



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO. E002 OF 2019

KIRTEEKUMAR BABUBHAI PATEL..... DEBTOR/APPLICANT

-VERSUS-

DIAMOND TRUST BANK KENYA LIMITED.....CREDITOR/RESPONDENT

RULING

1. The Debtor/Applicant herein filed Notice of Motion dated 8th April 2019 seeking the following main orders: -

1. Spent.

2. That pending hearing and determination of this application an Interim Order do issue in favour of the Applicant/Debtor herein to enable him make a proposal to his creditors for composition in satisfaction of the debts or a scheme of arrangement of his financial affairs.

3. That pending hearing and determination of this application an order due issue restraining the officers commanding station JUJA, PARKLANDS and CENTRAL Police stations, their offices, servants and or agents from arresting the Applicant/Debtor.

4. That unless this orders are granted by this Honourable court, the Applicant/Debtor will suffer irreparable loss as a result of the anticipated arrests.

5. That the application herein has been brought with utmost good faith and in the interest of justice.

6. That this honourable court be pleased to grant any other orders that it deems fit.

2. The application is supported by the Debtor's affidavit and is premised on the grounds that: -

a) That due to fear an eminent arrest by police from Juja Police Station and Parklands Police Station the Applicant/Debtor has shut his clinic which is the only source of livelihood for the past two weeks.

b) That one of the creditors Mr. KULWAT SING has made a report to Juja and Parklands Police Stations respectively seeking the arrest of the Applicant/Debtor on a claim of monies owed to him by the Applicant amounting to 1,000.000.

c) That the police have severally laid ambush on the Applicant/Debtor, which has made him vacate his home due to the inability to pay the monies due and owing.

d) That the Applicant is not in a position to discharge his debt obligation but given protection by this Honourable court as envisaged in the Insolvency Act, in the alternative of Bankruptcy, he shall be in a position to clear his outstanding debts.

e) That bad debts owing and due to the Applicant/Debtor by Nakumatt Holdings which was recently placed under receivership and National Hospital Insurance Fund has greatly contributed to the predicament of the applicant herein.

f) That it is just and equitable that this application by the Applicant/Debtor be allowed.

3. DIAMOND TRUST BANK LIMITED, one of the Creditors, filed it listed the following grounds:

Notice of Preliminary Objection to the application wherein

1. *The application offends the Provisions of the Insolvency Regulations, 2016 and particularly Regulation 45.*

2. *The application is bad in law as the Debtor/Applicant has failed to include in his filed statement of account, a statement of his income. Neither has the Debtor/Applicant included in the said statement of income his itemized statement of expenses.*

3. *By reasons of the non-disclosure complained of, the Debtor/Applicant has not disclosed or evidenced inability to repay debts owed to his creditors.*

4. *The application is invalid and bad in law for reasons that there is material non-disclosure which goes to the root of the matter.*

5. *The application is made in bad faith, is an abuse of the court process and meant to defeat the objectives envisaged in the Insolvency Act.*

6. *The application is incurably defective and ought to be struck out for deliberate failure to comply with the provisions of the Insolvency Act 2015 and the Regulations made thereunder.*

4. Momentum Credit Limited (hereinafter "**Momentum**") also a Creditor, opposed the application through the replying affidavit of its Legal Officer **Ms Sheila Imali** who avers that sometime in early June 2018, the Debtor approached Momentum with a view to securing financial facilities from it against motor vehicles Registration No. KAV 905V and KCK 772 N.

5. She states that Momentum agreed to advance the Debtor the facilities after conducting due diligence on the said motor vehicles and satisfying itself with the search results. She adds that the Momentum secured its interest by causing co-registration of the subject motor vehicles thus making it a secured Creditor.

6. She further states that the loan facilities fell into arrears and that failure to list Momentum as a secured creditor will occasion it great prejudice and financial loss this defeating its registered interest in the subject motor vehicles.

7. When the matter came up for directions on 25th April 2019, parties agreed, by consent, that an interim order be issued in favour of the Debtor to enable it make a proposal to his creditors for composition in satisfaction of the debts or a scheme of arrangements of its financial affairs.

8. Parties canvassed both the application and the preliminary objection by way of written submission which I have considered.

9. A summary of the Creditor's submissions is that having failed to comply with the provisions of Section 306(1) of the Insolvency Act (hereinafter "**the Act**") and Regulation 45 of the Insolvency Regulations, the Debtors' Notice of Motion is incurably defective.

10. It was submitted that the said statutory requirements go to the root of the matter as they are the basis upon which this court can determine whether the applicant is insolvent or not before granting the orders sought.

