



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION- MILIMANI**  
**IN THE MATTER OF INSOLVENCY ACT**  
**INSOLVENCY CAUSE NO. 4 OF 2017**

TEOLHAUS MUTUKU NGENGA.....PETITIONER/DEBTOR  
SIDIAN BANK LIMITED.....1<sup>ST</sup> CREDITOR  
KENYA WOMEN TRUST FUND (KWFT).....2<sup>ND</sup> CREDITOR  
MASAKU TRADE DEVELOPMENT JOINT BOARD.....3<sup>RD</sup> CREDITOR  
IKALA UKYENE GROUP.....4<sup>TH</sup> CREDITOR  
NOEL MUKELI MUTHOKA.....5<sup>TH</sup> CREDITOR  
MUEMA NDUNGI.....6<sup>TH</sup> CREDITOR

**RULING**

**BACKGROUND OF THE CASE**

**DEBTORS PETITION**

The Debtor, **Teolahus Mutuku Ngenga, P.O. Box 236 Makindu**, approached the court through a petition dated 23<sup>rd</sup> of March 2017 for a bankruptcy order and to be adjudged bankrupt in respect to his estate.

The petition was supported by an affidavit by the debtor included the list of creditors;

- a. **Sidian Bank- Kshs 2,000,000**
- b. **Kenya Women Trust Fund (KWFT)- Kshs 507,000**
- c. **Masaku Trade Development Joint Board- Kshs 700,000**
- d. **Ikala Ukyeny Group –Kshs 1,700,000**
- e. **Noel Mukeli Muthoka – Kshs 1,400,000**
- f. **Muema Ndungi- Kshs 2,500,000**

The debtor stated that the total debt owed to the creditors was **Kshs 8,807,000**. The debtor also stated that he was operating a business of selling cereals and timber where one, Janet Mueni who the debtor made a deal with to import timber and equally share the profits, disappeared with the debtor's **Kshs 11,000,000** and efforts to trace her have been futile.

Consequently this drained the debtor's monies and hence is unable to pay his debts.

## **SERVICE OF NOTICES UPON THE CREDITORS**

By an affidavit sworn on 20<sup>th</sup> April 2017, the **mention notice** was served upon the creditors by way of advertisement on **The Daily Nation Newspaper dated 21<sup>st</sup> April 2017**.

On 19<sup>th</sup> May 2017, service of a **hearing notice** was effected upon the creditors by way of advertisement on **The Daily Nation Newspaper dated 22<sup>st</sup> May 2017**.

## **REPLYING AFFIDAVIT**

In a replying affidavit dated 15<sup>th</sup> September 2017, the 1<sup>st</sup> Creditor herein commissioned an investigation into the affairs of the Debtor through Dominion Investigators Ltd and prepared a report which evidenced that;

- a. The Debtor runs a grocery shop at Makindu town known as Kasweswe Logistics- Group of companies**
- b. The Debtor had assets valued at kshs 1.5 million**
- c. The Debtor was in a position to pay off his debts hence the petition was not made in good faith**

## **1<sup>st</sup> CREDITOR'S SUBMISSIONS**

In the 1<sup>st</sup> Creditors submissions dated 26<sup>th</sup> March 2019, the Bank analyzed the facts and law as follows;

The Petitioner defaulted in repayment of his loan of **kshs 2,000,000** and was issued with a formal letter informing him of the extent of his default and the consequences of the same which was not settled. Furthermore, the Petitioner did not dispute the 1<sup>st</sup> Creditors right to recover under the letter of offer hence making the petition defective as the facility taken out was secured by title over Land Registration **No.240**.

