

REPUBLIC OF KENYA
IN HIGH COURT OF KENYA AT ELDORET
INSOLVENCY CAUSE NO. E001 OF 2024

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND

IN THE MATTER OF A DEBTOR'S PETITION

THOMAS LEVI SHIMANYULA.....PETITIONER-DEBTOR

JUDGMENT

1. The background to this matter is captured in my two Rulings delivered herein on 20/06/2025 and 31/07/2025, respectively, as follows:

“1. By the Petition dated 28/11/2024 and filed in this matter through Messrs Oscar Wachilonga & Associates Advocates, the Debtor, describing himself as “lately residing at Eldoret town and having for the greater part of the 6 months resided in Eldoret and carried on business at Eldoret town within the jurisdiction of this Court”, sought a declaration for his own insolvency.

2. The Petitioner alleged that he is unable to pay his debts and prayed that he be adjudged bankrupt and a bankruptcy order be issued against himself, and also that his property do therefore vest in the Official Receiver. He listed several creditors to whom he owed debts and which included bank loans and Court decrees. Among the Court decrees he listed included one in favour of the current Applicant, Al Husnain Motors Limited, issued in Kakamega CMCC No. 409 of 2016 at the sum of Kshs 12,124,811/-. He also stated that the Applicant had obtained a warrant of arrest against him which could lead to his committal to civil jail and therefore prayed that all proceedings to recover the debts owed by him be stayed pursuant to Section 48(1) of the Insolvency Act.

2. Upon perusing the Petition and the *ex parte* Application filed accompanying it, and after satisfying myself that the Petitioner had filed a Statement of Affairs and also obtained a Certificate of Compliance from the Official Receiver, I issued various directions including that the Petitioner do ensure the gazettelement of the Notice of filing of the Petition, and publication of the same in a daily Newspaper. I then also issued interim stay of execution of all the decrees in issue.

3. Although there is evidence that the other Creditors listed in the Petition, as well as the Official Receiver, were served, only **Messrs Al-Husnain Motors Limited** (*hereinafter referred to as the Creditor*) filed a response thereto.
4. The response by the Creditor can be deduced from the Replying Affidavit sworn by one **Kasif Riaz**, who described himself as a Manager with the Creditor. Although the Affidavit was sworn support of an interlocutory Application seeking the setting aside of the orders of interim stay of execution that I had granted in the matter, I believe it also basically contains the Creditor's response to the Petition. The same was filed through **Messrs Okong'o Wandago & Co. Advocates**, and I also summarized it in my Ruling delivered on 30/07/2025 as follows:

“5. He deponed that the Applicant is one of the creditors admitted by the Petitioner in this Petition, that the filing of the present Petition is a clear case of forum shopping and an abuse of Court process whose intent is to defraud the public and defeat creditors, that as at the time when the Petitioner commenced these proceedings, the ex parte orders issued herein on 2/12/2024 were in existence in similar proceedings before a Court of equal status, namely, Kakamega Insolvency Petition No. E003 of 2024, and which had been fixed for hearing before the Court in Kakamega on 4/12/2024. According to him therefore, these instant proceedings were commenced by the Petitioner with a view to avoiding to appear before Hon. Justice Mbungi in Kakamega for hearing of the Debtor's Petition which he had filed before that Court on 21/08/2024. He deponed that the Petitioner is guilty of material non-disclosure of relevant facts and deliberately misled this Court into issuing the orders as his intention was to avoid appearing before the High Court in Kakamega on 4/12/2024 to be examined, and that on 4/12/2024, the Petitioner did not disclose to the Court in Kakamega the reason why he was withdrawing Insolvency Petition No. E003 of 2024, and was so allowed to withdraw the same.

6. *He contended that the Petitioner needs to pay costs as was ordered by the Kakamega High Court before he can be allowed to continue with the instant Petition. He deponed further that the Petitioner had and still has means, ways and properties that he can use to settle the debt he owes to the Applicant but he has chosen to use this Court and these proceedings to postpone the day of the reckoning and ward off his obligations, and that he is using the insolvency laws purely to abuse the process of Court. He deponed further that on 2/1/09/2024, the*

Applicant, through his Advocates, gave an undertaking to the subordinate Court in Kakamega CMCC No. 409 of 2016, during the hearing of his own Application which he filed after a warrant of arrest was issued against him when he failed to attend Court, that by 18/09/2024, he would have made a lump sum payment towards liquidation of the debt owed to the Applicant and that by 19/09/2024, he would go back to Court with a proposal on how to liquidate the balance. In conclusion, he urged that these proceedings therefore constitute a gross abuse of the Court process and bankruptcy laws and that the Petitioner has come to Court with unclean hands, and does not deserve favourable exercise of the Court's discretion in the circumstances.”

