



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

BANKRUPTCY CAUSE NO. 11 OF 2015

STEPHEN NYAEGA MOSE.....DEBTOR

JUDGMENT

- 1. STEPHEN MOSE NYAEGA**, the debtor filed a petition for bankruptcy dated 6th March 2015 and sought that a receiving order be made against him.
- The petition was accompanied by a statement of Affidavit showing that he owed the sum of Kshs. 5,800,000/- and Kshs. 2,152,636 to the 1st and 2nd creditors respectively. The particulars of the creditors were shown in "**list C**". The Debtors property in not added under list 4 and list 1 but is given under "**list H**" as totally to Kshs. 90,000/- and under "**list 1**" is marked as **N/A**. Under "**list K**" on deficiency of account the Debtor has given a figure of Kshs. 7,952,636/-.
- What is of interest in this matter is the fact that the total sum shown in the statement of affairs does not add up with the particulars given in "**list C**" which is marked Not Applicable (**N/A**). There is no way "**list C**" can be said not to be applicable when names of the creditors are required to be given and none is given in "**the list C**" by the debtor.
- Upon the receiving order being issued on 13th March 2015 which constituted the official Receiver, the receiver of the estate of the debtor, convened the first creditors meeting by which time the creditors had filed their claims. The first creditor filed proof of Debt Forms claiming Kshs. 5,800,000/- plus interest on the Kshs. 6,500,000/- as assessed in case No. 161 of 2012, by the Disciplinary Tribunal of the Law Society of Kenya, whereas the 2nd creditor filed proof of Debt Form, for the sum of Kshs. 1,812,218 following a decree dated 28th September 2012.
- The Debtor/Applicant made a proposal for payment of the liability vide a letter dated 8th June 2016, however, the Debtor only complied with one instalment payment of Kshs. 150,000/- made on 30th September 2016. This is as per Report of the Official Receiver dated 26th June 2018.
- The Debtor/Applicant default provoked an application by the official receiver for public examination of the debtor by an application dated 27th January 2016. The public examination was conducted on 20th June 2018 in presence of Mr. Wananda, learned Advocate for the 1st creditor; and Mrs. Macharia, learned Advocate, holding brief for Mr. Munga, learned Advocate, for the 2nd creditor and Miss. Mumo, learned Advocate, for the Official Receiver.
- The debtor in his introductory remark, as to his inability to pay, averred that he lives in New Kitisuru Estate; House No. 359, Pioneer Road within the Estate, off Ngecha Road. He averred the said house was given to the petitioner by his mother for accommodation purposes and there hasn't been any transfer of ownership. The registered proprietor of the property is his mother Ms. Anne Chepkorir Atuya and there has been no indication that there will be a transfer of ownership to the Debtor.
- The debtor/petitioner previously practiced as an Advocate of the High Court of Kenya in the firm of Mose and Co. Advocates. Further, the Debtor/Applicant states that he receives a stipend of Kshs. 70,000/- from his mother who lives abroad and works with the United Nations currently based in Central African Republic.
- He further testified that he does not own any property, is not a Director of any Company and has not misrepresented any information averred to the Official Receiver.
- The Debtor/Applicant in his evidence further averred that the debts arose from Conveyancing transactions in which he acted as an advocate for the vendor. The first debt itemized above arose from Chief Magistrate Civil case number 4010 of 2012 where judgment was entered against the debtor for the sum of Kshs.1,652,500/-. The second debt arose from Disciplinary Cause number 161 of 2012 where the Debtor and Mr. Simon Ndege were both admonished and ordered to pay the balance of Kshs. 5,800,000/- together with interest at 12% p.a of Kshs. 6,500,000/-.

The Law

11. The petition was filed on 10th March 2015, under the then prevailing statute, Bankruptcy Act, Cap. 53. Section 5 of the said repealed Act provided as follows:

"If a debtor commits an act of Bankruptcy, the court may, on a Bankruptcy Petition being presented either by a Creditor or by the Debtor, make an order, in this Act called a Receiving Order, for the protection of the estate."

12. Section 733(1) and (2), of the Insolvency Act allows the continuance of matters commenced under the old Act. Sections 733(1) provides as follows:-

In this section-

"The commencement means the coming into operations of Parts III to V:

"Past event" means any of the following that has occurred before the commencement:

a) Issuing a bankruptcy notice:

b) Making an application for a bankruptcy order.....

c) Entering into a voluntary arrangement;

d) Making an application for a grant of probate or letters of administration in respect of an insolvent deceased's estate under section 89 of the Law of Succession Act, (Cap. 160)."

