

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. E004 OF 2021

FLAMCO LIMITED.....1ST PLAINTIFF/APPLICANT

HASMUKH RAICHAND SHAH.....2ND PLAINTIFF/APPLICANT

SANJAY RAICHAND SHAH.....3RD PLAINTIFF/APPLICANT

KAVIT HASMUKH SHAH.....4TH PLAINTIFF/APPLICANT

SHAH CHANRIKA HASMUKH RIACHA...5TH PLAINTIFF/APPLICANT

DIVIYA SINJAY SHAH.....6TH PLAINTIFF/APPLICANT

VERSUS

BANK OF BARODA (K)

LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Notice of motion dated 22nd September 2025 by the applicant herein prays for the following orders;

i. -iii- Spent.

iv. Pending the hearing and determination of the Bankruptcy Petitions being; Bankruptcy Petition No. E011 of 2025; In the Matter of Hasmukh Shah, Bankruptcy Petition No. E012 of 2025: In the Matter of Diviya Sanjay Shah Bankruptcy Petition No. E013 of 2025: In the Matter of Sana Shah, Bankruptcy Petition No. E014 of 2025: In the Matter of Kavita Hasmukh Shah, and bankruptcy petition No. E015 of 2025: In the Matter of Shah

Chanrika Hasmukh Raichand a stay of execution of the Notice to Show Cause dated 17th June, 2025 directing the 2nd, 3rd, 4th 5th and 6th plaintiffs/applicants to appear in court to show cause why they should not be committed to civil jail be issued.

v. The costs of this application be provided for.

2. The application is premised on the grounds on its face and the plaintiffs/applicants' director's affidavit sworn on even date. He deponed that they filed bankruptcy petitions before the High court at Milimani which were yet to be heard and determined. He stated that in the existence of pending execution proceedings against the 2nd, 4th, 5th and 6th plaintiffs /applicants, this court has the discretion to grant a stay of execution pending the hearing and determination of the said petitions. He added that any execution prior thereto would render the bankruptcy petitions nugatory.
3. In response the defendant/respondent filed a replying affidavit sworn on 25th November 2024 by its branch credit manager Justus Paul Muga. He averred that the present application herein was merely a gimmick, an after-thought, mischievously curated to deceive this court. That the plaintiffs/applicants seek to defeat the object and purpose of the Notice to Show Cause dated the 17th June, 2025. He further averred that this court has no requisite jurisdiction to grant the orders of stay of execution as it is not the bankruptcy court. He added that the said application is meant to delay recovery of costs and it ought to be dismissed with costs.
4. The application was canvassed by way of written submissions.

Plaintiffs/applicants' submissions

5. These were filed by Kiragu Wathuta & Company Advocates and are dated 19th November, 2025. Counsel gave a brief introduction of the case and identified two issues for determination.
6. The first one is whether this court has jurisdiction to hear and determine the application dated 22nd September 2025. Counsel referred to sections 34(1) and 3A of the Civil Procedure Act and submitted that pursuant to the said sections this court is clothed with the requisite jurisdiction to hear and determine the said application.
7. On whether the subject application is merited, counsel urged the court to exercise its inherent power in the present matter since the plaintiffs/applicants had filed bankruptcy petitions. He submitted that section 3A of the Civil Procedure Act allows this court to issue such orders as may be necessary to meet the ends of justice and prevent abuse of the court process.
8. Counsel further submitted that in order to safeguard the objectives of insolvency law, the Insolvency Act contemplates that execution against the debtor may be stayed once a petition is properly instituted. He cited section 23(2) of the said Act which provides as follows;
(2) If it is proved to the issuing court that an application for a bankruptcy order in respect of the debtor has been made to the high court, that court may either-
(a) stay the execution process on such terms as it considers appropriate; or

(b) permit the execution process to continue on such terms as it considers appropriate.

9. The court's attention was drawn to several cases among them **Re Satya Bhama Gandhi 2025 KEHC 11068 (KLR)** where the court held as follows;

"12. In the present case, the applicant has demonstrated that he is the subject of multiple execution proceedings arising from guarantees issued on behalf of a company that is no longer in existence. He has formally petitioned for bankruptcy asserting that he is insolvent and unable to satisfy the judgments against him.....

13.The respondents have raised procedural objections including that the application is premature. Under Section 11 of the Act an interim stay may be granted even before a bankruptcy order is issued provided the petition is properly before the court and the circumstances justify intervention.....

14.Ultimately, I am satisfied that the applicant has met the threshold for the grant of an interim stay so as to allow for the petition to be heard.

15.On a balance of probabilities the pending petition would be rendered irrelevant if the orders sought are not granted which would undermine the bankruptcy process.

16.In the circumstances I allow the application dated 18th September 2024."

10.He urged the court to exercise its statutory and inherent powers and issue stay of execution orders to preserve the

matter and uphold the overarching objectives of the Insolvency Act, 2015.

