

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
INSOLVENCY PETITION NO. E022 OF 2024

AND

IN THE MATTER OF DAVID WAWERU KAMOTHO

AND

**IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE
LAWS OF KENYA)**

BETWEEN

**PAUL MAINGI MUSYIMI T/A
MAINGI MUSYIMI & ASSOCIATES ADVOCATES.....
.....PETITIONER**

AND

**DAVID WAWERU KAMOTHO.....
.....RESPONDENT**

JUDGMENT

Introduction & Background

1. By a petition dated 26th July 2024, the Petitioner seeks a Bankruptcy Order against the entire estate of the Respondent. He relies on his verifying affidavit and supplementary affidavit sworn on 26th July 2024 and 3rd March 2025 to depone that there is a debt arising from a final judgment and court decree dated 30th

April 2024 that was issued by the Court's Family Division in **Miscellaneous Application No. E1788 of 2022** where the Respondent and another were ordered to pay the Petitioner the sum of Kshs. 1,094,763.00/=. That this amount remains unpaid and forms the basis of the bankruptcy petition as the petitioner served a Statutory Demand on the Respondent on 23rd May 2024, demanding payment of the said sum within 21 days but he failed to pay the debt, secure it, or compound it to the Petitioner's satisfaction ("the Statutory Demand").

2. The Petitioner states that the debt exceeds the prescribed bankruptcy threshold under the **Insolvency Act** and **Regulations and** that no application was made by the Respondent to set aside the Statutory Demand. The Petitioner asserts that the Respondent is unable to pay his debts and that he does not hold any security over the Respondent's property for this debt.
3. The Respondent responded to the petition through an undated response where he denies almost all the allegations therein. He admits to having been served with the Statutory Demand, however, he denies defaulting on the debt. He asserts that he is financially capable of settling the debt and claims to have a steady income, owns financial assets, and has properties that can

be liquidated to pay the Petitioner. He claims to be a beneficiary of the estate of the late John Joseph Kamotho and argues these proceeds will provide resources to settle the debt.

4. The Respondent states that he is willing to pay but proposes a structured instalment plan with reasonable monthly payments, to be determined by the court, rather than a lump sum. He avers that the Petitioner has failed to prove he is insolvent as required by the ***Insolvency Act*** and contends that the Petitioner did not demonstrate that he has no reasonable prospect of paying and failed to explore alternative recovery methods before resorting to bankruptcy. The Respondent denies committing any bankruptcy offences and suggests that the court consider remedies short of bankruptcy, such as a summary instalment order and a voluntary arrangement with creditors. The Respondent urges that the bankruptcy petition be dismissed with costs or in the alternative, if the court does not dismiss the petition, it should allow the debt to be repaid in structured instalments over a reasonable period.
5. The petition was canvassed by way of written submissions which are on record and I have considered the same. As they are reflective of the parties' positions, I have highlighted above, I will not rehash the same but make relevant references in my analysis and determination below.

Analysis and Determination

6. As submitted by the Petitioner, a bankruptcy petition by a creditor must, for a start, satisfy the minimum threshold set out in **section 17(2)** of the ***Insolvency Act*** which provides as follows: -

17. Creditor may apply for bankruptcy order in respect of debtor

.....

(2) Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made—

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;

(b) the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the applicant creditors, either immediately or at some certain, future time, and is unsecured;

(c) the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and

(d) there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts.

7. The Respondent has not denied that indeed it is indebted to the Petitioner for the sum of Kshs.1,094,763.00/=. I am in agreement

with the Petitioner's submission that this sum exceeds the prescribed Bankruptcy level specified in **Regulation 3** of **Insolvency Regulations, 2016** which is Kshs.250,000.00/=.

There is also no contention that the Respondent has not filed any application to set aside the Statutory Demand. In regard to the test under **section 17(2)(c)** as to whether the Respondent appears to be unable to pay, **subsection (3)** has the following deeming provisions: -

(3) For the purposes of subsection (2)(c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—

(a) the applicant creditor to whom the debt is owed has served on the debtor a demand requiring the debtor to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least twenty-one days have elapsed since the demand was served, and the demand has been neither complied with nor set aside in accordance with the insolvency regulations;
or

(b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part."

8. Again, the Respondent was served with the Statutory Demand and 21 days have elapsed since the Demand was served and the same has been neither complied with nor set aside. The same statutory notice and set of circumstances meets the test of when a debtor appears to have no reasonable prospect of being able to pay a debt provided in **section 17(4)** as follows: -

(4) For the purposes of subsection (2)(c), a debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable and—

(a) the applicant to whom it is owed has served on the debtor a demand requiring the debtor to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due;

(b) at least twenty-one days have elapsed since the demand was served; and

(c) the demand has been neither complied with nor set aside in accordance with the insolvency regulations”.