5. I also summarized the Petitioner's response contained in his Replying Affidavit as follows:

“7. The Petitioner, in opposition to the Application, filed the Replying Affidavit which he swore on 27/12/2024. He cited the preamble to the Insolvency Act, 2015 and deponed that by reason thereof, this process is not aimed at disadvantaging the Applicant or any creditor, and that the Court at Kakamega admitted to not being conversant with the law. He deponed that the orders sought are not available to the Applicant as the Court already made its decision on the matter and is functus officio, that a bankruptcy petition is essentially an ex parte affair and that any permitted objection ought to show that the Petitioner is rich or has the means to settle the debts in issue and not to show that he owes the Applicant. He deponed further that he stays in Kakamega but he has been carrying out business in both towns before he was unable to meet his financial obligations, he has been in the transport business for a long time with vehicles operating between the two towns, and that the debt in issue is one of the debts disclosed in the Petition. He contended that the Application is full of complaints but lacks substance as the Applicant's right shall be catered for during the administration of the estate by the Official Receiver, that there is no reason advanced for setting aside of the orders and that he had the option of filing these proceedings in Kakamega or Eldoret and he chose Kakamega but the Court is on record stating that this procedure is novel to it which in his view made the Applicant gain ground in the proceedings with the sole view of having him arrested even after disclosing his financial status. He contended further that it is his right under Article 48 of the Constitution to approach the Court and explain his financial position, Section 12 of the Act defines a Debtor's application, and Section 15 gives him the right to present such application, and that this procedure is equally available to the Applicant.

- 8. According to the Petitioner, the application has been made as though the creditors' consent was mandatory, meaning that the recovery of the debt in issue is permanently prohibited by the grant of the order in issue, which is a misconception. He contended further that the Application does not meet the threshold set under Section 30 of the Act as the debt is already determined by the Court, that the Petition had a Certificate of Compliance from the Official Receiver and the Court had no otherwise but to grant the orders in issue. According to him, the grounds alleged for setting aside the orders are alien to the provisions of the Insolvency Act and that Order 51 Rule 15 is not applicable herein as what is before the Court is a Petition and not an Application. He also urged that the succeeding paragraphs of the Act provide the window for the Applicant and other Creditors to join the proceedings as the Official Receiver takes over. He also urged that no prejudice shall be occasioned to the Applicant as its right to be heard is guaranteed under the Act and the Applicant has not demonstrated any injury it will suffer save for stay of execution of the decree it has against him, and that the claim giving rise to the warrant of arrest is one of the claims that shall be handled by the Official Receiver who shall process it as per the Insolvency Act.”**
6. After disposal of interlocutory Applications, the matter proceeded for *viva voce* trial before me on 29/10/2025. While the Petitioner testified for himself, the Creditor did not call any witness.
7. The Petitioner, in his evidence-in-chief, led by his Counsel, **Mr. Wachilonga**, stated that he was born in Kakamega but now resides in Eldoret, and that he used to be a businessman but now carries out casual work. He testified that he wants to be declared bankrupt as life has become financially difficult for him as he has many debts. He then adopted his Affidavits and his Statement of Affairs filed in this matter.
8. Under cross-examination by **Ms. Achieng**, Counsel for the Creditor, the Petitioner stated that he does not pay rent as he resides with his cousin. He confirmed that he had filed **Kakamega CMCC No. 409 of 2016** in which he sued the said Creditor, **Al-Husnain Motors Limited** in a bid to stop the Creditor from repossessing several motor vehicles that the Petitioner had purchased from the Creditor on credit. He stated that the motor vehicles are all now spoilt and have been lying in garages for about 5 years now. He also confirmed that he previously filed **Kakamega High Court Insolvency Case No. 3 of 2024**, which he however withdrew because it was too costly for him to travel to Kakamega. He testified that he has 3 wives (one of whom is in the United States of America) and 9 children who are in school, and that it is

their mothers who pay their school fees. Regarding **Kakamega CMCC No. 409 of 2016**, he stated that the Creditor filed a Counterclaim which was allowed, upon which warrants of arrest were issued against him, and that is when he filed **Kakamega High Court Insolvency Case No. 3 of 2024**. He agreed that he changed his Advocates in the said cases several times but claimed that they were offering him pro bono services. He confirmed that he applied for stay of the warrants in **Kakamega High Court Insolvency Case No. 3 of 2024**, and was granted time to settle the decree. He also confirmed that he had, before filing the insolvency cause, recorded a consent with the Creditors in Court to pay the decree in instalments as he had hoped to raise from funds from relatives, which however did not materialize. He testified further that there are several other Court cases filed against him, some by his wives. He agreed that in his Statement filed herein, he indicated that he has land whose land reference number he, however, did not disclose. He then stated that he has a parcel of land and estimated the value of his properties at between Kshs 1,500,000/- and Kshs 200,000/-, and stated that they are co-owned with the banks which financed the acquisition, namely **Family Bank Limited** and **Credit Bank Limited**, respectively. Regarding his daily subsistence, he claimed that it only relates to food and that he caters for it from the “little” proceeds he obtains from his engagement as a broker in a construction material yard. Asked why he did not, in his Statement of Affairs, disclose his expenditure for the last 3 years and also disclose his partners’ affairs, he responded that he was not aware that the law required such disclosure. He also conceded that he only mentioned the 1st wife, and not the 2 others. Regarding his bank accounts, he stated that they have no funds, and also stated that for 3 years he has only made 3 transactions via the Mpesa money transfer method. He however conceded that the letters from the banks that he produced were written about 8 years ago.

