



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

MISC. BANKRUPTCY CASE NO. 2 OF 2018.

JONATHAN CHERUIYOT

NANCY CHEPTUM CHEPTUL.....DEBTORS

VERSUS.

BUNGOMA CHEMIST LIMITED.....CREDITOR

RULING.

Jonathan Cheruiyot and Nancy Cheptui are husband and wife who also run a business in the name and style of Kamur Agrovet Stores at Kitale. They both filed a debtors Petition against themselves stating that they have been unable to pay their debts and sought that a bankruptcy order be made in respect of them. They named their assets of being a net value of Kshs.50,000/= and total debts of Kshs.28,654,638/= owed to various creditors, mainly the Agro-business and Pharmaceuticals. Indeed in one, Bungoma Chemist there is decree of Kshs.14,826,286/=.

Upon being served with the Petition, Mr. Imende for the Creditors filed this Preliminary Objection to the proceedings on the grounds that;

- 1. The Petitioner fails to comply with the Insolvency Act No. 18 of 2015 as required under Section 32(4) of the insolvency act.*
- 2. The Petitioner is guilty of material non-disclosure of crucial facts regarding this petition and has not come to this court with clean hands therefore making this petition frivolous, vexatious and an abuse of court process.*

On 7.11.2018 this court gave directions that the (Preliminary Objection) be canvassed first by way of written Submissions. Both parties filed their respective submissions.

Mr. Imende for the Creditors submitted that the Petition has not complied with the provisions of Sec. 32(4) of the Insolvency Act as he has failed to advertise or publish the application in a newspaper with local circulation.

Mr. Simiyu for the applicant debtor submitted that the requirement for advertisement has no timelines and the court can make an order for the same at any time during the proceedings.

An application for a bankruptcy order is governed by the Insolvency Act. Act No. 18 of 2015. Section 32 provides for when a debtor can make an application for a bankruptcy order. It provides;

32. (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.

(3) The Court may reject a statement of the debtor's financial position if of the opinion that it is incorrect or incomplete.

(4) 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 be prescribed by the Insolvency regulations for the purposes of this section.

(5) The Court may decline to hear the application if subsection (4) has not been complied with to its satisfaction.

Section 32(4) of the Act is in Mandatory terms that the debtor shall publish the notice of the application. The reason for this is to enable all persons to know of the application, the notice to debtors and notice of other people that the applicant intends to make an application and beware not extend credit to him. It is therefore mandatory that the application be published. Where the applicant has not published the application, then the application cannot be heard. Indeed Section 32(5) provisions that the court may decline to hear the application if the provisions of Section 32(4) have not been complied with to its satisfaction.

It is the duty of the applicant to publish the notice of the application in this proceedings, no evidence of the publication has been tendered or annexed. Indeed in its response the counsel for applicant submits erroneously in my view that it is not mandatory or can be made at any time. Publication is a necessary step in this proceedings and as such step has not been made. I therefore uphold the preliminary objection and decline to consider this application as the requirements of the Insolvency Act have not been complied with.

Dated and Signed at Bungoma this 2nd day of May, 2019.

S.N. RIECHI

JUDGE.