

**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 58 OF 2018**

**C.B. MWONGELA & COMPANY**

**ADVOCATES..... APPLICANT/RESPONDENT**

**VERSUS**

**TONY GACHOKA.....RESPONDENT/APPLICANT**

**RULING**

1. This ruling determines the Notice of Motion dated 23<sup>rd</sup> September, 2025, filed by the Respondent. The application is brought under Section 11 of the Bankruptcy Act, Section 63 of the Civil Procedure Act, Order 40 Rule 3 and Order 51 of the Civil Procedure Rules and the Constitution, 2010.
2. The applicant who is the main respondent in these proceedings seeks a stay of execution of the Judgment/order issued on 3<sup>rd</sup> August 2022 and all consequential proceedings and Orders, therein pending the proceedings of the Bankruptcy Proceedings in Milimani Bankruptcy Notice No. 01 of 2009 to effect the Receiving Order issued therein. The application is supported by the affidavit of Tony Gachoka sworn on 23<sup>rd</sup> September 2025.
3. The Respondent's case is that he received a call from an auctioneer from Ruol Auctioneers sometime on 17<sup>th</sup> September 2025, intending to effect service on the respondent with a proclamation notice in relation to the matter herein, which matter he claims that he was not aware of. The respondent states that he

directed the Auctioneers to serve his advocates on record and on 18<sup>th</sup> September 2025 his advocates were served with warrants of attachment and sale and proclamation Notice on 18<sup>th</sup> September 2025 intimating the Applicant's intention to proceed with execution by selling the respondent's proclaimed property within seven (7) days from 16<sup>th</sup> September 2025. The Respondent states that the Proclamation was to lapse on or about 24<sup>th</sup> September 2025.

4. According to the respondent, there is a Receiving Order issued on 30<sup>th</sup> October 2009 by the Court as against him in Milimani Bankruptcy Cause No. 01 of 2009 and that therefore Section 11 of the Bankruptcy Act applies as to stay of any execution against him, to ensure compliance with the Law as to the Bankruptcy procedure in having the official receiver to give effect to the said receiving order as per the provisions of the law. According to the respondent, the Receiving Order is still in force and that the Receiver is yet to move the proceedings accordingly as to the debt of the Applicant.
5. That further if the application herein is not allowed as prayed, then the Official Receiver will not be able to proceed as ordered by Court in Milimani Bankruptcy Notice No. 01 of 2009 as per the Bankruptcy Act.

### **Response**

6. In response, the Applicant filed a relying affidavit sworn by Charles Benedict Mwongela who introduces himself as an advocate of the High Court practicing

in the name and style of C.B. Mwongela & Company Advocates, the Decree-Holder herein. The affidavit is sworn on 6<sup>th</sup> October 2025.

7. The Applicant deposes that the instant application is misconceived, bad in law and brought in bad faith, and that the respondent has not annexed any certified order or confirmation from the Official Receiver to show that the alleged receiving order of 2009 is still in force.
8. It is the applicant's contention that the mere allegation of bankruptcy is insufficient and that the burden lies on the Respondent to strictly prove subsisting protection under the law. The applicant advocate further deposes that the Bankruptcy Act (Cap. 53) under which the alleged 2009 receiving order was made, was repealed by the enactment of the Insolvency Act, 2015 and that under Section 1(2) and (3) of the Insolvency Act, it is provided that the Act shall come into operation on such date as the Cabinet Secretary may, by notice in the Gazette, appoint, but that any provision not brought into force within nine months after publication, automatically comes into force upon expiry of that period.
9. Further deposition by the applicant is that by operation of section 1 (3) of the Act, all provisions of the Insolvency Act, including Part IV on bankruptcy of natural persons (sections 32-260), were in force by mid-2016 at the latest, and that the Bankruptcy Act (Cap. 53) ceased to apply except to the extent saved by section 734 of the Insolvency Act.

10. The applicant further deposes that section 254 of the Insolvency Act provides for automatic discharge of a bankrupt after three (3) years unless the period is extended by the Court on application of the Official Receiver.
11. Further, that under section 733 of the Insolvency Act, 2015, orders and proceedings made under the repealed Bankruptcy Act, such as the Applicant's alleged 2009 receiving order, are preserved in law, however that it does not support the Respondent's reliance on that section, as the saving provision merely preserves the validity of the order but does not entitle him to perpetual protection.
12. It is also the Applicant's case that Section 734(2) expressly allows the Court to direct those pending bankruptcies proceed under the new regime, including section 254 which provides for automatic discharge after three (3) years. It is deposed that no evidence has been adduced to demonstrate that any extension of bankruptcy period was ever sought or granted by any court of law, and that therefore, by operation of law, and with more than sixteen (16) years elapsing since 2009, the bankruptcy order cannot be alive.
13. It is further deposed by the applicant advocate that even if the receiving order subsists, the Official Receiver has not moved to administer the estate of the respondent for over sixteen (16) years, which makes the Applicant's reliance on the order inequitable and an abuse of process.

