



**In the matter of Ali Jillo Fallan (Insolvency Cause 6 of 2018) [2021]
KEHC 8 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 8 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE 6 OF 2018
JM MATIVO, J
SEPTEMBER 10, 2021**

RULING

1. Vide a Debtor's Petition dated 14th March 2018 filed in court on 21st March 2018, Ali Jillo Fallana, a resident of Nairobi, petitioned to this court for a Bankruptcy Order on grounds that he was unable to pay his debts. He prayed that he be adjudged bankrupt. Annexed to the Petition is his Statement of Affairs (Individual Person) (Form No. 11) reflecting assets worth Kshs. 158,000/= and liabilities to the tune of Kshs. 8,457,883.92. His Creditors whose debts are unsecured are shown as Gulf African Bank Limited-Kshs. 6,99287/=; First Community Bank-Kshs. 158,596.92 and Mars Afrik Ltd-Kshs. 1,300,000/=.
2. Additionally, the Petitioner provided information relating to his affairs and also filed an affidavit dated 14th March 2018 deposing that previously he engaged in Transport business. He averred that he approached Gulf Africa Bank Ltd which granted him a loan to the tune of Kshs. 6,554,800/= to purchase a Truck to further his business. He averred that the said has since sued him in CMCC No. 8225 of 2016 seeking to recover Kshs. 6,999,287/= plus interests thereon at the rate of 14% per annum from 15th August 2016 plus default damages at 20% until payment in full together with costs of the suit.
3. The Petitioner also avers that it secured a working capital loan of Ksh. 2,000,000/= from First Community Bank which it partially paid leaving a balance of Kshs. 158,596.92 which it has been unable to pay.
4. Additionally, he states that on or about August 2016, the said truck was involved in a road accident as a consequence it was declared a write off forcing him out of his transport business rendering him unable to pay his debts particularly the bank loan which financed the purchasing of the truck. He avers that he is indebtedness to his creditors to the tune of Kshs. 8,457,883.92 which he is totally unable to pay.

Creditor's response

5. Gulf Africa Bank Ltd, an unsecured Creditor filed grounds of opposition dated 14th October 2019. It opposed the Petition on grounds that the Petition falls short of the requirements of section 32 (3) (a)



of the *Insolvency Act*¹ (the Act) and Regulation 18(4) of the Insolvency Regulations (the Regulations) which require a debtor to publish a Notice of the application for Bankruptcy in a newspaper circulating within the region in which the debtor ordinarily resides. Also, it states that section 34 (5) of the Act provides that this court may decline to hear the application if the requirement of advertisement set out in the said provision is not complied with. Lastly, it states that the Petition is an abuse of the court process having been filed more than one year ago and its purpose is to defeat a court decree.

6. In addition to the grounds of opposition, Mr. Lawi Sato, the Legal Officer of Gulf Africa Bank Limited swore the Replying affidavit dated 19th November 2019. He deposed that at the Petitioner's request the Bank on 15th September 2015 advanced to the Petitioner the sum of Kshs. 6,554,800/= subject to the agreed conditions. He averred that the facility was secured by (a) joint registration of the Prime Mover Registration No. KCS 664 U and trailer registration number ZE 9024M in the names of the Petitioner and the Bank; (b) Chattels Mortgage dated 4th December 2014 for Kshs. 6,554,800/= over the assets being financed; and a duly executed letter of set off dated 25th September 2014.
7. He deposed that the Petitioner breached the agreed terms and defaulted in re-paying the loan which stood at Kshs 6,999,287/= as at 15th August 2016 which amount continues to accrue default damages at the rate of 20% per annum. He averred that on 2nd December 2016, the Bank sued the Petitioner in CMCC No. 8225 of 2016, seeking the said sum together with profits at the Banks commercial rates of 14% per annum from 15th August 2016 and default damages of 20% until payment in full. He averred that 28th November 2018, judgment was entered against the Petitioner and a decree was issued on 24th January 2019. Lastly, that the Bank has made attempts to execute the decree against the Petitioner.
8. He averred that no evidence has been tendered to show that the truck was involved in an accident, and that the Petitioner is trying to hide his asset from the bank. Further, he averred that the Petitioner runs an electronic shop in Nairobi, so he is in a position to pay his debts.
9. Mr. Sato averred that the Petition falls short of the provisions of sections 32 (4), 34 (5) of the Act and Regulation 18(4). Further, that the Statement of affairs may not reflect his true position having been filed one year ago. Lastly, that the Petition is non-starter aimed at defeating the decree issued in CMCC No. 8225 of 2016.
10. Mars Afrik Limited, also an unsecured Creditor vide the affidavit of Mr. Sadiki Mustapha Doufa, its director dated 11th November 2019 stated that it did not object to the Petition.

