REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

INSOLVENCY CAUSE NO. E020 OF 2024

BETWEEN

PAUL MAINGI MUSYIMI *T/A*

MAINGI MUSYIMI & ASSOCIATES ADVOCATES … PETITIONER

VERSUS

MARIANNE NYOKABI KAMOTHO ……. RESPONDENT

AND

KIRITI WOMEN & CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LTD ……. CREDITOR

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JUDGMENT

Introduction and Background

1. Through a Petition dated 29th July 2024, the Petitioner sought the issuance of a bankruptcy order against the Respondent on account of her failure to satisfy a debt of Kshs. 3,738,997/= despite being served with a statutory demand.

The Case Against the Respondent:

2. The Petitioner contends that he is entitled to the said sum pursuant to a judgment and decree issued in his favour on 6th December 2023 in **Milimani HCCC No. E628 of 2022**. He notes that the Respondent was afforded ample time and opportunity to settle the debt, which arose in 2023, but has failed to make any meaningful effort, thereby necessitating the filing of the present Petition.

3. He explains that his attempts to execute the decree and attach the Respondent's assets proved futile, as auctioneers were unable to trace any assets, resulting in the return of unexecuted warrants. He further states that garnishee proceedings pursued against the Respondent through Equity Bank were unsuccessful, as the funds in the Respondent's account were insufficient to offset the debt, thereby compelling him to withdraw the application.

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4. The Petitioner reiterates that the Respondent's claims of financial capacity are unreliable. He points out that the property known as **L.R. No. Thika Municipality Block 15/866**, registered in the name of Kencair Holdings Limited where the Respondent is the sole director, is currently the subject of litigation before the Environment and Land Court in Thika. He also challenges the credibility of the pay slips produced, noting that they were issued by a company owned by the Respondent's brother.

5. He avers that the statutory demand served upon the Respondent has neither been set aside nor is there any pending application seeking to set it aside. Accordingly, he urges that it is just and equitable for this Court to issue a bankruptcy order against the Respondent.

6. Following the publication of the petition, **Kiriti Women & Co-operative Savings & Credit Society Ltd** filed a Notice of Intention to Appear. In support of the Petition, the Creditor placed on record an affidavit sworn on 25th April 2025 by its Chairlady, **Eunice Wambui Kamotho**. In her

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deposition, she affirms that the Respondent is indebted to the Creditor in the sum of Kshs. 5,000,000/= arising from a failed land sale agreement, and a further Kshs. 340,000/= being rental arrears accrued during the period when the Respondent occupied a unit belonging to the Creditor.

7. The Creditor therefore supports the Petitioner's case and contends that the Respondent has demonstrated an inability to meet her financial obligations, thereby justifying the issuance of a bankruptcy order.

The Respondent Opposes the Petition:

8. In her response to the Petition, the Respondent concedes that she is indebted to the Petitioner in the sum of Kshs. 3,738,997/=. She further acknowledges receipt of the statutory demand dated 20th May 2024. However, she denies being in default of payment, maintaining instead that she has been making genuine efforts to settle the debt.

9. She reiterates that she has the financial capacity to discharge the obligation, emphasizing that she has

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continuous streams of income derived from ownership of several companies and properties, which constitute substantial financial assets capable of being liquidated or otherwise utilized to satisfy the debt.

10. The Respondent contends that the Petitioner has failed to exhaust alternative avenues for recovery of the debt, despite such remedies being available and capable of resolving the matter amicably. She highlights that she is a beneficiary of an estate currently undergoing distribution and maintains that the distribution process provides a viable means of repayment, thereby undermining the Petitioner's claim that she is insolvent.

11. She further emphasizes her willingness to settle the debt through a structured instalment plan under the supervision of the Court. In her view, bankruptcy proceedings are unnecessary, as there exist other remedies that can adequately address the dispute. She maintains that she has not committed any bankruptcy offences nor engaged in conduct warranting the issuance of a bankruptcy order. Moreover, she argues that the Petitioner has

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failed to satisfy the statutory requirements under ***Section 6 of the Bankruptcy Act and Section 17 of the Insolvency Act***, given that she has sufficient future income streams to meet her financial obligations.

