

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
INSOLVENCY CAUSE NO. E002 OF 2025

IN THE MATTER OF EUNICE NANJAMA SHITEMI
AND
IN THE MATTER OF INSOLVENCY ACT CAP 53 LAWS OF KENYA

JUDGMENT

1. The Petitioner, **Eunice Nanjama Shitemi**, has brought the petition dated 9th May, 2025 for an order that a bankruptcy order be made in respect of her estate and that she be adjudged bankrupt. Annexed to the Petition is her Statement of Affairs (Individual Person) reflecting assets worth Ks16,000/- and liabilities to the tune of Ks. 10,642,624/-
2. The Petition is supported by the Affidavit sworn by the Petitioner on 9th May 2025. In the Affidavit the Petitioner deposed that on or about the 26th February 2020, she was sued by the Plaintiffs in **Eldoret CMCC No.212 of 2024 Mary Nyabiage & Esther Nabalayo Mutoka vs. Eunice Nanjala Shitemi**. That the aforesaid suit proceeded to hearing and the trial Court determined the same in its judgment delivered on 27th November 2024 in favor of the Plaintiff against her.
3. That subsequently on 7th March 2025, a decree was issued against her for a total amount of Ks. 10,642,624/- and that on the 13th March 025, warrant of attachment of moveable property in execution of the said decree for money was issued to Razor Sharp Auctioneers but the properties attached in

execution of the decree were found not belong to her but her husband and the proclamation was quashed.

4. The Petitioner deposed that the decree holder then proceeded to obtain a Notice to Show Cause why execution should not issue against her on 28th April 2025 and the same was heard on 6th May 2025 subsequent to which the Court issued warrants for her arrest.
5. The Petitioner maintained that she is a house wife who solely relies upon the provisions of her husband and has no alternate source of income and that her husband's meager salary barely covers, their sustenance therefore she is incapable of paying the said decretal sums.
6. The Petitioner further deposed that she stands to be arrested and committed to civil jail at any time for the default in satisfying the decretal sums and unless a bankruptcy order is made expeditiously, she is likely to be incarcerated and will suffer immensely and her right to liberty under the Constitution risks being violated in the circumstances.
7. The Petitioner urged that she is unable to meet her obligations especially her payments due to her creditors and in the premises she should be adjudged bankrupt.

Replying Affidavit

8. The Petition is opposed by the Respondents vide their Replying Affidavit sworn by **Mary Nyabiage Maisiba** on 17th June 2025. The 1st Respondent deposed that she is the 1st Plaintiff in **Eldoret CMCC No.212 of 2020** while Esther Nabalayo Mutoka is the 2nd Plaintiff. The 1st Respondent deposed that

there is a pending appeal in **Eldoret HCCA No. E259 of 2024** filed by the Petitioner. According to the 1st Respondent, she is seriously surprised that the Petitioner filed for bankruptcy or insolvency.

9. The 1st Respondent maintained that the Petitioner herein, simply borrowed money from her and Esther Nabalayo Mutoka to carry out business with the assistance and knowledge of her husband one Joseph Shitemi Mwangani and this is not a mortgage loan that was taken by the Petitioner that she can now turn around and say she is bankrupt and unable to pay back.

10. The 1st Respondent further deposed that she is a widow following the demise of her husband Innocent Maisiba and that the Petitioner herein is a neighbor at Kimumu in Eldoret and they have known each other closely as such. That most of the monies which the Petitioner borrowed her is what she was paid as benefits for her husband's demise and the Petitioner borrowed the same with the promise to repay out of the business she carrying out which is money lending.

11. According to 1st Respondent, the Petitioner is now lying to this Court that she unable to repay back the money and that the Petitioner and her aforementioned husband live in their own premises and have several rental houses/premises housing several tenants from who they receive regular monthly income.

