbithi Mwalyo the debtor herein. He averred that the creditor failed to disclose that Kshs.5,600,000/= of the Kshs.9,259,814.00 owed in HCCC No. 681 of 2012 has been paid, leaving an outstanding balance of Kshs.3,659,814.00. He claimed that he could settle the said balance through his Kshs.4,883,138.00 salary as a Member of Parliament, and a pending payment of Kshs.17,568,353.05 owed to his company, Seven Fourteen Limited, by the Kenya School of Government, Mombasa Campus and the Kakamega County Government, which are pending bill approval. Mr. Mwalyo gave an undertaking to repay the outstanding debt of Kshs.3,659,814.00 plus interest from the decree date. He committed to paying Kshs.2,000,000/= by 31st May 2024, with the remainder in monthly instalments of Kshs.250,000/=.
6. He attributed previous non-payment to personal challenges, delays by his former Counsel, business debts from Seven Fourteen Limited (not his personal debts), delayed payments owed to Seven Fourteen Limited, uncertainty over the exact amount after partial settlement, and disruptions caused by the



COVID-19 Pandemic. Mr. Mwalyo argued that a bankruptcy order would severely impact his role as a Member of Parliament with potentially irreversible consequences. He claimed that the statutory demand violated Regulation 15(4) of the Insolvency Regulations, 2016, as it lacked endorsement by the Deputy Registrar.

7. He further averred that being a Member of Parliament, this Court has residual power to enforce the decree as outlined under Section 38 of the *Civil Procedure Act*, as may be necessary, for the decretal sum to be satisfied. He contended that liquidation or appointing a Receiver is the last remedy available to the creditor. Further, that the statutory demand manifestly overstated the amount owed.
8. In a rejoinder, the creditor filed a further affidavit sworn by Caroline Mbenge, the creditor's Company Secretary and Head of Legal, on 21st March 2024. She stated that in HCCC No. 681 of 2012, judgment was issued against the defendants for Kshs.9,259,814.00 plus interest at the rate of 12% per annum from 26th March 2011, until fully paid, bringing the total to Kshs.11,083,363.12 as at 5th November 2013, but since that date, the creditor has received only Kshs.1,000,000/= as partial payment of the amount owed. She stated that on 18th February 2021, the debtor offered to pay the creditor Kshs.8,000,000/= by 31st December 2021, and requested for a waiver of accrued interest. Ms Mbenge stated that the creditor agreed to the proposal, provided payments were made within sixty (60) days from 31st March 2021, but the debtor made no payment. She pointed out that a cheque issued on 26th April 2021 as partial payment was dishonored, thus not credited.
9. She asserted that since the proceedings began, the debtor has made no payment of the balance of the decretal sum to the creditor. She urged this Court not to allow the debtor to misuse his position as a Member of Parliament to avoid his legal obligations, emphasizing on the need for equality before the law under the provisions of Article 27 of *the Constitution* of Kenya, 2010. She also noted that despite offering his parliamentary salary, the debtor has not disclosed if he has any deductions for loans by providing a salary slip. Counsel confirmed that prior efforts to enforce the decree under Section 38 of the *Civil Procedure Act*, including attempts to arrest the debtor, have been unsuccessful, as shown by warrants of arrest of 22nd June 2015.
10. The instant petition was canvassed by way of written submissions which were highlighted on 8th May 2024. The creditor's submissions were filed on 16th February 2024 and 19th April 2024 by the law firm of Majanja Luseno & Company Advocates, whereas the debtor's submissions were filed by the law firm of Obae & Ding'i Advocates on 11th April 2024.
11. Mr. Muchiri, learned Counsel for the creditor relied on the Court of Appeal case of *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* [2018] eKLR. She also relied on the decisions made in *Peter Munga v African Seed Investment Fund LLC* [2017] eKLR, and *East Africa Cables Limited v SBM Bank (K) Limited* [2020] eKLR, and submitted that having demonstrated that the debtor has not fully paid the decretal sum to the creditor, which sum is the subject of the statutory demand preceding this petition, this Court should proceed and adjudge the debtor bankrupt within the meaning of the *Insolvency Act*.
12. Mr. Ding'i, learned Counsel for the debtor submitted that the creditor's statutory demand violates Regulation 18(3) of the Insolvency Regulations by not disclosing that Kshs.5,600,000/= of the Kshs.9,259,814.00 debt was paid, leaving Kshs.3,659,814.00 outstanding. He cited the case of *SBM Bank Kenya Ltd v Sasah Contractors Limited & another* [2020] eKLR, where the Court held that an innocent client should not suffer for their Counsel's mistake, especially in serious matters, and submitted that the debtor's former Advocates on record failed to dispute the debt amount despite having proof of partial payment.