11. It was submitted that the Debtor therefore needed to present its competent statement of affairs showing his income and expenses for evaluation of the court so as to determine if he is insolvent or not. For this argument, counsel relied on the decision on **Rajendra Ratilal Sangani v Schoon Ahmed Noorani** [2018] e KLR wherein it was held: -

"When dealing with an applicant who is not yet adjudged Bankrupt, like 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."

12. In a rejoinder, the Debtor's counsel submitted that the overall design of the Insolvency Act is to give a distressed Debtor a second chance by making provisions for an Interim Order to enable the Debtor make a proposal for composition in satisfaction of the debts.

13. It was submitted that an application for an Interim Order can only be stopped if it is demonstrated that it is an abuse of the court process or if it is so hopeless that it cannot possibly succeed. It was further submitted that the Debtor made sufficient material disclosure of his accounts at the time of filing the application.

14. The Debtor argued that the majority of the Creditors should be given a chance to look at his proposal of 24th September 2019 and that the court should not be too quick to shut the door on an insolvent person.

Analysis and determination.

15. Having considered the pleadings filed by the parties herein together with their written submissions. I find that the main issue for determination is whether the Preliminary Objection is merited and depending on outcome of the Preliminary Objection, whether the applicant has made out a case for the granting of the orders sought in the application of 8th April 2019.

16. Section 306(1) of the Act stipulates as follows: -

“(1) On the hearing of an application made under section 304, the Court may make an interim order if satisfied-

(a) that the debtor intends to make a proposal under this Division;

(b) that on the day of the making of the application the debtor was an undischarged bankrupt or was able to make an application for the debtor's own

(c) that no previous application has been made by the debtor for an interim order during the twelve months immediately preceding that day; and

(d) that the supervisor designated under the debtor's proposal is willing to act in relation to the proposal.”

17. Regulation 45 of the Insolvency Regulations, on the other hand, stipulates as follows: -

“45. For the purposes of section 307(2) of the Act, the particulars to be included in a statement of the debtor's financial affairs are as included in the Debtor's Statement follows— of Affairs.

a) statement of the debtor's income including details of shareholding in companies;

b) an itemised statement of the debtor's expenses;

c) if the debtor has included his partner's expenses, a statement of the partner's income;

d) a statement of any assets that the debtor has disposed of during the preceding three years; and a statement of all financial transactions by the debtor during the preceding three years.”

18. In the present case, the Debtor swore an affidavit in support of the application wherein he averred that he is a doctor by profession and that he is currently financially incapacitated due to debts amounting to Kshs 29,500,000 due and owing to his Creditors. He attached copies of his financial statement marked as annexure “**KBP2**” to the affidavit.

19. He stated that his financial misfortunes arose as a result of the collapse of Nakumatt Holdings that owed him Kshs 4,000,000 and National Health Insurance Fund which owes him close to Kshs 6,000,000. He urged the court to grant him time to reorganize his finances so as to be in a position to settle the debts.

20. The Debtor also attached his statement of affairs and proposal dated 19th September 2019 to his written submissions. The question which this court has to grapple with is whether the Debtor herein has complied with the above cited relevant provisions of the Act and Insolvency Regulations. I have perused Debtor's annexed ‘**KPP2**’ and I note that they are statements of accounts from his various bankers outlining the state of affairs of his accounts for the period preceding the filing of the instant application.

21. From the evidence presented by the Debtor, I am unable to find that he is guilty of material non-disclosure as was suggested by the creditors. My finding is that the material presented by the Debtor reveals that he is unable to pay his debts as he has disclosed both his creditors and debtors besides setting out his assets and liabilities.

22. As was observed by the court in **Rajendra Ratilal Sangani** case (supra), the court is at this juncture not expected to carry out a detailed examination on the fortunes of the Debtor. The upshot is that the instant application cannot be said to be hopelessly wanting so as to warrant its being struck out.

23. For the above reasons, I am unable to uphold the Preliminary Objection which I dismiss with no orders as to costs.

24. Turning to the substance of the application dated 8th April 2019, I note that the prayers sought have been overtaken by events if not spent. The applicant is therefore at liberty to move the court appropriately should he deem it necessary.

Dated, signed and delivered via Microsoft Teams at Nairobi this 15th day of April 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Kirui for petitioner

Mr. Jango for Kisingu for Creditor

Mr. Mose for Momentum Credit Ltd/Creditor

Miss Kale for Kimutai for Kingdom Bank

Mr. Masinde for Creditor No. 14 in the list of Creditors

Court Assistant: Sylvia.