12. The 1st Respondent further deposed that the Petitioner used the money she borrowed from her to send two of their sons Brian and Raphael who are now living and working in the USA and Spain and regularly send money to her and husband and that they are actually capable of repaying back her money,

that the said Petitioner works for Moi University and that this is further proof that they are capable of repaying her money.

- 13.** The 1st Respondent contended that the pending appeal **No.259 of 2024**, means that the Petitioner is intent on pursuing the appeal and that one fails to understand why she has to file for insolvency while the appeal remains pending, that this Court gave conditions for stay that require the Applicant to deposit the decretal sum pending the determination of the appeal and that this same Court has on the other hand allowed the Petitioner to file for insolvency.
- 14.** The 1st Respondent maintained that when the Petitioner says she is unable to pay the decretal sum and moves to declare herself bankrupt or insolvent, it is clear that her intent is to frustrate her and cause her to be unable to recover her money that she willingly borrowed.
- 15.** The 1st Respondent further deposed that the Petitioner and her said husband own moveable assets including motor vehicle KBY 258 and other assets which had been proclaimed by auctioneer's M/s Razor Sharp before the Petitioner's husband instructed his Advocate who filed an Objection simply to thwart her efforts to attach.
- 16.** The 1st Respondent contended that the Petitioner has displayed what she calls a "Statement of Affairs" in which she has deliberately shown everything to read NIL so as to show the Court that she has no earning ability but assumes that the 1st Respondent is unable to interpret this to mean that she out to cover the true position of her financial soundness and that the

Petitioner has shown that the only liability against her is the sum owing herein of Ks. 10,642,624/- which is indeed a lie.

17. The 1st Respondent maintained she is now unable to pay fees for her children who have joined universities because of the failure of the Petitioner to refund her money and that it is obvious that the Petitioner has other accounts through which she receives monies from abroad and she of course cannot disclose them.

18. The 1st Respondent further deposed that she has gathered that the Petitioner had been released from civil jail without her Advocate being served with the application seeking her release, that the Petitioner was released on a cash bail of Ks. 250,000/- and if she can afford to raise this kind of money under the circumstances then she has shown that she is a woman of means. The 1st Respondent added that the Applicant is now boasting out there that she is now a free person and that she is not going to pay or refund the monies due to her.

19. The 1st Respondent urged that she should not be made to suffer by someone who borrows money from her, promises to pay back then all of a sudden, the person wants be declared insolvent in order to make her suffer. The 1st Respondent thus urged the Court to dismiss the instant Petition because the same has been filed with bad motives.

Further Affidavit

20. The Petitioner also filed a Further Affidavit dated 1st July 2025 in which save for denying all the allegations made by the 1st Respondent she reiterated her averments already captured herein.

Submissions

21. The Petition was canvassed vide written submissions. The Petitioner filed submissions dated 3rd June 2025 while the Respondents filed submissions dated 29th August 2025.

Petitioner's Submissions

22. Counsel for the Petitioner gave a brief background of the case. On whether the Debtor is unable to pay the Debt and should therefore be adjudged bankrupt, Counsel submitted that **Section 32 of the Insolvency Act, 2015** 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 Act proceeds to lay out the procedure therein necessary to enable a debtor be adjudged bankrupt. He submitted that there is no denial that the debt of Ks. 10,642, 624/- is due, the Respondent avers as much in her Replying Affidavit dated 17th June 2025.

23. Counsel submitted that the Petitioner was subsequently arrested on 13th May 2025 and presented before court on the 14th May 2025 for the hearing of the Notice to Show Cause. That the Petitioner was committed to civil jail on the even date. Counsel argued that said committal was upon establishment by the court that the Petitioner herein could not pay her debt.

24. Counsel observed that the Act gives circumstances under which a bankruptcy order may be made. For instance, Counsel submitted that a bankruptcy order will be made where the amount of the debt, or the

aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level, 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, 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 there is no outstanding application to set aside a statutory demand in respect of the debt or debts.