13. Counsel relied on the case of *Oldonyo Nairasha Estates (Narok) Limited v OCP Kenya Limited* [2021] eKLR, where the Court considered a debtor's unforeseen circumstances in declining insolvency proceedings. He stated that the debtor's non-payment of the balance of the decretal sum was due to personal challenges, lack of updates from his former Counsel, business debts with Seven Fourteen Limited, and delayed payments. He asserted that the debtor has demonstrated in his replying affidavit that he is in a position to settle his debts.
14. In a rejoinder, Mr. Muchiri relied on the case of *Mereka & Company Advocates v Kitololo T/A Kitololo Consultants Services* [2023] KEHC 24765 (KLR) and *Printwell Industries Ltd v East African Educational Publishers & another* [2018] eKLR, and submitted that the debtor has not demonstrated that his parliamentary salary exceeds the value of the monies demanded in the Statutory Notice, thus rendering the bankruptcy proceedings unchallenged. He cited the case of *Peter Munga v African Seed Investment Fund LLC* (supra) and argued that the debtor has not even effected payment of the alleged undisputed sum of Kshs.3,659,814.00 as per his replying affidavit. Counsel contended that the debtor cannot be allowed to rely on the alleged mistake of his previous Advocates as a failure to challenge the Statutory Demand, because he had failed to explain the reason as to why since the year 2015, not a single payment has been made in respect of a Decree issue in the year 2013.

Analysis and Determination.

15. I have considered the instant petition and the affidavits filed in support thereof, as well as the Notice of Preliminary Objection and the replying affidavit filed by the debtor, together with the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether this Court has jurisdiction to determine this petition in view of the provisions on Section 15(1) of the *Insolvency Act*;
 - ii. Whether this petition offends the provisions of Sections 12 & 17 of the *Insolvency Act*, 2015; and
 - iii. Whether a bankruptcy order should issue against the debtor.
16. Before I delve into the merits and demerits of the issues identified hereinabove, it is important to point out that none of the parties herein submitted on the merits or otherwise of the debtor's Notice of Preliminary Objection dated 26th February 2024. Nevertheless, in determination of this Petition, I will address the issues raised in the said Preliminary Objection.

Whether this Court has the jurisdiction to determine this petition in view of the provisions on Section 15(1) of the *Insolvency Act*.
17. The debtor contends that this Court does not have the jurisdiction to hear and determine the instant petition for not having been brought in accordance with the provisions of Section 15(1) of the *Insolvency Act*. In the case of the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA., held that as follows on the issue of jurisdiction-

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
18. Section 15(1) of the *Insolvency Act* provides as follows-

A bankruptcy application may be made to the Court in accordance with the provisions of this Part -



- a. by one of the person's creditors or jointly by two or more one of them;
 - b. by the debtor; or
 - c. by the supervisor of any person who is for the time being bound by a voluntary arrangement proposed by the debtor and approved under Division I of Part IV.
19. The creditor herein obtained judgment in HCCC No. 681 of 2012 - Eco Bank Kenya Limited v Seven Fourteen Limited, Joshua Mbithi Mwalyo and Margaret Wangui Mbithi, where the debtor herein had been sued as one of the defendants therein. Judgment in that suit was entered in favour of the creditor as against the defendants jointly and severally for Kshs.9,259,814.00, with interest to be calculated at the rate of 12% per annum from 26th March 2011, until fully paid. It is not disputed that to date, the debtor has not fully paid the creditor the aforesaid decretal sum.
20. In the case of Benson Mulevu Mulwa & 59 others v Invesco Assurance Co. Limited & another [2020] eKLR, the Court in defining who a creditor is stated thus-
- “Section 2 of the Act defines the term “Creditor” to include a person entitled to enforce a final judgment or final order.”
21. In light of the above provisions of the law, I am persuaded that Eco Bank Kenya Limited is a proper creditor pursuant to the provisions of Section 15(1) of the *Insolvency Act*, 2015, hence qualified to file the instant petition.

Whether this petition offends the provisions of Sections 12 & 17 of the *Insolvency Act*, 2015.

