

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MILIMANI COMMERCIAL & TAX DIVISION
INSOLVENCY CAUSE NO. E001 OF 2023

IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND
IN THE MATTER OF A CREDITOR’S BANKRUPTCY PETITION

HON. JUSTICE ALEEM VISRAM

17TH MARCH, 2026

BETWEEN

**EPSIDON TECHNOLOGY DISTRIBUTION (PTY)
LIMITED T/A FIRST DISTRIBUTION.....
PETITIONER**

VERSUS

**OPONDO ISAAC OCHIENG
RESPONDENT**

JUDGMENT

Introduction

1. This is a creditor’s bankruptcy petition dated 13th December, 2022, brought by the Petitioner seeking an order adjudging the Respondent bankrupt under the provisions of the Insolvency Act, 2015.

2. The petition arises from a commercial relationship between the Petitioner and Netronics Communications Limited, a company in which the Respondent served as a director. Under a Credit Account Application Agreement dated 31st July, 2019, the company purchased equipment and services from the Petitioner on credit. As part of that agreement, the Respondent executed a personal suretyship binding himself as surety and co-principal debtor for the obligations of the company.
3. The Petitioner contends that the company failed to honour invoices issued for goods supplied between November 2019 and April 2021. After partial payments, a substantial balance allegedly remained outstanding. The Petitioner asserts that the Respondent, as surety, became personally liable for the debt.
4. Statutory demands were issued on 30th June, 2022. The Respondent did not satisfy the demands and the present petition followed.
5. The Respondent opposes the petition. He does not dispute signing the suretyship agreement but contends that the dispute was subsequently referred to court-annexed mediation where the parties reached a settlement agreement dated 27th August, 2024, providing for repayment of the debt by instalments. He argues that the existence of that mediated settlement and the surrounding circumstances justify dismissal or suspension of the petition.

6. The question for determination is therefore whether the Petitioner has established the statutory basis for the making of a bankruptcy order and, if so, whether the Court should exercise its discretion to nonetheless decline such an order.

Issues for Determination

7. From the pleadings, affidavits and submissions filed by the parties, the Court considers that the following issues arise for determination:-

- a. Whether the statutory requirements for the presentation of a creditor's bankruptcy petition under the Insolvency Act have been satisfied.*
- b. Whether the Respondent has demonstrated grounds under the Act upon which the Court should decline to make a bankruptcy order.*

Applicable Law

The statutory framework

8. Bankruptcy proceedings in Kenya are governed principally by the Insolvency Act, No. 18 of 2015.

9. Section 17 of the Act sets out the circumstances in which a creditor may apply for a bankruptcy order. Section 17(2) provides that such an application may be made only if:-

- 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.**

(see – *Mohhamud v Tom Ojienda & Associates [2025] KEHC 3616 (KLR)*)

10. The Act also recognises the central role of a statutory demand as evidence of inability to pay. Section 17(3) read together with Section 384 of the Act provides that a debtor is deemed unable to pay a debt if he fails to comply with a statutory demand within the prescribed period.

11. Even where those conditions are satisfied, the Court retains discretion. Section 20(3) of the Act provides that the Court may dismiss a bankruptcy application where:-

The Court may dismiss the application if it is satisfied that the Respondent is able to pay all of the Respondent's debts or is satisfied:-

- i. That the Respondent has made an offer to secure or compound for a debt in respect of which the application is made;**
- ii. That the acceptance of that offer would have required the dismissal of the application; and**
- iii. That the offer has been unreasonably refused.**

12. The High Court in *Diamond Hasham Lalji v Cargill Kenya Limited [2019] KEHC 12260 (KLR)*, where the Court, applying Section 20(3) of the Act affirmed that: -

“the Court can refuse to make a Bankruptcy order where the Respondent who is unable to pay the Debt at the time of the proceedings makes a reasonable offer to secure or compound for the debt, but which offer has been unreasonably refused by the Respondent.”

13. Further discretionary powers are provided under Sections 304, 305 and 306 of the Act which permit the Court to stay or otherwise regulate proceedings where a debtor proposes a voluntary arrangement or other settlement with creditors.

Whether the statutory threshold has been met

14. The Petitioner asserts that the Respondent is indebted to it in the sum of Kshs. 139,725,105.30/- arising from the supply of goods to Netronics Communications Limited.

15. It is not disputed that the Respondent executed a suretyship agreement guaranteeing the obligations of the company. The legal effect of a guarantee or suretyship is well settled. In *Cottingham Properties Limited v Tausi Assurance Company Limited & another; Chandreshkumar Madhubhai Babariya & 2 others (Third Party) [2019] KEHC 263 (KLR)* the Court observed that a surety is:-

“a person who is primarily liable for paying another’s debt or performing another’s obligation; specifically, a person who becomes a joint obligor, the terms of the undertaking being identical with the other obligor’s and the circumstances under which the joint obligation is assumed being such that, if the joint obligor becomes required to pay anything, he or she will be entitled to complete reimbursement.”

16. The Respondent himself acknowledges that he executed the suretyship agreement in favour of the Petitioner.

17. The evidence placed before the Court further shows that statutory demands dated 30th June, 2022, were served upon the Respondent and were not complied with within the prescribed period.