25. Counsel urged that the Petitioner has fully complied with the provisions of the Act and the Insolvency Regulations to the letter and therefore prays that the bankruptcy order does issue as sought. He cited Prof Ngugi J., In re **James Maina Kabatha (Debtor/Applicant) NKR Insolvency Cause No. 4 of 2019 [2020] eKLR.**
26. Counsel further submitted that the Petitioner herein is unable to pay the judgment debt of Ks.10, 642, 624/- to the Respondent herein as and when it is required and added that Petitioner has produced before court her statement of affairs in compliance with the Act and as a show of good faith and in spirit of full disclosure; the said statement of affairs was truthfully and/or accurately filled to the best of the Petitioner's knowledge and all the contents therein are a stark reflection of the correct albeit grim financial status of the Petitioner.
27. Counsel maintained that the statement of financial affairs as filed contains all details as pertains the Petitioner herein for purposes of enabling the Respondent herein and the Court to ascertain the bona fides of the Petition for bankruptcy and ensure that bankruptcy proceedings are not being

conducted by the Petitioner to game the system and evade paying her debts in circumstances in which she can pay. Counsel argued that Petitioner herein has assets which are estimated at Ks. 16,000/- only whereas the judgment debt is Ks.10, 642, 624/- and it is practically impossible for her to pay said debt.

Respondents' Submissions

- 28.** On his part, Counsel for the Respondents also gave a brief background of the parties' case. On whether this debt qualifies for insolvency, Counsel submitted that this debt arose out of monies willingly borrowed by the petitioner from the respondents who are neighbors. That the Petitioner put the cash into her family business and that all along the Respondents asked her to refund but she kept responding that her business was low. Counsel urged that this was not a loan or mortgage where she can decide to ask the court to adjudge her bankrupt after failing to service the same. Counsel maintained that a debt acquired voluntarily does not qualify to make one apply for bankruptcy.
- 29.** He submitted that this is a deliberate move by the Petitioner to swindle the Respondents of her hard earned money. Counsel maintained that the Petitioner definitely invested the monies by using it to send two of their sons Brian Shitemi and Rapheal Shitemi abroad. Counsel added that one is in Spain and the other in U.S.A and there is evidence that the two sons regularly remit monies to their parents though respondent cannot access the evidence but says that the Petitioner mentioned this several times before the suit was commenced.

30. Counsel urged that nobody can believe the purported statement of affairs filed with this petition suggesting that the Petitioner's balance or average balance per month is Ks.16,000/- . Counsel argued that this is only a figure given to try and convince the court. Counsel further argued that the Petitioner has separated her husband Josephat Shitemi Mwangani from herself who earns good money as an employee of Moi University and yet the borrowed monies were used for the benefit of the family. Counsel submitted that the family has assets including motor vehicle KBY 258B, land where they reside which has rental premises among others. Counsel maintained that these are not insolvent people. Counsel argued that if the Petitioner knew she would not pay back the debt, she should have filed this petition as soon as suit was filed in the Chief Magistrate's Court so as to forestall the suit.

31. Counsel urged that Petitioner and her family have enriched themselves from monies received from the respondents and now in their view they see that the best way is to go bankrupt so that the Respondents can go to the streets begging.

32. Counsel then cited **Section 32 of the Insolvency Act and The Insolvency Regulation No.18**. Regarding the Petition being incompetent, Counsel submitted that this petition is incompetent to the extent that the Debtor has not complied with **Section 32(3), (4) and (5) of The Insolvency Act and Regulations 18(3)(p), 18(4) and (5)**.

Determination

33. I have considered the petition and the submissions on record and find the issue for determination is;

i. Whether the Petitioner has met the necessary conditions to warrant that she be adjudged bankrupt

34. The guiding principle of insolvency laws and procedures is that, in the event that a debtor is unable to find other solutions to their financial distress, they have the right to file for bankruptcy in order to obtain relief from the overwhelming debt. However, because of its severe repercussions, bankruptcy is always considered as a last choice.