14. The Applicant further deposes in contention that under section 47 of the Insolvency Act, after-acquired property ordinarily vests in the trustee as part of the bankrupt's estate. However, that in the instant case, a search of the current list of undischarged bankrupts maintained by the Official Receiver reveals that the Respondent's name does not appear thereon.
15. The Applicant also states that the Respondent has after-acquired property which has already been lawfully proclaimed, and that it is unjust to allow him to misuse bankruptcy as a permanent shield against lawful execution of court decree. Further, that although the proclamation notice expired on 24<sup>th</sup> September 2025, this does not extinguish the Applicant's right to execute, and that fresh step shall be taken to re-proclaim or obtain a new warrant to safeguard the fruits of the judgment of this court.
16. The applicant deposes that this Court has inherent power to grant leave to execute decree against the respondent, notwithstanding his alleged bankruptcy, particularly where the estate of the bankrupt has lain dormant and no steps have been taken by the Official Receiver to assume possession of the debtor's property.
17. The Applicant also contends that the decree herein has remained unsatisfied since 3<sup>rd</sup> August 2022 and that the Respondent is entitled to enjoy the fruits of his judgment. Similarly, that the Applicant's motion is therefore without merit and ought to be dismissed with costs.

18. The applicant deposes that in the alternative, and without prejudice to the foregoing, should this Court find the bankruptcy plea arguable, that the Court directs the Applicant to produce certified records from the Official Receiver within a strict timeframe or that in the further alternative, the court grants the Applicant leave to execute notwithstanding the bankruptcy, in view of the dormancy of the 2009 cause and the existence of after-acquired property.

**The Respondent's Further Affidavit**

19. The Respondent in response to the Applicant's replying affidavit filed a further affidavit sworn on 9<sup>th</sup> October 2025 by the Respondent. In the said affidavit, it is contended that the Applicant herein has not disputed the validity nor tendered any evidence that the court order issued on 30<sup>th</sup> October 2009 is invalid and is not in force. That the said Bankruptcy cause was filed against him by Harendra Pal, and that there are no stay Orders in the said Milimani Bankruptcy Notice No. 01 of 2009 to date hence, the said Court Order remains valid as it has never been lifted, vacated or discharged.

20. The Respondent further contends that despite the Bankruptcy Act (CAP 53) being repealed, the bankruptcy order issued against him remains valid and by dint of Section 733 of the Insolvency Act, the transitional provision implies that the Bankruptcy Act (Cap. 53) and Section 89 of the Law of Succession Act continue to apply, to the exclusion of the Insolvency Act, to any past event and to any step or proceeding preceding, following, or relating to that past event,

even if it is a step or proceeding that is taken after the commencement of the Insolvency Act.

21. It is deposed that Creditors have a right to object automatic discharge as provided by Section 735 of the Insolvency Act and hence the said Receiving Order is a preserve in law. Further, that with a valid Receiving Order in place, the same cannot be deemed to have automatically lapsed without creditors being served as provided by Section 735 of the Insolvency Act.

22. Further, that indeed, Section 733 of the Insolvency Act 2015, confers Orders and proceedings made under the repealed Bankruptcy Act as a preserve of the law and that leaves all property of the Respondent herein under protection of the law for administration by the Official Receiver in accordance with the law.

23. The Respondent argues that Section 734(2) of the Insolvency Act applies only to companies under the Companies Act specifically Parts VI to IX and the provisions necessary to give effect to those Parts, not to natural persons such as himself.

24. He further points out that Section 254(2) of the Insolvency Act sets out circumstances under which a bankrupt is not automatically discharged, including where a trustee or creditor has lodged an objection that remains unresolved after three years, where the bankrupt has not completed a public examination under Section 180, or where the individual remains undischarged from a previous bankruptcy.

25. The Respondent refutes the averments in paragraphs 13 and 14 of the replying affidavit sworn by the applicant stating that he has not been publicly examined in accordance with Section 180 of Insolvency Act and as such, the Receiving Order issued on 30<sup>th</sup> October 2009 in Milimani Bankruptcy Notice No. 01 of 2009 is not automatically discharged.

26. Further, that the mover of the Receiving Order should be the Official receiver as provided by law and that the said order is still valid and binding in light of Section 254(2) of the Insolvency Act.

27. In response to paragraph 15 of the replying affidavit, the Respondent states that the list of bankrupts tendered by the Applicant is one of bankrupts for orders issued between 2017-2024 but that in the respondent's case, the court issued Receiving Order as against him on 30<sup>th</sup> October 2009 and that the applicant has not provided such a list.