Petitioner' Replying

11. The Petitioner swore the Supplementary affidavit dated 11th November 2019 in response to the grounds of opposition filed by Gulf Africa Bank Ltd. He averred that the Petition complies with the provisions of section 32(4) (a) of the Act and Regulation 18 (4) in so far as the provisions required him to publish a Notice of the application/Petition in a Newspaper circulating within the region he ordinarily resides.

The Petitioner's oral evidence and cross-examination

12. The Petitioner's testimony was essentially a replication of his affidavit in support of the Petition. It will add no value to rehash I here. It will suffice to state he testified that at the time of filing the Petition, he was unemployed, but currently, he is employed. He said that he did not provide bank statements for three years because his earning does not allow him to operate a bank account nor was he asked to avail bank statements. He denied that he has hidden the truck from the bank.

¹ Act No. 18 of 2015.



13. Upon cross-examination, he stated that he filed a Statement of Affairs which included his assets and liabilities and that currently he works in a business owned by another person and that his business no longer exists. He denied owning an online business. He said he filed the Petition after his business went down and the truck was involved in an accident.

The Petitioner's advocates submissions

14. The Petitioner's counsel submitted that Section 32(1) of the Act permits a debtor to apply to be adjudged bankrupt on the grounds that he or she is unable to pay his or her debts. He argued that the Petition discloses that the Debtor owes his creditors a cumulative sum of Ksh. 8, 457, 883.92. Further, he argued that as per the Statement of Affairs, the only assets owned by the Debtor are households and personal effects worthy Kshs. 158, 000/= while the total debt due to the Creditors is Ksh. 8, 457, 883.92. He argued that even though the Debtor is employed in an Electronic Shop earning a Salary of Kshs 30, 000/=, this amount is meagre and only utilized by the debtor for purposes of making provisions to his family which includes his wife and two children which confirms his inability to pay his debts.
15. He submitted that the Creditor commissioned investigations into the affairs of the debtor culminating in a Report by Josi Services which did not make any definitive findings whether the Debtor owns assets that are capable of paying the debts. He argued that there is no documentary proof such as Certificate of Registration showing that the Debtor is the proprietor of the businesses listed at Paragraph 5 of the Gulf African Bank's Supplementary Affidavit. He argued that the Debtor has demonstrated that he is indeed indebted to the tune of Ksh 8, 457, 883.92 and that he is unable to pay the debts.

Gulf African Bank Limited advocates submissions

16. Counsel for the above creditor cited *In re James Maina Kabatha (Debtor/Applicant)*² in which the court stated 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 court in the said case stated: -
17. Counsel submitted that Regulation 18(3) details the information a Petitioner is required to include in his Statement to enable the creditors and the court to ascertain the bona fides of the Petition and to ensure that bankruptcy proceedings are not used by the Petitioner to evade paying his debts. He submitted that the Petitioner has not complied with the said Regulation because the following information is missing from the Petitioner's Statement:- (a) an itemized statement of the Petitioner's income and expenses; (b) a statement of all the Petitioner's current assets, including the description, value, and location of those assets; and, (c) a statement of all financial transactions by the Petitioner during the previous three years.

² NKR Insolvency Cause No. 4 of 2019 [2020] e KLR.

3. 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.
4. 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.
5. 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 this double threshold for individual Petitioners.



18. Counsel argued that as per Regulation 18(4), in addition to publication of a notice in a newspaper of regional publication under section 32(4), the Petitioner is also required to arrange for publication of his Statement of Financial Position in the Kenya Gazette which was not done. Counsel argued that it is premature for the court to consider the Petition for bankruptcy. He urged the court to decline the application.
19. In addition, counsel cited *re John Kamau Njau(Debtor)*³ which held that “insolvency law on individuals is intended to grant some respite to natural persons who are truly insolvent. Because the grant of the order insulates the Petitioner from the aggression of creditors through civil or other proceedings, a Petitioner who bespeaks an Insolvency (Bankruptcy) order must be candid and forthright as to his state of affairs. There must be a full and frank disclosure by the Petitioner.”
20. He submitted that the averments in the Petition are not substantiated and that no evidence has been adduced to buttress the Petitioner’s assertions that he earns Kshs. 30,000/= per month and the prime mover truck KCA 664 U and Trailer ZE 9024 was involved in an accident. He argued that the elementary principle of law is that he who alleges must prove the allegations as required by Section 107(1)(2),108 and 109 of the *Evidence Act*.⁴
21. He relied on *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)*.⁵
22. Additionally, counsel submitted that the Petitioner has concealed material facts and evidence from the court, and that his assertions are an afterthought and false. He submitted that the Petition is meant to defeat execution of the Decree and to obstruct the Bank from recovering the loan and enjoying the fruits of its judgment. He cited *Stephen Nyaega Mose*⁶ in which the court cautioned against abuse of Bankruptcy laws and proceedings noting that Bankruptcy laws were never meant to protect people who are in debt because of their own act of fraud or professional misconduct; but are meant to protect genuine people who have unfortunately found themselves in debt out of innocent factors such as harsh business environment and unavoidable business calamities.

