



REPUBLIC OF KENYA



**In re Benson Mukanzi (Insolvency Cause E003 of 2023)
[2024] KEHC 15723 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E003 OF 2023
BM MUSYOKI, J
DECEMBER 13, 2024
IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND
IN THE MATTER OF THE INSOLVENCY REGULATIONS, 2016
AND
IN THE MATTE OF BENSON MUKANZI**

RULING

1. By a notice of motion dated 8th February 2024, the petitioner/applicant has applied for the following orders;
 1. Pending hearing and determination of this application, this honourable court be pleased to grant an order of stay of execution of the ruling and consequential orders of the Hon Wendy K. Micheni (CM) of Chief's Magistrate's Court at Nairobi, Milimani Commercial Courts delivered on 13th September 2023 in Nairobi Milimani Commercial Courts civil case No. 1332 of 2011.
 2. Pending hearing and determination of the bankruptcy proceedings (Insolvency Petition) herein, this Honourable Court be pleased to grant an order of stay of execution of ruling and consequential orders of the Hon. Wendy K. Micheni (CM) of the Chief Magistrate's Court at Nairobi, Milimani Commercial court delivered on 13th September 2023.
 3. The costs be in the cause.
2. The application was expressed as being brought under Sections 1B and 3 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 22 Rule 22(1), Order 42 Rule 6(2), Order 52 Rule 1 and all other enabling provisions of the law and was supported by affidavit of the applicant sworn in 8-02-2024. The applicant has deponed that there is a judgement against him in the aforementioned chief magistrate's



court in the sum for Kshs 287,798.61 for which he was facing imminent arrest. He exhibited a notice to show cause for that sum dated 23rd May 2022. Upon being served with the notice to show cause, the applicant filed an application before the lower court seeking stay of execution pending hearing of this cause. The application was dismissed by the honourable magistrate as she then was on reason that stay of execution proceedings to recover debts of the party adjudged bankrupt could only be stayed after the bankruptcy order is issued.

3. To begin with, the provisions of the law cited by the applicant are not applicable in bankruptcy proceedings. This is an insolvency cause in form of bankruptcy against a natural person whose procedure is governed by part III of the *Insolvency Act* and the Insolvency Regulations 2016. The relevant provisions for an application of this nature are in Sections 23 of the *Insolvency Act* which provides that;

1. This section applies if an execution has been issued by a court other than the High Court.
2. If it is proved to the issuing court that an application for a bankruptcy order in respect of the debtor has been made to the High Court, that court may either;
 - a. stay the execution process on such terms as it considers appropriate; or
 - b. permit the execution process to continue on such terms as it considers appropriate.

4. The above section applied in this case at the lower court and that is what the said court ruled on. That order was not appealed or set aside and still remains in place. It is clear that the *Insolvency Act* does not have provision for stay of execution proceedings by the High Court where the application for bankruptcy has been made by the debtor. Section 23 gives powers to the High Court to stay proceedings of execution in other courts but only where the application for bankruptcy has been made by the creditor. Sections 32, 33, 34 and 35 which provide for application by debtors do not have provisions for stay or restrictions of execution proceedings in matters before courts. This is unlike the division 3 (sections 17 to 31) which provides for application by creditors. In this case, the application has been made by the debtor.

5. In my view, the omission of such a scenario was deliberate and made to prevent situations where a debtor rushes to court to file for their own bankruptcy in order to frustrate execution of judgements or decrees against them. I resonate with the finding of the court in *Rajendra Ratilal Sanghani v Schoon Ahmed Noorani* (2018) KEHC 2780 (KLR) where Justice F. Tuiyot as he then was stated;

When dealing with an applicant who is not yet adjudged bankrupt, the debtor herein, the court must be satisfied that the debtor is unable to pay his/her debts. While the court is not expected to carry out a detailed examination as to the fortunes (perhaps misfortunes) of the debtor, the evidence presented must be such as to make out a prima facie case that the debtor is insolvent and is unable to pay his/her debts. It seems fairly elementary that such an assessment cannot be undertaken unless the debtor gives a true and full inventory of his creditors and debtors and other liabilities and assets.

6. The only instance where the High Court is mandated to make interim orders in an application by the debtor is section 304 (1) of the *Insolvency Act* which provides that;

An application to the court for an interim order may be made if the debtor intends to make a proposal to the debtor's creditors under this Division for a composition in satisfaction of the debtor's debts or a scheme of arrangements of the debtor's financial affairs.



7. That is not the case in this matter. The applicant has not made any proposals and in fact does not appear keen in progressing the application for bankruptcy. Flowing from this, it is my view that an application for interim reliefs has to be restricted to the instances expressly provided for in the *Insolvency Act*. The applicant has not fitted his application within the restrictions of the *Act*
8. The petitioner in this matter has not given inventory of his assets and liabilities other than stating that he is unable to pay his debts which to me is not enough to establish a prima facie case. What the petitioner in this matter should be pursuing is to fast track its application and allow the process of bankruptcy to be proceed in the normal manner.
9. In these circumstances, I do not think that it is appropriate for this court to allow what the law deliberately avoided. The work of the court is to interpret and apply the law and not to enforce law in the manner that would appear to contradict the intention of the legislature. I find no merit in the application dated 8th February 2024 and the same is dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Ruling delivered in presence of Miss Musando for Mr. Kanyonge for the applicant.