18. Failure to comply with a statutory demand is ordinarily sufficient evidence that a debtor is unable to pay a debt within the meaning of the Act.

19. The High Court in *Martin Gatheca Gaiti v Baniel Kirera Bosire t/a Ongegu & Associates Advocates [2020] KEHC 9450 (KLR)* held that non-compliance with a statutory demand raises a presumption of inability to pay unless the debtor demonstrates otherwise.

20. Similarly, in *Meduprof SBV v Odhiambo [2025] KEHC 63 (KLR)* the court held that where a creditor has issued a valid statutory demand and the debtor has not complied with it, the statutory requirements under Section 17 of the Insolvency Act are satisfied.

21. In the present case the debt is for a liquidated sum exceeding the statutory threshold and no security has been shown to exist in respect of the debt.

22. The Court is therefore satisfied that the Petitioner has established the statutory conditions necessary for the presentation of a bankruptcy petition under Section 17 of the Insolvency Act.

Whether the Court should nonetheless decline to make a bankruptcy order

23. The Respondent's principal argument is that the dispute was referred to court-annexed mediation where the parties reached a settlement agreement dated 27th August, 2024, providing for payment of the debt by instalments.

24. The Respondent contends that the settlement agreement constituted a binding compromise which ought to preclude or suspend the present bankruptcy proceedings.
25. The existence of such an agreement is not in dispute. The evidence indicates that the parties indeed negotiated a settlement and prepared a consent intended to mark the petition as settled upon implementation of the agreed payment plan.
26. However, the material before the Court also shows that the consent was never executed by the Petitioner and no payment was made under the proposed settlement arrangement.
27. The Court must therefore determine whether the existence of that incomplete settlement arrangement constitutes a sufficient basis for declining to make a bankruptcy order.
28. Section 20(3) of the Insolvency Act gives the Court discretion to dismiss a petition where a debtor has made an offer to secure or compound a debt and that offer has been unreasonably refused.
29. The scope of that discretion was considered *in Diamond Hasham Lalji supra* where the court held that the refusal to accept a genuine proposal for settlement may justify dismissal of a bankruptcy petition.

30. The same principle was echoed in *In re Johnson Mwendwa Muthengi (Debtor/Applicant) [2022] KEHC 15657 (KLR)* where the court observed that a finding of inability to pay must be assessed in its proper context and that bankruptcy should not be used in a situation that is “temporary financial embarrassment”.

31. Those authorities illustrate that insolvency law pursues two related objectives: the protection of creditors and the orderly treatment of financially distressed debtors.

32. The Court also takes note of the observations made in *In re James Maina Kabatha (Debtor/Applicant) [2020] KEHC 2685 (KLR)* where the court stated that individual bankruptcy law seeks both to protect creditors and to provide debtors with a fresh start where circumstances justify it.

33. In the present case, however, the Respondent has not demonstrated that the settlement agreement has been implemented in any meaningful way. No payment has been made under the proposed instalment arrangement.

34. Indeed, the Respondent candidly acknowledges that no payments have been made pursuant to the settlement terms.

35. The mere existence of negotiations or an unsigned consent cannot by itself defeat a properly presented bankruptcy petition.

36. In *Yunes Muniafu Mukolwe v Moses Makokha & 3 others [2016] eKLR*, the Court reiterated that the burden of proving payment or discharge of a debt lies upon the debtor who asserts it.

37. In this case the Respondent has not demonstrated that the debt has been paid, secured or otherwise compromised.

38. Nor has he shown that the Petitioner acted unreasonably in declining to proceed with the proposed settlement.

39. The Court must also bear in mind that insolvency proceedings are intended to operate where a debtor has failed to honour lawful obligations despite demand.

40. The material before the Court shows that the Petitioner has issued demands and extended opportunities for payment over several years without success.

41. In those circumstances, the Court is unable to conclude that the present petition is oppressive or an abuse of the insolvency process.

Conclusion

42. Having carefully considered the pleadings, affidavits and submissions filed by the parties, the Court is satisfied that:-

- a. The Petitioner has established the statutory requirements under Section 17 of the Insolvency Act for the making of a bankruptcy order;
- b. The Respondent has not demonstrated any sufficient basis under Sections 20(3), 304, 305 or 306 of the Act upon which the Court should exercise its discretion to decline such an order.

43. The debt remains unpaid and the statutory demand has not been satisfied.

44. In those circumstances the Court is satisfied that the Respondent appears unable to pay his debts within the meaning of the Insolvency Act.

Orders

45. Accordingly, the Court makes the following orders:-

- a. **The Respondent, Opondo Isaac Ochieng, is hereby adjudged bankrupt and a bankruptcy order is hereby made against his estate.**
- b. **The Official Receiver is hereby appointed as the trustee of the bankrupt's estate or such person as may be nominated by the Official Receiver.**
- c. **The costs of the petition shall be borne out of the Respondent's estate.**

Dated and delivered virtually via Microsoft Teams this 17th day of March, 2026

**ALEEM VISRAM, FCI Arb
JUDGE**

**In the presence of;
Court Assistant: Lispa**

.....for
Petitioner

.....**Respondent**

ORIGINAL