



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**INSOLVENCY CAUSE NO. 11 OF 2017**

**JOHN KAMAU NJAU .....DEBTOR**

**JUDGMENT**

1. In the matter of **Stephen Nyaega Mose [2018] eKLR**, Hon. J. A. Makau J, warns of the abuse of Bankruptcy laws and proceedings in the following words:-

“Bankruptcy laws were never meant to protect people like the debtor herein, 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, but not fraudsters. The aim is to give such people a fresh start in life to enable them "get back to their feet and solder on in life". I have no doubt to state that would be blatant abuse of the court process for a debtor to defraud members of public and when judgment is issued against him, and ordered to pay his creditors, the court allows him to obtain bankruptcy order, so as to escape justice. That would be wrong for courts if they would allow themselves to be used to protect fraudsters from being forced to pay for their criminal acts by being shielded by being issued with bankruptcy orders”.

2. I get the impression that these proceedings are an abuse of Court process.

3. They are commenced by John Kamau Njau (the Petitioner) who states that he is in debt of Kshs.50,233,523.34 to various creditors which he is unable to pay. In a Statement of Affairs lodged alongside the Petition he puts the estimate of his realizable value at Kshs.180,000.00.

4. Among the creditors is Stanbic Bank Kenya Limited (Stanbic) who through an affidavit of Hamilton Suba sworn on 4<sup>th</sup> December 2018, aver that it holds two decrees against the Petitioner in HCC No. 592 of 2010 and CMCC No. 6393 of 2007. It opposes grant of an insolvency order against the Petitioner and asserts that it is an abuse of Court process and a scheme by an able debtor to avoid financial obligations to third parties.

5. I think Stanbic is right. Mr. Suba avers that faced with a Notice to Show cause on 15<sup>th</sup> November 2017 in HCC No. 592 of 2010, the Petitioner informed Court that he was willing to come up with a payment proposal within a month of that date. This allegation has not been controverted by the Petitioner and the Court accepts it to be true. It would then be curious that just 12 days later, on 27<sup>th</sup> November 2017, the Petitioner would swear an affidavit in support of these insolvency proceedings. It would be expected that the Petitioner would at least give an explanation of what had changed from 15<sup>th</sup> November 2017 when he promised to come up with a repayment proposal and 27<sup>th</sup> November 2017 when he deposes that he is unable to meet his debts and that his financial fortunes are at a sum of Kshs.180,000.00 only!

6. Something else dissuades this Court from finding merit in the Petition. In his supporting affidavit, Mr. Njau blames his state of affairs on breach of contract by one VIL Limited (VIL) on a sub-contract of Kshs.165,540,823.40 between it and Bridgeways Contractors Limited (Bridgeways). Bridgeways is said to have entered into an agreement with the Petitioner to trade using the company.

7. The Petitioner then deposes as follows:-

**23. That all my financial problems emanated from of (sic) VIL Limited failure to honour the sub contractual terms to pay for services offered to Brideways Contractors Limited as a result of which all my financiers repossessed all the motor vehicles I had taken on loan to perform the contract.**

**24. That since all the financiers repossessed all the motor vehicles, I lost all meaning of earning, I have difficulty in settling my debts (sic).**

**25. That if VIL Limited would pay my money as per the contract, I can be in a position to repay all my loan and/or debts.**

8. It would seem, and this is an unequivocal averment by the Petitioner, that if he was to realize the debt from VIL then he would attend to his entire debt portfolio. What he does not say is what efforts he has made to claim from VIL. He does not demonstrate that notwithstanding best effort on his part the debt from VIL is unrealizable.

9. And if therefore the debt from VIL is realizable then it would be curious that he fails to disclose it in his statement of affairs.

10. Insolvency law on individuals are 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. In addition, if the Petitioner is in turn owed money by some third party/ies, then the Petitioner must show that he has made all attempts to realize such debt but that such effort has come to naught. Only then can the Petitioner be said to be truly insolvent.

11. I do not see such evidence in the matter at hand and this Court is inclined to dismiss the Petition dated 27<sup>th</sup> November 2017, which it hereby does with Costs. The order on Costs is motivated by the finding of this Court that these proceedings are an abuse of court process.

**Dated, delivered and signed in open Court at Nairobi this 2<sup>nd</sup> day of October 2019.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:-**

**Oduor for Petitioner**

**Macheyo holding brief Chemigoh for Stanbic**

**Court Assistant: Nixon**