



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MILIAMNI COMMERCIAL & TAX DIVISION
INSOLVENCY CAUSE NO. 05 OF 2018

MARTIN GATHECA GAITI.....CREDITOR/PETITIONER

VERSUS

BANIEL KIRERA

BOSIRE T/A ONGEGU & ASSOCIATES ADVOCATES.....DEBTOR/RESPONDENT

JUDGMENT

1. The Petitioner commenced this cause vide a Petition dated 13th February 2018, praying for orders that; Daniel Kirera Bosire t/a Ongegu & Associates Advocates, be declared “bankrupt/insolvent” by the court under the provisions of; the Insolvency Act and the costs of the petition be borne by the Respondent or debtor.
2. The Petitioner avers that, the Respondent is truly and justly indebted to him in the aggregate sum of; Kshs. 34,000,000 made up of the principal sum of; Kshs. 25,000,000 plus interest of 12% per annum. The debt arose from a conveyancing transaction in which the Petitioner was the purchaser and deposited the principal sum with the Advocate for transmission to the vendor, towards the purchase price for a property L.R. No. 14970/89.
3. However, the transaction was not concluded and the Petitioner demanded a refund of the purchase price from the Respondent to no avail, causing him to institute the suit HCCC No. 85 of 2015 (formerly HCCC 184 of 2014) against the Respondent. The suit was heard and determined whereby Judgment was entered against the Respondent on 6th November 2015, in the sum of Kshs. 25,000,000 together with interest at court rates from the date of filing the suit until payment in full.
4. On 17th January 2017, the Petitioner served the Respondent with a statutory demand under Section 17 of the Insolvency Act and Regulation 15(1) of the Insolvency Regulations 2016. Thereafter twenty one (21) days elapsed after the service of the statutory demand the Respondent did not compel with the demand or apply to set it aside.
5. Further, neither the Petitioner nor any of his agents holds any security on the Respondent’s estate or any part thereof, for the payment of the said sum.
6. However, the Respondent responded to the Petition by filing a Replying affidavit dated 17th September 2018 sworn by himself in which he avers that the Petitioner has violated the Rules and procedures of Insolvency proceedings. Further the Petition is premature and has been filed in bad faith with a view to frustrating various reconciliatory overtures and attempts at settlement he has made to the Petitioner.
7. That the Petitioner has maliciously filed this Petition with the sole aim to arm-twist him and to embarrass him. He has all along make it clear to the Petitioner and his Advocates that, subject to resolution of accounts arising out of the land transaction, which gave rise to the proceedings in; HCCC No. 85 of 2015, he remains willing and amenable to resolving and settling any sums outstanding.
8. For this reason he has all along contended that notwithstanding any claims of sums outstanding, these proceedings herein should not be used by Petitioner to not only tarnish his name but cripple his main source of income being his legal practise. That if the Petition is allowed, it will totally cripple his financial position to pay to pay the debt, if any. Further, there is no evidence that has been adduced that he is not able to meet his obligations and/or service the decree herein. Therefore the Petition should be dismissed with costs.
9. The Petition was disposed of through written submissions whereupon the Petitioner submitted that, he has satisfied the threshold to warrant the grant of an order of bankruptcy as against the Respondent for the reasons that:-

- (a) *The outstanding debt emanates from a judgment and decree of court issued in HCCC No. 85 of 2015;*
- (b) *The Respondent has not filed any review and/or any appeal against the Judgment and orders made on 9th November 2016;*
- (c) *The debt had been outstanding since November 2013;*
- (d) *The Respondent had not tabled any tangible proposal to offset the outstanding debt;*
- (e) *The Respondent was duly served with a statutory demand notice and no application had been filed to set aside the statutory demand notice served upon the Respondent;*
- (f) *The Respondent had really admitted the debt*

10. However, the Respondent submitted that the Petitioner has not met the requirements of Section 17 of the Insolvency Act in that he has not established the amount of the debt, or that, the aggregate amount of the debts is equal to or exceeds the prescribed bankruptcy level or 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 prospects of being able to pay.

11. Further, during the hearing of the Petition, the Respondent has made payments to the Petitioner and is willing to continue making payments. That the spirit and the intention of the Insolvency Act as stated under Section 3 is to enable a “wounded and struggling” debtor continue to operate as a going concern.

12. I have considered the Petition and the replying affidavit which I believe is the response to the Petition. It suffices to note that, other than the averments therein, it does not contain any annexure and therefore the documents relied on and considered herein are those filed by the Petitioner. In that regard, I note that the Petitioner has produced a verifying affidavit sworn by the Petitioner to the effect that, averments in the Petition are true to his knowledge and belief.