The 1<sup>st</sup> Creditor relied on the case of **Barclays Bank of Kenya Ltd vs Kepha Nyabera & 191 others [2013]eKLR** where the court held that;

***“The general rule is that a secured creditor is not obliged to resort to his security. He can claim repayment by the debtor personally and leave the security alone. He can sell the charged securities or set off or combine accounts. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.”***

The 1<sup>st</sup> Creditor submitted that the Petitioner failed to disclose material facts and is evading his obligations through alleging a mistake caused but his own negligence such as;

- a. His current source of income;**
- b. Demand of payment from the alleged creditors; as the Petitioner during his examination alleged that he paid back the creditors a total of Kshs 3,000,000 per month even after the alleged fraud;**
- c. Proof of the alleged fraud by Janet Mueni;**
- d. Proof that the motor vehicle was involved in an accident –Police Abstract.**

The 1<sup>st</sup> Creditor also relied on the case of **Hook vs Jewson Ltd [1997]1BCLC 664** as was cited in the case of **Ratilal Sanghani vs Schoon Ahmed Noorani [2018]eKLR** where the court stated;

***“Judges must, I think, be careful not to allow applications for interim orders simply to become a means of postponing the making of bankruptcy orders in circumstances where there is no apparent likelihood of benefit to the creditors from such postponement.”***

*Te 1<sup>st</sup> Creditors submission was therefore that the Petitioner should not be accorded the benefit of protection because this would allow him to “wash away his debts”.*

## **DEBTOR'S WRITTEN SUBMISSIONS**

In the Debtor's submissions dated 22<sup>nd</sup> February 2019 he stated that after taking loan facilities from the creditors and defaulted in repayment, he had a meeting with the 1<sup>st</sup> Creditor who he had requested to restructure the loan repayment plan but the bank refused. Since the petitioner had no other source of income, he could not continue servicing the loan secured under **L.R.No.240** by the 1<sup>st</sup> Creditor as evidence in the statement of affairs dated 23<sup>rd</sup> March 2017.

With regard to the loan by the 2<sup>nd</sup> Creditor which was secured under motor vehicle registration number **KAY 486J**, the said security had

been involved in an accident.

The Debtor also submitted that none of the creditors attended court during public examination to contradict the evidence adduced by the petitioner and therefore his testimony remains unchallenged.

### **ISSUE FOR DETERMINATION**

The Court considered evidence on record and submissions by parties and the issue for determination is whether the Applicant has made out a case to be adjudged bankrupt.

### **ANALYSIS**

All creditors were served by print media advertisement and none of them attended Court except the secured Creditors.

The Applicant claims that in 2016 he was conned by one named Janet Mueni whom they conducted business for 6 years prior to the deal that turned sour. He sought credit from various sources now Creditors and raised **Ksh 11million** which he gave **Ms Janet Mueni** who the disappeared to date.

He claimed he reported the matter to Makindu Police Station he did not produce any document to evidence the report; OB extract.

He claimed he conducted business with **Ms Janet Mueni** for 6 years yet he produced no document, photo, agreement, receipt of the existence of the said Janet Mueni. It is not plausible in a business relationship of 6 years no trace of any document is available to establish existence of his business partner and or the partnership itself in form of banking documents, purchases of products or materials, agreements etc.

He claimed that the motor vehicle **Reg. KAY 468J** was involved in an accident and became write-off and was insured by **Britam Insurance Company**. He did not produce a Police Abstract.

The Applicant has not shown any document to confirm indebtedness to/from the unsecured Creditors to demonstrate the level of indebtedness.

From the above issues that remain un proven, this Court finds that at this stage it is not satisfied from evidence on record it is sufficient to declare the Applicant a Debtor Bankrupt.

The Court orders that the Applicant undertake a Public Examination under the Official Receiver and meeting with Creditors and the Report with recommendation shall be filed in Court within 60 days for final determination of the matter.

**DELIVERED SIGNED DATED IN OPEN COURT ON 17<sup>TH</sup> JUNE 2019**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR.MUNYASIA HOLDNG BRIEF MRS NYABERI FOR PETITIONER**

**MR. KISIKA HOLDING BRIEF MR. KAMAU FOR 1<sup>ST</sup> CREDITOR**

**COURT ASSISTANT - JASMINE**