Defendant/respondent's submissions

11. These were filed by Sheth & Wathigo Advocates and are dated 27th October, 2025. Counsel gave brief facts of the case and identified three issues for determination.

12. The first issue is whether this honourable court possesses the requisite jurisdiction to render itself in the cause. Counsel submitted that the only recourse recommended to the plaintiffs/applicants in seeking orders for stay pending the hearing and determination of the insolvency proceedings was the bankruptcy court. He placed reliance on the decision in **Joseph Nzyoki Mwanthi v S.M Khatau & Another [2020] KEHC 6438 (KLR)** where the court stated that it was not a bankruptcy court and dismissed an application for stay of execution while citing provisions of Section 48 (1) of the Insolvency Act Cap 53 Laws of Kenya which provides as follows:

“When a bankruptcy order commences—(a) all proceedings to recover the bankrupt's debts are stayed; and.....”

13. The second issue is whether the plaintiffs/applicants' application dated 22nd September 2025 is merited. Counsel submitted that it is only after the commencement of a bankruptcy order, that stay orders may be issued. Further, that section 48(1) of the Insolvency Act is specific that stay orders may only be issued after Bankruptcy Orders are issued by a Bankruptcy Court. Reference was made to the decision in

Re Akbarali Karim Kurji (Debtor) [2017] eKLR where the court held as follows;

“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.” (Emphasis Ours).

14. Lastly, on costs counsel submitted that the same follow the event. He urged the court to award costs to the defendant /respondent.

Analysis and determination

15. I have considered the application, the affidavits and the submissions by the respective parties. The issue I find falling for determination is whether the application dated 22nd September 2025 is merited.

16. It is the plaintiff/applicant's case that the pending execution proceedings against the 2nd, 4th, 5th and 6th plaintiffs /applicants would render the bankruptcy petitions Nos. E011 of 2025, E014 of 2025 and E015 of 2025 nugatory. Thus, it is necessary that this court grants stay of execution pending the hearing and determination of the said petitions. On its part the respondent argued that this court has no requisite jurisdiction

to grant the orders of stay of execution orders as it is not the bankruptcy court.

17. The plaintiffs/applicants relied on section 23 of the Insolvency Act and argued that the same contemplated that execution against the debtor may be stayed once a petition is properly instituted. In **James Mwangi Macharia v Gerald Ochoki alias Marube [2019] KEHC 367 (KLR)**, the late Majanja J held as follows;

“A plain reading of section 23 of the Act shows that the provision applies where the execution process is issued by any other court other than the High Court. Further, the court empowered to stay any execution is the court that issued the process hence the use of the phrase “issuing court”. In this case the execution process was issued by the Bomet Magistrates’ Court and it is to that court that the Debtor must look to for relief.” (Emphasis mine)

18. Further in **Pan African Credit Finance Ltd v Hellen Chebet Koech [2011] KEHC 156 (KLR)** the court held as follows;

“The issue has also been raised whether this court (not being the bankruptcy court in the bankruptcy proceedings against the Defendant) has jurisdiction to grant stay of execution. Section 11 of the Bankruptcy Act provides as follows: -

11. (1) The court may, at any time after the presentation of a bankruptcy petition, stay an action, execution or other legal process against the property or person of the debtor, and any court in which

proceedings are pending against the debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

Stay of any action, execution or other legal process against the property or person of the debtor may be issued by the bankruptcy court at any time after presentation of a bankruptcy petition. Equally, any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

In the present case execution of decree proceedings are pending against the Defendant. This court thus has jurisdiction to issue the stay sought.” (Emphasis mine)

19. Section 48 of the Insolvency Act which was been relied on by defendant/respondent provides as follows:

(1) When a bankruptcy order commences—

(a) all proceedings to recover the bankrupt's debts are stayed; and

(b) the property of the bankrupt (whether in or outside Kenya), and the powers that the bankrupt could have exercised in respect of that property for the bankrupt's own benefit, vest in the Official Receiver.

20. In **Re Akbarali Karim Kurji (debtor)** (supra) also relied on by the defendant/respondent the court held that:

"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 proceeding 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." (Emphasis mine)

21. It is not disputed that the plaintiffs/applicants have only filed bankruptcy petitions and no bankruptcy orders have been made yet by the bankruptcy court handling the said petitions. Regarding section 23 of the Insolvency Act, it is clear that the same does not apply to this court while the holding in **Pan African Credit Finance Ltd v Hellen Chebet Koech** (supra) was based on section 11 of the Bankruptcy Act which was repealed by the Insolvency Act.

22. Guided by the provisions of section 48 of the Insolvency Act and the decision in **Re Akbarali Karim Kurji (debtor)**

(supra), it is clear that the plaintiff/applicants recourse is in the court handling their bankruptcy petitions.

23. The upshot is that the Notice of Motion is devoid of merit and the same is hereby dismissed. There shall be no order as to costs.

24. Orders accordingly.

Delivered virtually, dated and signed this 16th day of December, 2025 in open court at Nakuru.

**H. I. ONG'UDI
JUDGE**