22. Section 12 of the *Insolvency Act* provides that a bankruptcy application by a creditor ought to be made in accordance with the provisions of Section 17 of the *Insolvency Act*. The latter Section states that –
1. One or more creditors of a debtor may make an application to the Court for a bankruptcy order to be made in respect of the debtor in relation to a debt or debts owed by the debtor to the creditor or creditors.
 2. Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made –
 - a. the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;
 - b. 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;
 - c. 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
 - d. there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts.
 3. For the purposes of subsection (2)(c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either –
 - a. the applicant creditor to whom the debt is owed has served on the debtor a demand requiring the debtor to pay the debt or to secure or compound for it to the satisfaction



- of the creditor, at least twenty-one days have elapsed since the demand was served, and the demand has been neither complied with nor set aside in accordance with the insolvency regulations; or
- b. execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part.
4. For the purposes of subsection (2)(c), a debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable and –
 - a. the applicant to whom it is owed has served on the debtor a demand requiring the debtor to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due;
 - b. at least twenty-one days have elapsed since the demand was served; and
 - c. the demand has been neither complied with nor set aside in accordance with the insolvency regulations.
 5. This section is subject to sections 18 to 20.
 6. An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless –
 - a. the debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing; and
 - b. the debtor makes that notification within the period specified in the demand for the debtor to comply with it.
 7. A debtor complies with a demand that overstates the amount owing by-
 - a. taking steps that would have complied with the demand had it stated the correct amount owing, such as by paying the creditor the correct amount owing plus costs; and
 - b. taking those steps within the period specified in the demand for the debtor to comply. (Emphasis added).
23. Section 12 of the *Insolvency Act* goes further to define a debtor as a natural person who owes money to one or more creditors; and, if a trust, partnership or other unincorporated body owes money to a creditor, includes all of the trustees of the trust, all of the partners of the partnership and all of the members of the body.
 24. Earlier on in this ruling, this Court found that the Eco Bank Kenya Ltd is the debtor's legitimate creditor in view of the judgment that was entered in its favour as against the debtor and two others in HCCC No. 681 of 2012, which judgment has never been appealed against, reviewed and/or set aside.
 25. Further, it is not disputed that the amount of the debt owed to the creditor by the debtor exceeds the prescribed bankruptcy level, the said debt is for a liquidated amount payable to the creditor immediately, and is unsecured. It is also evident that the debtor appears to be unable to pay the said debt, or has no reasonable prospect of being able to pay the same, since he was served with a statutory demand before the instant petition was filed, and did not pay the debt within the timelines provided. In addition to the above, there is no outstanding application to set aside the statutory demand served upon the debtor by the creditor in respect of the debt in issue.



26. This Court notes that in as much as the debtor asserts that the debt as indicated in the statutory demand is overstated contrary to the provisions of Regulation 18 (3) of the Insolvency Regulations, Section 17(6) of the *Insolvency Act* provides that an overstatement in a statutory demand of the amount owed by the debtor does not invalidate the demand, except in cases where the debtor notifies the creditor that he disputes the validity of the demand for overstating the amount owing, which was not done in this case.
27. In the premise, this Court finds that the instant petition does not offend the provisions of Sections 12 & 17 of the *Insolvency Act*, 2015.

Whether a bankruptcy order should issue against the debtor.