Section 733(2) of the Insolvency Act also provides as follows:

Despite their repeal, the Bankruptcy Act and section 89 of the Law of succession continues to apply, to the exclusion of this Act, to any past event and to any proceeding that is taken after the commencement."

13. The public examination revealed that the debtor's reason for filing the petition and applying for Bankruptcy was to evade an order obtained against him for warrant of arrest and committal to civil jail. If it was not for the obtained order by the 2nd creditor, it is doubtful whether the Debtor would have bothered to apply for bankruptcy. It is admitted by the debtor that before he filed the petition, he owned substantial properties including a Mercedes Benz vehicle, which he averred was sold **"by the police"** to recover some other debts that he owed other third parties, no evidence was adduced in support of that allegation. From the type of car in question there is no doubt the debtor had chosen to lead a flashy lifestyle beyond his means and earning capacity; thus funding that lifestyle from proceeding of funds borrowed from innocent and unsuspecting people.

14. The debtor averred that he resides in Kitisuru, an area of the most upmarket region in Nairobi and has even a tenant within the house who pays him a monthly rent of Kshs. 30,000/-. That until recently he admitted he has been running a law firm at St. George's House, 2nd Floor, Parliament Road, Nairobi, where he had been paying rent for the office and maintaining staff. That he admitted he is currently operating two trucks each worthy Kshs. 3.5 million and which he uses for business in which he averred he has not been paid for services rendered by the trucks. He claimed the lorries belong to his mother and even the house, however he did produce any documentary evidence to that effect nor produced any record to the court in respect of invoices to confirm he has not been paid. He further alleged he gets monthly stipend of Kshs.70, 000/- from his mother which did not prove non substantiated by way of documentary or oral evidence. I observed the Debtor as he gave his evidence and he did not strike me as an honest person. I find the debtor evidently guilty of non-disclosure of material facts and in failing to provide a full discovery of his assets in his statement of affairs filed herein by the receiver. He claims that even at the age of 42 years he relies on his mother for support. The debtor claim the two trucks do not give him any profit, the one wonders how does he manage to put them on the road and why he can't sell them to pay the debts. I have considered how the debts incurred came to being, and note the debtor was placed in a place of trust and abused his position by using the creditor's funds entrusted to him to sustain his lavish lifestyle. He had in my view no intention of repaying the funds he got unlawfully to the creditors.

15. In the instant petition; the Debtor had executed a consent to pay the sum owed, but paid only one instalment and stopped prior to seeking receiving order. I find by debtor's conduct, by filing this petition he had no intention to pay and that he is being dishonest. It cannot be said he did know he could not pay but chose not to pay hoping that he can go round that matter by filing petition for bankruptcy. His application is an abuse of the court process. He is further guilty of non-disclosure of material facts as per Statement of Affairs he filed in the petition. He did not disclose the particulars of the creditors in full nor his assets.

16. The Debtor admitted he was charged before the Advocates Disciplinary Committee and convicted of professional misconduct and sentenced accordingly and since 2017 denied practicing certificate. He promised to refund the money in 2011, when according to him the land transaction collapsed. That between 2011 and December 2016 always had practicing certificate but did not explain why then he did clear the debtor between 2011 and 2016. I have considered all what came out during public examination of the debtor and all his conduct before he was convicted for misconduct, and I am alive to the fact that 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.

17. In the instant petition; and from the Debtor's public examination, the only presumption that can be made is that he has not demonstrated his inability to pay. It has been shown that the debtor has regular income from somewhere but he has no intention of repaying the debts. The court can only adjudge a debtor bankrupt if there is demonstrated inability to pay.

18. In this petition, I am convinced of petitioner ability to pay. The petition as presented before this court I have no doubt that the same was presented to evade paying just debts that are due. I accordingly for reasons stated herein above find the petition is for dismissal. The petition is dismissed and I proceed to discharge the Receiving order issued on 13th March 2015.

19. I award the cost of the petition to 1st and 2nd Creditors.

Dated, signed and delivered at Nairobi this **4th** day of **October, 2018.**

J .A. MAKAU

JUDGE