35. Whereas it is necessary for a debtor to be protected by a bankruptcy order, the Petition must be filed honestly and without any material non-disclosure. There must be unambiguous evidence of true insolvency. It is imperative that the founding affidavit makes a strong argument for the petitioner. The claim needs to show that the Petitioner is "factually and commercially" bankrupt.

36. Commercial insolvency, which is simply a means of expressing that a debtor is unable to pay his debts when they become due, places the responsibility on the debtor's to demonstrate that his assets outweigh their liabilities. It is not a sufficient reason to issue an insolvency order on its own.

37. To establish insolvency therefore, it must be shown that the debtor's liabilities do as a matter of fact exceed his assets and not merely that they might do so, and clear proof of this must be adduced. An applicant must

make a prima facie case. In addition, even if the Petitioner had established a prima facie case, the Court has a discretion whether or not to grant the order.

38. The inability to pay debts is a fact to be proved by evidence. It is not to be assumed that because a petitioner says that he is unable to pay his debts the court should believe this assertion on the face of it. A Petitioner who wants to be adjudged bankrupt must lay before court concrete evidence to enable the court make a determination based on that evidence that indeed the person is bankrupt. This is because the court cannot act as an instrument to aid and/or allow a person run away from their financial obligation towards his creditors by dint of the fact that once adjudged bankrupt, the debtor is tossed beyond his creditors' reach.

39. It must also be clear to any Applicant that the purpose of bankruptcy proceedings is to protect the debtor from undue pressure from creditors, preserve fairness among the creditors, and discharge the debtor from his liabilities and enable him to start afresh. This favor should however go to a person who is genuinely bankrupt and unable to pay debts.

40. I am guided by the English case of **Corner Shop (Pty) Ltd v Moodley 1950 (4) SA 55 (T) at p 60**, where the Court observed that;

The inability to pay a debt should not be taken out of its context, for it may be “consistent with a state merely of temporary financial embarrassment” or due to “commercial insolvency” in circumstances where a Debtor’s liabilities do not exceed the value of his assets.” At the same time, one must bear in mind the

principle that the Court will not make an order for compulsory bankruptcy on the ground of general insolvency unless the facts are clearly proved”

41. In the matter of Ali Jillo Fallan (Insolvency Cause 6 of 2018) [2021] KEHC 8 (KLR), the Court observed as follows;

“The proper approach in deciding the question whether a Bankruptcy order should be issued on this ground appears to me, to be that, if it is established that an individual is unable to pay his debts, in the sense of being unable to meet the current demands upon it, his day-to-day liabilities in the ordinary course of his business, it is in a state of commercial insolvency; that he is unable to pay his debts may be established by proper evidence.”

42. Given these circumstances, it is only where inability to pay debts is satisfactorily proved would the Court adjudge a debtor bankrupt. The other important issue is for consideration in an application for bankruptcy is that a party seeking to be adjudged bankrupt in their petition must conform with the relevant provisions and regulations of the Act. Section 32 of the Bankruptcy Act provides as follows: -

When debtor may make application for bankruptcy order

(1).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.

(2)The Court may decline to deal with such an application if it is not accompanied by a statement of the debtor's financial position containing—

(a)such particulars of the debtor's creditors and of the debtor's debts and other liabilities and assets as may be prescribed by the insolvency regulations; and

(b)such other information as may be so prescribed.

(3).The Court may reject a statement of the debtor's financial position if of the opinion that it is incorrect or incomplete.

(4).A debtor who makes an application under this section shall publish a notice of the application in—

(a)a newspaper circulating within the region in which the debtor ordinarily resides; and

(b)in such other publications (if any) as may prescribed by the insolvency regulations for purposes of this section.

(5)The Court may decline to hear the application if subsection (4) has not been complied with to its satisfaction.