Determination

23. The policy underpinning insolvency legislation and practice is that a debtor is entitled to seek relief from unmanageable debt through bankruptcy if the debtor is unable to resolve his or her financial difficulties through other means. However, bankruptcy is regarded as an option of last resort because it has serious consequences.
24. Even though it is imperative that a debtor be shielded through a bankruptcy order, the Petition must be made in good faith and there should be no material non-disclosure. There must be clear proof of actual insolvency.⁷ The Petitioner’s case must firmly be asserted in the founding affidavit. The assertion must demonstrate that the Petitioner is “factually and commercially” insolvent. But commercial insolvency, another way of saying that a debtor cannot pay his debts as and when they fall due for payment, is no more than an onus-shifting device, which then burdens the debtor to show that his assets exceed his liabilities. It does not serve as a standalone ground for an insolvency order to issue.

³ {2019} eKLR.

⁴ Cap 80, Laws of Kenya.

⁵ Kisumu Hccc No. 68 of 2007.

⁶ {2018} e KLR.

⁷ See *Hugo N.O v Lipkie* 1961 (3) SA 66 (O) at 6.



25. This brings me to the central issue to be decided in this case which is has it been proven, at least prima facie, that the Petitioner is unable to pay his debts? Factual insolvency may be established either directly by adducing evidence of the debtor's liabilities and of the market value of his assets at the date of the application, or indirectly by providing evidence of circumstances indicative thereof, e.g., the fact that debts remain unpaid, or that the debtor has sought a moratorium or that he has endeavored to compromise with his creditors.⁸ A court must be cautious not to infer insolvency from such circumstances. As was pointed out in *Corner Shop (Pty) Ltd v Moodley*⁹ the inability to pay a debt should not be taken out of its context, for it may be "consistent with a state merely of temporary financial embarrassment" or due to "commercial insolvency" in circumstances where a debtor's liabilities do not exceed the value of his assets." At the same time, one must bear in mind the principle that the court will not make an order for compulsory bankruptcy on the ground of general insolvency unless the facts are clearly proved.¹⁰
26. The proper approach in deciding the question whether a Bankruptcy order should be issued on this ground appears to me, to be that, if it is established that an individual is unable to pay his debts, in the sense of being unable to meet the current demands upon it, his day to day liabilities in the ordinary course of his business, it is in a state of commercial insolvency; that he is unable to pay his debts may be established by proper evidence. If the individual is in fact solvent, in the sense of its assets exceeding his liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realizable assets available out of which, or the proceeds of which, the debtor is in fact able to pay its debts.
27. To establish insolvency; it must be shown that the debtor's liabilities as a fact exceed his assets and not merely that they might do so, and clear proof of this must be adduced. An applicant must make a prima facie case. The court must do its best to decide the probabilities by taking into account the full conspectus of allegations and decide as they appear on the affidavits, read as a whole, which are placed before it. The Petitioner's case is premised on his assertion that his truck was involved in a road accident as a consequence of which his business collapsed. In my view, the Petitioner ought to have gone further to offer more credible evidence in support of this allegation. For example, production of a police abstract report would have greatly helped to strengthen his case that indeed an accident did occur. Also, it as an express term of the loan that the vehicle was to be insured. The Petitioner did not adduce evidence to demonstrate whether as at the time of the accident the truck was insured and if it was whether any compensation was paid by the insurer and if it was paid, who pocketed the proceeds. Alternatively, the Petitioner ought to enlighten the court whether the insurer repudiated liability and if so, what was the reason. Closely tied to the foregoing questions is yet another pertinent issue. If the truck was a write off as argued, then why didn't the Petitioner produce an assessment report. And, if the truck was assessed by a professional motor vehicle assessor, was it the basis upon which the truck was declared a write off? If it was assessed what was the salvage value of the truck if at all it was a write off and was it sold to recover the salvage.
28. With the above key yet decisive questions remaining unanswered, it is my view that the Petitioner cannot be said to have established on a balance of probabilities the existence of the accident, whether

⁸ See *Meskin, Insolvency Law, par 2.1.3.*

⁹ 1950 (4) SA 55 (T) at p 60.