9. When the provisions of **section 17(2)(c)** are read together with **sections 17(3) and 17(4)**, it becomes clear that a debtor is deemed to be unable to pay or to have no reasonable prospect of being able to pay when the factors set out therein exist. The Court will have to find that the debtor is unable to pay or has no reasonable prospect of being able to pay (see **Diamond Hasham**

Lalji v Cargill Kenya Limited [2019] KEHC 12260 (KLR)]. It is therefore my finding that having satisfied the essentials of **section 17(2)**, the present Bankruptcy petition is properly before Court and that the Respondent's failure to pay, secure, or compound the debt following the service of the Statutory Demand creates a statutory presumption that he is unable to pay his debts. The burden then shifts to the Respondent to demonstrate to this Court that he is, in fact, able to pay or has a reasonable prospect of doing so.

10. In the Respondent's explanation, he relies on two pillars: his alleged current solvency and the future prospect of an inheritance. On the claim of solvency and the ability to pay, the Respondent makes general assertions of having a "steady source of income" and "financial assets sufficient to settle the debt." However, he has provided no tangible evidence to substantiate these claims. There are no bank statements, asset valuations, or proof of income presented to the Court. Mere assertions, without corroborating evidence, are insufficient to rebut the statutory presumption of inability to pay raised by his default on the Statutory Demand. If he were truly solvent and capable of immediate payment as he claims, he would have settled the judgment debt long before the issuance of this Petition.

11. On the proposed instalment plan, the Respondent's offer to pay by instalments is, in itself, an admission that he cannot pay the debt in its entirety at present. This admission aligns with the finding that he is unable to pay his debts as they fall due. On the inheritance and future prospects, the Respondent's primary argument is that he is a beneficiary of a substantial estate and that the proceeds will enable him to pay his liabilities. With respect, this argument is misconceived in law. The law, as encapsulated in **sections 17(2)(c), 17(3), and 17(4)** of the ***Insolvency Act***, is concerned with the debtor's present inability to pay debts that are currently due and payable. I am in agreement with the Petitioner's submission that under **section 272** of the ***Insolvency Act***, the court may annul a bankruptcy order if "*...it considers that the liability of the bankrupt to pay the bankrupt's debts should be revived because there has been a substantial change in the bankrupt's financial circumstances since the bankruptcy commenced;*"
12. In my view, a future, contingent interest in an estate that is still under administration does not constitute liquid funds available for the immediate payment of a judgment debt. The inheritance remains speculative until formally distributed, and its value upon distribution is not guaranteed. To hold that a future inheritance

bars a bankruptcy order would be to permit judgment debtors to indefinitely frustrate creditors based on mere expectations, thereby rendering the insolvency regime ineffective. The **Act** requires an assessment of the debtor's present financial condition, not his potential wealth at an uncertain future date.

13. Consequently, I find that the Respondent's claim that he is awaiting an inheritance or future income does not negate his present inability to pay this debt and does not preclude the making of a bankruptcy order.

Conclusion and Disposition

14. In the foregoing, I find that the Petitioner has satisfied all statutory prerequisites for the presentation of this Petition. The debt is undisputed, being founded on a Court Decree. The Statutory Demand was properly served and not complied with. The debt exceeds the prescribed bankruptcy threshold. In accordance with **section 17(4)** of the **Insolvency Act**, and having found that the circumstance in **section 17(2)(c)** exists, the Court is satisfied that the Respondent is unable to pay his debts. The Respondent's defences are without merit and fail to rebut the statutory presumption of insolvency. In sum I now issue the following final orders:

1) DAVID WAWERU KAMOTHO is adjudged bankrupt

2) A Bankruptcy Order is hereby issued against the entire estate of the Respondent, DAVID WAWERU KAMOTHO.

3) The Official Receiver shall be the Bankruptcy Trustee of the Estate of DAVID WAWERU KAMOTHO.

4) The costs of these proceedings shall be paid out from the Estate of DAVID WAWERU KAMOTHO.

DATED SIGNED AND DELIVERED virtually at NAIROBI this 18TH DAY OF NOVEMBER 2025

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Maingi for the Petitioner.
2. Mr. Mwangi holding for Ms. Makori for the Respondent.
3. Amos - Court Assistant