



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**IN THE MATTER OF THE INSOLVENCY ACT**  
**INSOLVENCY CAUSE NO.12 OF 2016**  
**IN THE MATTER AKBARALI KARIM KURJI (DEBTOR)**  
**RULING**

[1] The Notice of Motion dated **11 January 2017** was filed herein by the Debtor/Petitioner, **Akbarali Karim Kurji**, (hereinafter the Applicant) pursuant to **Sections 32 and 33 of the Insolvency Act, No. 18 of 2015**, and **Rules 10 and 45 of the Insolvency Regulations, 2016**, for orders that:

[a] That the application be certified as urgent and be heard *ex parte* in the first instance;

[b] That there be a stay of all proceedings against the Petitioner in **High Court Miscellaneous Application No. 59 of 2003: Shalimar Limited, Saz Caterer Limited, Zulfikar Rahemtulla vs Sadrudin Kurji & Akbar Kurji** pending the hearing and determination of the application;

[c] That a Bankruptcy Order be made against the Petitioner in respect of the Petitioner's Estate and he be adjudged bankrupt;

[d] That thereafter, the Court do make orders as to how the Estate of the Petitioner is to be administered;

[e] That the costs be in the cause.

[2] The application is premised on the grounds that the Applicant's Creditors have obtained judgment against him in **HCMC No. 59 of 2003** aforementioned and that the decretal amount currently stands in excess of **Kshs.40 Million**. It was further averred that the Creditors have taken out execution proceedings whereupon, on **12 October 2016**, the Applicant was committed to prison for 21 days but inexplicably ended up spending 37 days in jail; whereafter, the Deputy Registrar ruled, on **17 November 2016**, that the Applicant pays **Kshs. 40,000,000** within 45 days from the date of the order, failing which he be committed to civil jail. It was the Applicant's contention that the order for payment of **Kshs. 40,000,000** was made in total disregard of his financial position and without regard to his true worth in terms of assets. He added that he is unable to satisfy the decree in **HCMA No. 59 of 2003** and has accordingly petitioned the Court for a Bankruptcy Order to issue in respect of his Estate.

[3] In the Applicant's Supporting Affidavit, he deponed to the circumstances that led to the subject debt. The Applicant, his co-debtor, **Sadrudin Kurji** and the Creditors were business partners prior to **1997**. A

dispute thereafter arose between them which was referred to arbitration. The Arbitrator, **Azim Virjee**, made an award of **Kshs. 2,360,000** in favour of the Creditors, and an Award of a sum of **Kshs. 3,997,745** in favour of **Saddrudin Kurji** and the Applicant. According to the Applicant, since the net difference was minimal, it was agreed between the parties that neither party would pursue their respective awards; but that in disregard of that agreement, the Creditors proceeded to register their Award in **HCMA No. 59 of 2003** and obtained judgment therein on **13 March 2003**.

[4] The Applicant averred further that they applied for review of the Judgment but their application was dismissed on **19 July 2012**; and that their application for stay of execution pending appeal to the Court of Appeal, being **Civil Application No. 222 of 2012** was granted on condition, inter alia, that they deposit **Kshs. 40,000,000** in Court; which condition they were unable to meet. He added that it was thereafter that the Creditors moved the Court for their committal to civil jail. The Applicant reiterated his contention that he is unable to pay off the debt aforementioned and consequently had no option but to petition the Court for a Bankruptcy Order.

[5] The Creditors, **Shalimar Limited, Saz Caterers Limited** and **Zulfikar Rahimtulla** (hereinafter "the Respondents") opposed the application on the basis of the Grounds of Opposition dated **12 January 2017** and filed herein on **13 January 2017**. According to the them, the application is without basis and constitutes an abuse of the process of the Court, since the Applicant had already made a similar application for stay of proceedings in **HCMA No. 59 of 2003**; and that the said application had been fixed for hearing on **16 January 2017**. It was further the contention of the Respondents that the Court has no power to grant a stay of proceedings against a debtor before a Bankruptcy Order is made. Thus, it was the Creditor's posturing that the Petition had been filed for an ulterior purpose, namely to defeat a Decree of a Court of concurrent jurisdiction, and ought not to be entertained. All these and other grounds were expounded in the Replying Affidavit sworn by **Zulfikar Rahemtulla** sworn on **17 January 2017** as well as the affidavit of **Victor Rapando**, sworn on **12 January 2017**.