28. It is deposed that the Applicant has not at all proved that the proclaimed items belong to the Respondent, claiming that the said properties are unknown to him.

### **Submissions**

29. The application was canvassed by way of written submissions with only the Respondent filing submissions dated 9<sup>th</sup> October 2025. In the said submissions, the Respondent relies on the case of **In the Matter of Mohini Patel & another (Debtors) (Bankruptcy Cause 4&5 of 2010 (Consolidated)) [2022] KEHC 457 (KLR) (Commercial and Tax) (6 May 2022) (Judgment)** where the court

is said to have, in determining whether the repealed Bankruptcy Act or the Insolvency Act, 2015 applied to the matter, observed that the Debtor's argument that the old law still governed their case under the transitional provisions in Section 733 of the Insolvency Act, which preserve the application of the Bankruptcy Act for "past events" such as bankruptcy notices, bankruptcy applications, voluntary arrangements, or probate proceedings involving insolvent estates was the correct position. The court is said to have reviewed Section 733 and confirmed that these transitional clauses indeed allow the repealed Act to continue applying to such situations.

### **Analysis and Determination**

30. Having considered the application, grounds in support, supporting and replying affidavit and further affidavit as well as the submissions by the respondent and the applicable law, the issues for determination are whether the Respondent has established a lawful basis for stay of execution on account of the Bankruptcy Order issued on 30<sup>th</sup> October 2009 in Milimani Bankruptcy Notice No. 01 of 2009 and whether he has satisfied the legal principles for the grant of a stay of execution.

31. It is not disputed that a Receiving Order was issued against the Respondent on 30<sup>th</sup> October 2009 under the repealed Bankruptcy Act (Cap. 53). The Respondent contends that, by virtue of section 733 of the Insolvency Act, 2015, that Receiving Order continues to subsist and protects him from execution. He

maintains that the Order has never been vacated, that he has never been publicly examined under section 180 of the Insolvency Act and that therefore he cannot have been automatically discharged.

32. The Applicant, however, contends that while section 733 of the Insolvency Act preserves the validity of past orders, it does not preserve the procedural regime of the repealed Act. That Section 254 of the Insolvency Act provides for automatic discharge of bankrupts after three (3) years unless an extension is granted by the Court on application by the Official Receiver or a creditor.

33. It is also the Applicant's Contention that no evidence has been adduced to show that any exception or extension was sought or granted.

34. It is further contended that the Respondent has not provided any certified record from the Official Receiver confirming that he remains subject to a continuing bankruptcy administration.

35. In resolving the above rival positions, this Court finds it necessary to state clearly that the repeal of a statute does not, without more, invalidate court orders or legal proceedings undertaken pursuant to the repealed law. The Supreme Court in the case of **Moi University v Zaippeline & another** [2022] KESC 29 (KLR) observed thus:

***“Section 23(3) of the Interpretation and General Provisions Act, provides that where a written law repealed in whole or in part another written law, then unless a contrary intention appeared, the repeal was not to affect a***

***right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed and it was not to affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation and such legal proceedings or remedy could be instituted, continued or enforced as if the repealing written law had not been made.”***

36. Thus, Section 23(3) of the Interpretation and General Provisions Act preserves all rights, obligations, liabilities and remedies that had accrued under the former statutes unless the repealing legislation expresses a contrary intention.

37. This matter concerns the Respondent's contention that the Receiving Order issued against him on 30th October 2009 under the now-repealed Bankruptcy Act (Cap. 53) continues to subsist and, by virtue of Section 733 of the Insolvency Act, 2015, protects him from execution proceedings. The Respondent further maintains that, as the Receiving Order has never been vacated, and he has never been publicly examined pursuant to Section 180 of the Insolvency Act, his bankruptcy status remains in effect, and he cannot be automatically discharged.

38. I have considered the arguments presented by both parties, the relevant statutory provisions, and the factual matrix surrounding the Respondent's bankruptcy. In particular, I find it necessary to address the following key issues:

- i. Whether the Receiving Order continues to subsist and protect the Respondent from execution proceedings.*
- ii. Whether the Respondent has been automatically discharged from bankruptcy, and if so, the consequences of such discharge.*

39. The Applicant contends that the Respondent cannot indefinitely shelter under the repealed Bankruptcy Act (Cap. 53) to avoid execution. It is contended that, by operation of section 254 of the Insolvency Act, 2015, the Respondent would have been automatically discharged from bankruptcy, and therefore any assertion of continuing protection flowing from the Receiving Order issued on 30th October 2009 is untenable.

40. According to the Applicant, the Insolvency Act introduced a statutory regime under which a bankrupt individual is discharged after three years, unless specific statutory exceptions apply. It is argued that more than sixteen (16) years have elapsed since the Receiving Order was made, and the Respondent has neither demonstrated the existence of any statutory bar preventing his automatic discharge nor shown that the court extended his bankruptcy period on any lawful basis. The Applicant therefore asserts that the Respondent's alleged continuing protection from execution is unfounded, and that he cannot rely on an expired bankruptcy status to defeat lawful execution proceedings.