28. The creditor has a valid decree against the debtor which is yet to be fully satisfied. In HCCC No. 681 of 2012 where the creditor instituted a suit against the debtor and two others, judgment was entered in favour of the creditor, against the defendants jointly and severally for Kshs.9,259,814.00, with interest to be calculated at the rate of 12% per annum from 26th March 2011, until payment in full, bringing the total amount to Kshs.11,083,363.12 as at 5th November 2013. From the record, it is evident that the parties herein have demonstrated that out of the sum of Kshs.11,083,363.12, the debtor paid the creditor a total of Kshs.1,000,000/= on different occasions between 17th December 2013 and 29th October 2015.
29. In the debtor's replying affidavit, he averred that apart from the aforesaid Kshs.1,000,000/=, he also paid the creditor Kshs.500,000/= on 18th February 2011, and Kshs.4,000,000/= on 26th September 2011. As stated herein above, the debt that forms the subject of the bankruptcy proceedings is as a result of judgment entered in favour of the creditor against the debtor and two others on 5th November 2013. In my considered view, the debtor cannot rely on payments made before the date of the said judgment to claim that he has substantially paid the creditor the debt owed to it, as the Trial Court could not have entered judgment against him on amounts that he had already paid.
30. From the record, it is evident that the creditor served the debtor with a statutory demand dated 18th October 2022 demanding payment for Kshs.9,259,814.00 together with interest thereon at the rate of 12% p.a. from 26th March 2011 until payment in full. It is not disputed that despite receipt of the said demand, the debtor neither notified the creditor that he was disputing the amount stated therein, nor did he seek to have the said statutory demand set aside on account of either his being in a position to pay his debts and/or on the basis of the amount on the statutory demand being overstated. Further, the debtor did not engage the creditor in out of Court negotiations, in a bid to come up with a payment plan for paying the debt owed. For the said reasons, the debt herein was not properly disputed by the debtor as contemplated under the *Insolvency Act*, thus the creditor was at liberty to institute the instant bankruptcy petition against the debtor, upon the elapse of twenty-one (21) days from the date of issuance of the statutory demand dated 18th October 2022.
31. This Court notes that the debtor attributed non-payment of the debt herein to personal challenges, delays by his former Counsel, business debts from Seven Fourteen Limited (not his personal debts), delayed payments owed to Seven Fourteen Limited, uncertainty over the exact amount after partial settlement, and disruptions caused by the COVID-19 Pandemic. He has however still not settled the admitted debt or attempted to do so as per his undertaking under paragraphs 8, 9 & 10 of his replying affidavit.
32. In urging this Court not to make a bankruptcy order against him, the debtor averred that he is still able to pay his debts through his Kshs.4,883,138.00 salary as a Member of Parliament and a pending



payment of Kshs.17,568,353.05 owed to his company, Seven Fourteen Limited, by the Kenya School of Government, Mombasa Campus and the Kakamega County Government, pending bill approval. However, as was correctly submitted by Counsel for the creditor, the debtor has not demonstrated that the said salary is sufficient to settle the said debt and/or that it is not committed elsewhere. He has also not demonstrated the existence of the pending bills to Seven Fourteen Limited, by the Kenya School of Government, Mombasa Campus and the Kakamega County Government and/or that Seven Fourteen, a limited liability company has allowed him to direct its funds and assets to settle his personal liabilities.

33. The debtor also relied on the provisions of Section 38 of the *Civil Procedure Act* in arguing that this Court has residual powers to enforce the decree in line with the said provisions. Further, he argued that liquidation or appointing a Receiver without is the last remedy available to the Creditor. In the case of *Pride inn Hotels and Investments Limited v Tropicana Hotels Limited MSA CA Civil Appeal No. 98 of 2017 [2018] eKLR, Visram JA.*, reading the majority judgment of the said Court, had this to say -

This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the *Insolvency Act* or the *Companies Act*, which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.

34. The debtor also challenged the lack of endorsement of the Petition by the Deputy Registrar as provided in the *Insolvency Act*. On this issue, in my considered view, lack of said endorsement is a procedural technicality which does not affect the substance of the Petition. That on its own, cannot invalidate the competency of the petition before me, as it meets all the other requirements provided in law.
35. The debt herein has been due and owing to the creditor from the debtor since 5th November 2013 when the judgment in HCCC No. 681 of 2012 was delivered in favour of the creditor against the debtor. The debtor was served with a statutory demand dated 18th October 2022, but to date he has not made good the said demand. The debtor has not at the very least demonstrated that he paid and/or attempted to pay the undisputed amount and or submitted a payment plan proposal for consideration by the creditor and the Court, so as to show this Court his willingness and/or ability to pay the debt herein. It is not enough for a debtor to state that he is earning a large salary per month, but still keep the debt unpaid for so many years. This Court would have expected to see evidence of the amounts the debtor has been paying in satisfaction of the decretal sum. Apart from the payment of Kshs.1,000,000/=, no other evidence of payment was forthcoming.
36. I am therefore persuaded that the creditor has satisfied the prerequisites set out under Section 17 of the *Insolvency Act*, 2015 reproduced earlier in this ruling. Further, I find that there is sufficient evidence that the debtor is unable to pay his debts. I do not find any compelling reason to decline making a bankruptcy order against him.
37. The upshot is that the petition dated 2nd December 2022 is merited. It is allowed in the following terms -
- i. Joshua Mbithi Mwalyo is hereby adjudged bankrupt and a bankruptcy order is made against his estate;



- ii. The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed as the Bankruptcy Trustee in respect of the debtor's property.
- iii. Costs of the petition shall be borne out of the debtor's estate.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF NOVEMBER 2024
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Musau for the creditor/petitioner

Mr. Kuria holding brief for Mr. Ding'i for the debtor/respondent

Ms B. Wokabi – Court Assistant.