[6] In his Further Affidavit filed on **23 January 2017**, the Applicant sought to respond to the issues raised by the Respondents in the Replying Affidavit, averring in particular that he made a full and frank disclosure of his assets in his Statement of Affairs. He also exhibited documents to confirm compliance with the provisions of **Section 32** of the Insolvency Act, including gazetteement. The Petitioner annexed to his Further Affidavit a copy of the advertisement that he caused to be carried in the Daily Nation of **20 January 2017**, giving notice of the Petition; and a copy of a letter to the Government Printer, requesting for the publication of his Statement of Affairs. He also exhibited copies of his Annual Statutory Returns.

[7] Having perused and considered the Notice of Motion, the affidavits filed in respect thereof as well as the submissions filed by Counsel for the respective parties herein, and the oral highlighting thereof, I would summarize the issues for determination to be: firstly, whether the Court has jurisdiction to grant an order for stay before the issuance of a Bankruptcy Order; and if so, whether the orders sought in the instant application are deserved. I note that an issue was raised as to whether the Applicant had complied with the provisions of **Section 32** of the **Insolvency Act** and **Rule 18 of the Insolvency Regulations** in terms of advertisement of the Petition and full disclosure; and that in the Further Affidavit filed herein on **23 January 2017**, the Petitioner exhibited copies of the advertisement and a copy of a letter to the Government Printer. I am thus satisfied that there has been compliance and that the question of non-compliance is, accordingly, a non-issue.

[8] The Petition and the interlocutory application have been brought pursuant to **Sections 32 and 33** of the **Insolvency Act, 2015**. **Section 32(1)** provides that:

**"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."**

The Applicant has averred herein that he is unable to pay the debt owing to the Respondents and, although this was opposed and a lot of energy spent on demonstrating that it was unconstitutional for the Applicant to be committed to civil jail for non-payment of a debt as he was, there is no gainsaying that he has indeed been unable to pay the **Kshs. 40,000,000** as was ordered. That, to my mind suffices for

purposes of **Section 32(1) of the Insolvency Act**, and it is accordingly my finding that the Petition and the instant application are competently before the Court; and that they have not been filed simply to serve some collateral or ulterior purpose.

[9] As to whether an order of stay can issue before the making of a bankruptcy order, the Respondents cited **Sections 41 and 48(1)(a) of the Insolvency Act** to support their argument that it is only when a bankruptcy order commences that proceedings to recover the bankrupt's debts can be stayed. I would agree entirely with the Respondents' argument granted the provisions of **Section 48(1)(a)** that:

**"When a bankruptcy order commences all proceedings to recover the bankrupt's debts are stayed."**

So that, it is no longer necessary to file an interlocutory application for stay along with a petition for bankruptcy as used to be the case under **Section 11** of the repealed **Bankruptcy Act, Chapter 53** of the **Laws of Kenya**.

[10] Additionally, **Rule 10(1)** of the **Insolvency Regulations** under which the application was brought expressly provides that:

**"This Regulation applies to applications made in Court pursuant to the provisions of the Act, but does not apply to an application for an administration order, a winding up petition or a bankruptcy petition."**

This therefore constitutes a second reason why the application for stay is misconceived.

[11] The third reason is the contention by the Respondents that the Applicant had already made a similar application in Nairobi **High Court Miscellaneous Civil Application No. 59 of 2003** which was fixed for hearing on **16 January 2017**; and which may have been disposed of by now. It would be inappropriate, and smirks of abuse of the court process, for the Applicant to seek the same relief from different courts. In this connection, I fully endorse the views of **Warsame, J** (as he then was) as expressed in **Standard Chartered Bank Ltd vs Jenipher Atieno Odok Kisumu HCCC No. 120 of 2003** that:

**"It is not within the rights of parties to engage in a multiplicity of suits as the multiplicity of suits is meant to obstruct the due process of law and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time ... If a party has a legitimate cause of action he/she must present it before the Court with jurisdiction and resolve the same in that court."**

Accordingly, it is my considered finding that the Applicant's Notice of Motion dated **11 January 2017** is not only misconceived but also lacking in merit and is hereby dismissed with costs.

[12] The foregoing notwithstanding, **Rule 18** of the **Insolvency Regulations** is clear that an application for a bankruptcy order by the debtor is by way of the petition itself, whereupon the provisions of **Divisions 5 and 6** of the **Insolvency Act** would kick in. Thus, having satisfied myself as to compliance for purposes of **Section 32(2)**, and having carefully perused and considered the documents attached to the Petition, it is directed that a bankruptcy order be and is hereby issued herein in respect of the estate of **Akbarali Karim Kurji** as prayed in the Petition dated **20 December 2016** and that the Official Receiver be accordingly notified by the Deputy Registrar for the purposes of appointment of a Bankruptcy Trustee as required by **Section 44(1) of the Insolvency Act** as read with **Regulation 21** of the **Insolvency Regulations**.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2017**

**OLGA SEWE**

**JUDGE**