12. On this basis, she urges the Court to dismiss the Petition, or in the alternative, to permit repayment of the debt in structured instalments over a reasonable period.

13. In response to the Creditor's Supporting Affidavit, the Respondent submits that the issues raised therein are extraneous to the proper scope of insolvency proceedings. She argues that the affidavit introduces allegations relating to land transactions dating back to 2015, which cannot be adjudicated within the limited framework of insolvency proceedings under the Insolvency Act.

14. She stresses that insolvency should not be employed as a debt collection mechanism in circumstances where liability is disputed or where contested factual issues arise. She further relies on ***Section 17 of the Insolvency Act***, which requires proof of actual inability to pay debts,

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rather than the mere existence of disputed liabilities. For these reasons, she contends that the present proceedings amount to a misuse of process, intended to exert undue pressure upon her.

Analysis and determination

15. Having carefully considered the Petition, the affidavits filed in support thereof, the response by the Respondent, together with the parties' written submissions and oral arguments, the central issue for determination is whether the Petitioner has met the statutory threshold for the grant of the bankruptcy orders sought.

16. The question of indebtedness and the existence of a statutory demand is not in dispute. Under *Section 17 of the Insolvency Act*, a debtor is presumed unable to pay their debts if they fail to comply with a statutory demand. This position has been reiterated by this Court in Re ***George Karunji, [2023] KEHC 18165 (KLR)***.

17. The Respondent has expressly admitted owing the Petitioner the sum claimed and has further acknowledged service of the statutory demand

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dated 20th May 2024. Despite this admission, the Respondent has neither settled the debt nor taken any steps to challenge or set aside the statutory demand. Such inaction, in the face of clear liability, raises a presumption of inability to pay debts as and when they fall due.

18. I have considered the Respondent's proposal to liquidate the debt through structured instalments. While such an arrangement may, in certain circumstances, demonstrate good faith and a genuine willingness to meet financial obligations, it is not lost on me that the debt in question arises from a judgment and decree issued on 6th December 2023 which remains unsettled to date. If the Respondent truly possessed the financial capacity she now claims, nothing would have prevented her from commencing instalment payments immediately upon issuance of the decree. Doing so would have been a clear indication of her commitment to honour the debt and would have served as evidence of good faith in dealing with her creditor.

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19. While it is correct that the Insolvency Act provides alternative mechanisms to bankruptcy, such mechanisms are intended to benefit debtors who act in good faith and who genuinely seek to restructure and rehabilitate their financial obligations. The procedures set out under ***Part IV of the Insolvency Act,*** including voluntary arrangements and debt restructuring plans, are debtor-driven processes. The law presupposes that it is the debtor who must take the initiative to invoke them, since it is the debtor who is best placed to understand and disclose their financial position, assets, liabilities, and capacity to meet obligations.

20. In the present case, the Respondent has not taken any steps to utilize these statutory alternatives. She has neither proposed a voluntary arrangement nor demonstrated any effort to engage the mechanisms available to her under the Act. Instead, she seeks to shift the burden onto the Petitioner by suggesting that he ought to have pursued such processes on her behalf. That argument is unconvincing. The responsibility to initiate restructuring lay squarely with her, not the

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Petitioner. To blame the Petitioner for failing to give these processes a chance is misplaced, particularly when the Respondent herself has not shown any willingness or good faith to pursue them.

21. Additionally, the Respondent's reliance on two payslips for the months of October and November 2024, without producing an employment contract or any corroborative evidence of consistent and ongoing income, is inadequate to establish financial capability.

