



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY CAUSE E014 OF 2019

IN THE MATTER OF THE INSOLVENCY ACT

AND

SHABBIR MOHAMMEDALI KHATAU.....DEBTOR

-VERSUS.

JOSEPH NZYOKI MWANTHI..... CREDITOR

JUDGMENT

1. The petitioner herein **Shabbir Mohammedali Khatau** filed this petition dated 6th August 2019 under Section 32 of the Insolvency Act No 18 of 2015 and Regulation 18 of the Insolvency Regulations, 2016. The petition is supported by his affidavit dated 6th August 2019 wherein he states that he does not have any assets to liquidate the decretal sum of Kshs 6,102,487. He further states that he is old, frail and does not have any reasonable prospect of paying the debt.

2. A creditor, **Joseph Nzyoki Mwanthi**, opposed the petition through a replying affidavit dated 15th November 2019. He avers that he obtained judgment against the Petitioner in Nairobi HCC No. 118 of 2001 on 20th May 2015 wherein he was awarded a total of Kshs 4,385,557 in damages plus costs.

3. The Creditor states that the petitioner did not settle the decretal sum and was committed to Civil Jail on 15th July 2019 after which he filed this petition with the intention of defeating the execution process. According to the Creditor, the Petitioner is not a man of straw and has not disclosed that he had a thriving motor spares business as at the time of the judgment. He adds that the Petitioner's advocate intimated to him that the Petitioner would be able to raise Kshs 2,000,000 from the sale of the spare parts. He states that the petitioner has not disclosed his Kenya Revenue Authority Personal Identification Number or attached his Kenya Revenue Authority tax returns for the year ending 31st December 2018 so as to present his true financial position.

4. The petition was canvassed by way of written submissions which I have considered. The main issue for determination is whether the petition is merited.

5. **Section 32(1)** of the *Insolvency Act, 2015* provides that a debtor is entitled to apply to be adjudged bankrupt if he or she is unable to pay his or her debts: -

6. Section 32(2)(a) of the Insolvency Act on the other hand provides that:

The Court may decline to deal with such an application [to be declared bankrupt] if it is not accompanied by a statement of the debtor's financial position containing –

(a) such particulars of the debtor's creditors and of the debtor's debts and other liabilities and assets as may be prescribed by the insolvency regulations.

7. Regulation 18 of the Insolvency Rules 2016 requires the debtor to provide detailed information on his financial states so as to guide the court and the creditors in ascertaining his creditworthiness.

8. The Creditor opposed the petition on the ground that the Debtor at one point operated a KCB MBENKI Account that made transactions running to Kshs 500,000. This claim was however not supported by any tangible evidence. The Creditor faulted the Petitioner for failing to

disclosed his Kenya Revenue Authority Personal Identification Number. A perusal of the Petitioner's statement shows that he did not disclose his Kenya Revenue Authority Personal Identification Number.

9. *In Re James Maina Kabatha NKR Insolvency Cause No. 4 of 2019 [2020] eKLR* the court observed that;

“The twin goals of consumer or individual bankruptcy law are to protect creditors and ensure optimal payment to them where possible; and the provision of shelter and a “fresh start” to individual debtors overburdened by debt.”

The learned judge added that:

“The “fresh start” goal is accomplished through the bankruptcy discharge, which usually releases the debtor from personal liability from certain debts and prevents creditors from taking any action against the debtor to collect those debts.

Consequently, bankruptcy protection being an extraordinary relief, one of the corollaries to these seemingly conflictual twin goals of bankruptcy law – the protection of creditors and the provision of fresh start for the honest but unfortunate debtor -- is that an individual seeking bankruptcy protection is required to scrupulously demonstrate that he is acting in good faith and disclose all his financial information.

It is only upon meeting this double threshold – demonstration of good faith and full disclosure of all financial information – that a Petitioner can become entitled to a bankruptcy order. The architecture and structure of the Insolvency Act and Insolvency Regulations, 2018 reinforce these double thresholds for individual Petitioners.”

10. The dictum in the above cited case is that the burden rests on the Debtor to demonstrate that he is acting in good faith by providing his financial records. In other words, the Debtor must make full disclosure of his financial affairs so as to leave nothing to doubt. In the instant case, there is the nagging question of the Debtor's Personal Identification Number that was not disclosed as is required under Regulation 18(3) (f). For this reason, I find that it will be premature for the Court to determine the Debtor's petition for bankruptcy and that it will be in the interest of justice to have the Debtor comply with the said provision before concluding this judgment.

11. Consequently, I direct that: -

a. The petitioner discloses his Kenya Revenue Authority Personal Identification Number to the Creditor and this court within 14 days from the date of this order.

b. This order be served upon the Creditor.

c. The matter to be mentioned before the Deputy Registrar on 22nd September 2021 to confirm compliance with the orders of this court.

d. I make no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th day of July 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:

None appearance of the parties

Court Assistant: Sylvia.