¹⁰ See, e.g., *Bhyat v. Kburishi, 1929 T.P.D. 896* at pp. 900, 901; *Union Government v. Milne, 1948 (3) SA 1153 (T)*; *Corner Shop (Pty.) Ltd. v. Moodley, 1950 (4) SA 55 (T)* at p. 59H.



the vehicle was a write off and indeed whether he was pushed out of business as alleged. Simply put, the Petitioner has not discharged the burden of prove. “Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. As Lord Denning held in *Miller v Minister of Pensions*¹¹ stated: -

29. The burden placed upon the Petitioner by the law is to establish a prima facie case. In civil cases, the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case.
30. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others*¹² the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated:-
31. From the above dicta, the lesson that comes out is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavor is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth. This court must be persuaded that the Petitioner’s account is credible, reliable and probable. In short, on a balance of probabilities, the court must be satisfied that from the material before it, there was sufficient evidence to show that the accident did occur as alleged, that the truck was written off, that the insurer either paid or repudiated liability and that the salvage was or was not recovered. The court must also be satisfied that the version put forward by the Petitioner is not a ploy to conceal his assets. Upon analyzing the material before me and these unanswered questions which present glaring gaps in the Petitioner’s case, it is my conclusion that the Petitioner has not discharged the burden of prove.

¹¹ {1947} 2ALL ER 372.

‘The...{standard of proof}...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

¹² 2003 (1) SA 11 (SCA) at para 5.

“ To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiposed probabilities prevail.”



32. In addition, even if the Petitioner had established a prima facie case, the court has a discretion whether or not to grant the order. The Petitioner failed to address the court and to put forward any facts justifying any special circumstances why the court should exercise its discretion in his favour.

33. The other important issue is conformity with the Regulations and the Act. Section 32 of the Act provides as follows: -

When debtor may make application for bankruptcy order

- (1). A debtor may make an application to the Court for an order adjudging the debtor bankrupt only on the grounds that the debtor is unable to pay the debtor's debts.
- (2). The Court may decline to deal with such an application 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; and
 - (b) such other information as may be so prescribed.
- (2). The Court may reject a statement of the debtor's financial position if of the opinion that it is incorrect or incomplete.
- (3). A debtor who makes an application under this section shall publish a notice of the application in—
 - (a) a newspaper circulating within the region in which the debtor ordinarily resides; and
 - (b) in such other publications (if any) as may prescribed by the insolvency regulations for purposes of this section.
- (5). The Court may decline to hear the application if subsection (4) has not been complied with to its satisfaction.

34. The Regulations stipulate the documents to accompany the Petition and the details to be included in the statement of the debtor's financial position. A reading of Regulation 18 and the information filed by the Petitioner shows that the Petitioner did not exercise diligence in providing all the details required under the said Regulations.

35. Additionally, Regulation 18 (4) requires the debtor to sign and date the 'statement of the debtor's financial position and arrange for the publication of the statement in the Kenya Gazette. The Petitioner only annexed a newspaper advertisement. There is nothing to show that the Petition was Gazetted in the Kenya Gazette as the law requires. Insolvency proceedings are class actions by their very nature. This is the reason why the proceedings are advertised in newspapers and the Kenya Gazette. The advertisement affords creditors the opportunity to come forward to either oppose or support the Petition. The Petitioner was required under the law to comply with the regulation and Gazette the Petition. He did not. On the foregoing grounds, the competence of the Petition for want of conformity with the rules is questionable. The court cannot shut its eyes to such a grave failure to comply with the law. The court cannot entertain a practice which has the potential of causing injustice.



36. A bankruptcy Petition triggers judicial scrutiny into the merits of the Petition and conformity with the substantive law and Regulations. It enables the court to evaluate, at an early stage, the Petitioner's standing ('locus standi') and to consider the prima facie merits of the Petition. The Petition is subjected to court scrutiny, and an unjustified or unmerited Petition is identified and declined.
37. Flowing my discussion herein above, it is my finding that the instant Petition is unmerited. I dismiss the Debtor's Petition dated 14th March 2018 and filed on 21st May 2018 with costs to the Creditor, M/s Gulf Africa Bank Limited.

Orders accordingly

Signed and Dated at Nairobi this 10th day of September 2021

John M. Mativo

Judge