41. On the Receiving Order and its continued effect under the insolvency act, 2015, it is undisputed that a Receiving Order was made against the Respondent on 30th October 2009 under the repealed Bankruptcy Act, Cap. 53. The Respondent maintains that the Receiving Order continues to have effect under the Insolvency Act, 2015, relying specifically on Section 733 of the Act, which provides for the continuation of bankruptcy proceedings initiated under the old Bankruptcy Act.

42. Section 733 of the Insolvency Act expressly stipulates that a bankruptcy order made under the Bankruptcy Act shall continue to subsist under the Insolvency Act, 2015, unless discharged by the court. I find this provision clear in its intent to ensure that bankruptcy orders made prior to the enactment of the Insolvency Act continue to have effect under the new law, unless specifically annulled or concluded.

43. The Respondent's position is that he cannot be subjected to execution proceedings since the Receiving Order is still in effect and has not been discharged or vacated.

44. In this case, there is no indication that the Receiving Order issued in 2009 has been vacated or discharged. The Respondent has not sought or been granted a discharge, nor has the bankruptcy order been otherwise terminated. Therefore, I am persuaded by the Respondent's argument that, pursuant to Section 733, the

Receiving Order continues to have effect and the Respondent remains under the protection afforded by that order, including protection from execution.

45. One of the fundamental protections granted by such an order is the automatic stay of execution.

46. I find no merit in the argument that the Respondent, despite his bankruptcy, should be subjected to execution in these circumstances because of lapse of time. The Insolvency Act, 2015, under Section 733, provides a seamless transition from the old law to the new regime. There is no suggestion that the Respondent's bankruptcy order has been concluded, and as such, the protection from execution remains intact. Neither has the applicant herein applied to court to discharge the respondent from being bankrupt.

47. On the automatic discharge under the Insolvency Act, 2015, the Respondent further contends that he has not been automatically discharged from bankruptcy because he has never been publicly examined under Section 180 of the Insolvency Act, nor has the bankruptcy order been vacated. Section 180 provides for the public examination of a bankrupt individual, a crucial part of the bankruptcy process. If the individual fails to comply with this requirement, it can delay or prevent the automatic discharge.

48. The Respondent's argument is grounded in the fact that, since the public examination has not occurred, and there is no indication that the bankruptcy order has been discharged by the court, he cannot be said to have been

automatically discharged. I am inclined to agree with this position. The Respondent's failure to undergo a public examination and the absence of any formal discharge suggest that the bankruptcy order is still operative.

49. It is clear from Section 733 and the broader provisions of the Insolvency Act that an individual remains subject to the bankruptcy regime until such time as they are either formally discharged or the bankruptcy order is lifted by the court. Since neither event has occurred, the Respondent remains in bankruptcy, and his protection from execution continues. Needless to say, that the applicant herein can apply for the lifting of the bankruptcy order. In other words, if a decree holder wishes to have a bankruptcy order discharged, to facilitate execution of a decree, they have to apply to the Court- the Insolvency Court, in this case, the Commercial Division of the High Court for an order to discharge the order.

50. In light of the foregoing, although section 254 (1) of the Insolvency Act provides for automatic discharge of the order after elapse of three years, from the date of the bankruptcy order, the proviso thereof states that the discharge shall not take effect if the bankrupt has failed to comply with the requirements of the Act, including attending the public examination under section 180 of the Insolvency Act. It is upon the applicant to apply to the Insolvency Court for discharge of the order if the applicant has evidence that the bankrupt has

sufficient means to settle decree, or that he has refused to be examined under section 180 of the Act, among other grounds.

51. In the end, I find that the Receiving Order issued on 30th October 2009 against the Respondent/applicant herein continues to subsist under Section 733 of the Insolvency Act, 2015. The Respondent is still entitled to the protections afforded by that order, including immunity from execution proceedings as long as he remains undischarged from bankruptcy.

52. I therefore find the application for stay of execution proceedings against the Respondent is merited. The execution proceedings are stayed, and the Respondent shall continue to enjoy the protection provided by the Receiving Order issued on 30th October 2009, until such time as the bankruptcy order is formally discharged or vacated in accordance with the law.

53. I make no orders as to costs.

54. This file is closed in view of the stay granted until the respondent's bankruptcy order is formally discharged or vacated by the Insolvency Court in accordance with the Insolvency Act, 2015.

55. It is so ordered.

**Dated, Signed & Delivered virtually at Nakuru this 19<sup>th</sup> Day of November, 2025**

**R.E. ABURILI  
JUDGE**

ORIGINAL