43. Under **Regulation 18(3) of the Insolvency Regulations, 2016**, at least seventeen distinct items of comprehensive information must be included by the debtor in his Statement of Financial Position. This comprehensive information is intended to help the court and creditors determine whether the bankruptcy petition is legitimate, and also to prevent the debtor from using the bankruptcy process to avoid paying his debts when he is able to do so.

44. A reading of the said **Regulation 18** vis-à-vis the information filed by the Petitioner reveals a key contradiction which is significant in assisting the court in determining the bona fides of her Petition. The court notes that at paragraph I under the part titled “Information Relating to The Bankrupt/Petitioner” she describes herself as an “unemployed housewife”. At Part 5a) on the Requirement for the reasons for insolvency, the Petitioner has given the reason as “Unemployment or Loss of Income” and “Adverse legal Action”. At paragraph 5b) on the contributing causes of her insolvency, the Petitioner has indicated “Lack of sufficient working capital” and “Economic conditions including external influences competition and increase in costs”

45. Now, a reasonable, plain and simple assessment of this information only goes to show that the Petitioner is not being honest with the court in her application. This is because having described herself as an unemployed housewife and having not at all and/or in any way alluded to the fact that she is engaged in any business activity whatsoever, she cannot then plead loss of income, lack of sufficient working capital and economic conditions including external influences, competition and increase in costs.

46. This is simply because her own statement on what she does for a living, does not allow her to operate in the environment in which the conditions she has cited as having impacted on her finances, thereby necessitating the need that the court adjudges her bankrupt exist and manifest.
47. Further to the above, by her conduct, the Petitioner is blowing hot and cold. On the one hand she does not deny that the amount awarded to the Respondents comprising the decretal sum is legitimate, due and owing. Her only plea is that she is unable to pay the same for reasons that she does not have the financial wherewithal to do so and prays that she be adjudged bankrupt.
48. On the other hand, notwithstanding this admission, she has lodged an appeal against the judgement that gave rise to the decretal sum. The appeal is indeed alive and subsisting notwithstanding the fact that Counsel for the Petitioner in his submissions, has himself stated that one of the conditions set by the **Bankruptcy Act** in an application such as the one before the court, is that a Petitioner needs to demonstrate that there is no outstanding application to set aside a statutory demand in respect of the debt or debts.
49. This is precisely what the appeal filed is intended to achieve and to my mind, this only goes to further underscore the fact that this Petition has not been brought in good faith and/or with clean hands, but as presented is only intended by the Petitioner to evade paying just and due debts.
50. Lastly, **Section 32(4)(a) &(b) of the Bankruptcy Act** and **Regulation 18 (4) & (5)** of the attendant Regulations requires that the debtor signs and dates the statement of the debtor's financial position and arrange for the

publication of the statement in a newspaper circulating within the region in which the debtor ordinarily resides and in the Kenya Gazette at the debtor's own cost. This is a mandatory requirement. No evidence has been availed to court to show that these requirements were met.

51. Insolvency proceedings are by their very nature class actions. This then is the reason why the proceedings are advertised in newspapers and the Kenya Gazette. The advertisement affords creditors the opportunity to come forward to either oppose or support the Petition. The Petitioner was required under the law to comply with the regulation and Gazette the Petition. She did not. Based on the foregoing, the Petition then is rendered incompetence for want of conformity with the mandatory provisions of the Act.

52. The upshot of my above conclusions is that I am satisfied that the Petition has not been filed in good faith and/or with clean hands, but is simply only intended by the Petitioner to evade paying the just and due debts owed to the Respondent herein. In this regard, I find the same to be mischievous and devoid of merit. Accordingly, it is now hereby dismissed in its entirety with costs to the Respondent. The interim orders herein earlier issued are now hereby vacated.

Read Dated and Signed at ELDORET on 12th March 2026

E. OMINDE
JUDGE