22. The Respondent also relies on her ability to utilize the parcel known as **THIKA MUNICIPALITY BLOCK 15/866** to settle the debt. She however does not dispute that the property is the subject of ongoing litigation in **ELC No. 112 of 2021**. In any event, the property is registered in the name of Kencair Holdings Limited and not in the Respondent's personal name. The law is settled, following the pronouncement in ***Salomon V Salomon & Co Ltd, (1897) AC 22 H.L****;* that a company is a distinct legal entity separate from its directors and shareholders. Consequently, the

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assets of a company cannot be treated as the personal property of its directors or shareholders for purposes of satisfying individual liabilities.

23. It follows, therefore, that the parcel of land in question is not readily available to the Respondent for settlement of her personal debts. Her reliance on this property as evidence of financial capacity is misplaced, as the Court cannot disregard the principle of corporate separateness. The property belongs to the company, and unless due process is followed, it cannot be attached or realized to meet the Respondent's obligations to the Petitioner.

24. Equally, the Respondent's submission that she is an heir in the estate of the late John Joseph Kamotho does not advance her case. Although I have been presented with the Certificate of Confirmation of Grant issued on 8th March 2024, such a certificate does not, in itself, confer ownership of the properties listed therein nor does it equate to immediate liquidity. No evidence of transmission of the property to the Respondent has been provided. Until transmission is effected, the

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property remains part of the estate and cannot be treated as the Respondent's personal asset.

25. Moreover, even if transmission were to occur, the property may be subject to existing encumbrances or competing rights which could even rank superior to those of the Petitioner. As such, the property is not immediately available for realization in satisfaction of the debt. Her reliance on inheritance as proof of financial capacity is therefore speculative and unconvincing.

26. It is evident from the above analysis that the instant Petition was precipitated by the frustration encountered by the Petitioner in his attempts to execute the decree issued in his favour. I do agree with the Respondent that ordinarily, bankruptcy proceedings ought not to be the first or only mode of execution pursued by a decree-holder. This is because a bankruptcy order is not designed to serve merely as a debt recovery mechanism. Rather, it is a statutory process intended to address situations where a debtor is genuinely unable to meet financial obligations, thereby providing an orderly framework for the

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administration of their estate and equitable distribution among creditors.

27. In the present case, the Petitioner has demonstrated that he exhausted the conventional avenues of execution without success. The averments made by the Petitioner regarding the obscurity and unavailability of the Respondent's assets have not been controverted by the Respondent. I would therefore readily draw the inference that the Respondent does not possess readily available assets capable of attachment to satisfy the debt and that the Petitioner's resort to bankruptcy proceedings was not premature or opportunistic.

28. With respect to the claim advanced by the supporting creditor, even if the same were to be disputed on bona fide grounds, that alone would not alter the outcome of these proceedings so long as the Petitioner has independently established a proper basis for the grant of a bankruptcy order. The supporting creditor in this case served to reinforce the Respondent's financial distress rather than negating it. Their claim remains ancillary to the main petition. At the very least, the supporting

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creditor will be afforded the opportunity to lodge their proof of debt with the trustee in bankruptcy, where the validity and extent of such claims can be scrutinized and determined in accordance with the Insolvency Act.

29. The long and short of it is that the Petitioner has satisfied the threshold under ***Section 17 of the Insolvency Act*** by demonstrating that the Respondent is unable to pay her debts as they fall due.

Disposition

30. Accordingly, the Petition dated 29th July 2024 is allowed in the following terms:

i. A bankruptcy order is hereby issued against Marianne Nyokabi Kamotho and her estate;

ii. The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed to be the Bankruptcy Trustee in respect of the Respondent's Property.

iii. This Order shall be served upon the Official Receiver forthwith.

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iv. The costs of the petition shall be borne out of the Respondent's estate.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *30TH* DAY OF *JANUARY* 2026.

F. MUGAMBI
JUDGE

Delivered in presence of:

Ms Makori for Mr Kimathi for the respondent

Mr Maingi for the petitioner in person

Court Assistant: Lillian

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