13. Further as aforesaid, the Petitioner has provided documents, a sale agreement dated 4th September 2013, between one Ephraim Mwangi Maina as the Vendor and the Petitioner as the purchaser to prove that he entered into an agreement for the purchase of the subject property. He has also produced a receipt number 013, issued to him by the firm of Ongegu & Associates Advocates, in the sum of Kshs. 10,000,000 being a deposit for the purchase of the property L.R. No. 14970/89. The payment is acknowledged by the Advocates through a letter dated 5th September 2013. Similarly, the bank statements of the said law firm have been availed which reflect the payments by the Petitioner to them as claimed herein.

14. I have also noted a preliminary decree dated 6th November 2015, where judgment was entered on admission in favour of the Petitioner as against the Respondent in the sum of Kshs. 25,000,000 together with interest at court rates from the date of filing the suit until payment in full. The Petitioner has also produced a statutory demand dated 16th December 2016 served upon the Respondent and an application for bankruptcy Trustee/supervisor dated 13th February 2013 served upon the Respondent. Finally, a certificate of compliance signed by the Acting Official Receiver was produced.

15. Be that as it were, I find that the relevant provisions that guide an application for a creditor’s application for an order to adjudge a debtor as bankrupt are found under Section 41 to Section 47 of the Insolvency Act No. 18 of 2015 (herein “the Act”). In particular though, Section 17 of the Act provides for bankruptcy applications by creditors and states as follows:-

“17 Creditor may apply for bankruptcy order in respect of debtor

(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.

16. Finally, the provisions of Section 25 of the Act stipulates the circumstances under which the court may adjudge a debtor bankrupt and states as follows:-

“25(1) The court may make a bankruptcy order in respect of the debtor if the creditor has complied with Section 17.

(2) the court may refuse to adjudge a debtor bankrupt if-

(a) the applicant creditor has not satisfied the requirements specified in Section 17;

(b) the debtor is able to pay the creditor's debts; or

(c) it is just and equitable that the court should not make a bankruptcy order

17. Having considered these provisions of the law and the facts herein, I find that the creditor has proved that a judgment has been entered in HCCC No. 85 of 2015 against the Respondent. A preliminary decree and a statutory demand served upon the Respondent has not been satisfied and neither has the debt been secured. In addition, the court record will bear out that after the petition was filed, the Respondent sought adjournment on several occasions on the ground that he was organising for finances to pay the debt. In this regard, on 3rd March 2019, the Respondent addressed the court in person and sought for sixty (6) days to make a concrete proposal to repay the debt. Although the Petitioner objected, the court granted the Respondent two (2) weeks to make some payments.

18. On 4th April 2019, the Respondent came to court with Kshs. 100,000 and informed the court that he will be making substantial payments thereafter and sought for indulgence after June 2019. Once again, the Petitioner opposed the request arguing that a payment of Kshs. 100,000 for a debt that has been pending for over six (6) in the sum of Kshs. 34,000,000 was not acceptable and sought that the Petition be heard. The Petition was fixed for 21st May 2019. On that date, the Respondent sought for another fourteen (14) days to pay the debt and the court allowed him fourteen (14) days to make a payment of at least Kshs. 5,000,000.

19. On 6th June 2019, the Respondent informed the court that he had paid Kshs. 500,000 and sought for more time. He was indulged and the matter fixed for 3rd September 2019. On that date, the Respondent informed the court that he had not made the payment as anticipated but had a banker's cheque of Kshs. 200,000. The Petitioner vehemently objected to any further adjournment in the matter whereby the court resolved to hear the Petition.

20. From the above analysis of events, and taking into account that this debt has been pending since 9th November 2016, when judgment was entered against the Respondent and despite the indulgence given to the Respondent, he has completely been unable to repay the debt. The Petitioner has satisfied the requirements under Section 17 of the Act that the Respondent is unable to pay the subject debt herein.

21. Therefore, in accordance with the provisions of Section 25(1) of the Act, I hereby order that a bankruptcy order be and is hereby issued in respect of the Respondent and/or debtor herein as prayed for in the Petition. The Respondent shall also bear the costs of the Petition.

Further, in accordance with the provisions of Section 43 of the Act, the Registrar of the court shall forward a copy of this order to the Official Receiver. This order shall be deemed to have been made on this 10th day of February 2020 as per the signature of the court.

22. Those then are the orders of the court.

Dated, delivered and signed in an open court this 13th day of February 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Mwachio for the Petitioner

Mr. Mwangi for the Respondent