9. When examined further by the Court, the Petitioner stated that he used to be a prominent businessman in Kakamega running matatu business on the Kisumu-Kakamega route but the businesses collapsed basically as a result of accident claims and failure by his insurers to compensate him. When asked whether he made any investments during the time his businesses were thriving, he claimed that he purchased and/or developed the two parcels of land, but that the proceeds therefore are collected by the banks to recover the loans they advanced to him. He stated that his wives are also claiming interest over the properties. When asked whether he fully understood the consequences of being declared bankrupt and whether he had given it sufficient thought, he answered in the affirmative, and stated that he wanted time to revive himself financially. When asked about his age, he stated that he is 48 years old. Regarding **Kakamega High Court Insolvency Case No. 3 of 2024**, he denied that he was dishonest by abandoning it and then, instead, filing this fresh Cause in Eldoret.

Written Submissions

10. Upon close of the trial, I gave the parties leave to file written Submissions. The Petitioner's Submissions is dated 1/12/2025 while the Creditor's is dated 20/11/2025.

Petitioner's Submissions

11. Counsel for the Petitioner identified various provisions of the **Insolvency Act, 2015**, and basically submitted that all, including the requirement to file a Statement of Affairs, were complied with. He also submitted that the Notice of the Petition was published in the Standard Newspaper as required under the provisions of **Section 32(4)**, a requirement whose non-compliance as set out under **Section 32(5)**, is the only condition under which the Court can decline to hear the Petition. He submitted further that all the other directions given by the Court, including service upon the Official Receiver, were also complied with, and that the Official Receiver issued a Certificate of Compliance. Counsel also observed that the alleged undertaking given by the Petitioner in the Kakamega case was not produced, but submitted that all is however not lost for the Creditor since it shall still have a chance after the Bankruptcy Order is made, after which the Official Receiver, as Trustee, shall give all creditors a chance to participate in the matter as provided under the provisions of **Sections 48-58**. He submitted that there is no evidence of *mala fides* on the part of the Petitioner, and pointed out that the Petitioner's level of bankruptcy is about Kshs 150,000,000/-. He also reiterated that the Petitioner disclosed all the creditors, and all were served.

Creditor's Submissions

12. On his part, Counsel for the Creditor, reiterated that the Petitioner failed to honour the undertaking that he gave in **Kakamega CMCC No. 409 of 2016**, to settle the decree issued in the suit, and instead filed **Kakamega High Court Insolvency Case No. 3 of 2024**, which he later withdrew and filed this fresh Insolvency Cause. He submitted that **Section 3** of the **Insolvency Act, 2015**, establishes the twin objectives of insolvency proceedings which are to grant relief to honest but unfortunate debtors by providing a genuine opportunity for a fresh start and to protect and balance the rights of creditors. He cited the case of **In the matter of James Maina Kabatha (Debtor/Applicant [2020] KEHC 2685 (KLR)**, and urged that the instant Petition must be assessed against this legal framework. He submitted that the Creditor challenges the Petition's competence on the Petitioner's non-compliance with the provisions of **Section 32(2), (3), (4) and (5)** of the **Act**, which deal with the requirement to file Statement of Affairs and the contents thereof. He submitted that the Statement filed herein falls short of the requirements, as did not disclose the Petitioner's financial transactions for the 3 years preceding the Petition, and is not supported by **Eldoret High Court Insolvency Case No. E001 of 2024**

documentary evidence to substantiate the details provided. He contended that there is nothing to prove that the Petitioner is unable to pay his debts as there is also no evidence of the market value of his assets, and also no expenses incurred by the Petitioner. He urged further that the Petitioner did not demonstrate how he feeds for himself and his family despite admitting that he had 9 children and 3 wives, that in the Statement of Affairs, he only disclosed one wife, and also that his partner's income was also not disclosed. Counsel observed further that whereas there was proof of the Petitioner's dealings with several banks, he did not provide bank statements, nor Mpesa statements, and that there is no indication of the amount of debt that remains unpaid, as the letters attached by the Petitioner were written over 8 years ago. He also cited the case of **In re Jeremiah Koskei Bowen [2025] KEHC 2286 (KLR)** and also the case of **In re Jillo Fallan [2021] KEHC 8 (KLR)**. He contended that there was no proof on where the Petitioner's motor vehicles were at present, and also that there were no assessment reports to show that the vehicles had been written-off. Counsel also pointed out that the Petitioner only annexed evidence of publication of the Notice of filing of the Petition in a newspaper, and there is therefore no evidence that the Notice was also published in the Kenya Gazette.

Determination

13. The single issue for determination in this matter is **“whether the Debtor's Bankruptcy Petition should be allowed and a Receiving Order issued in his favour”**.
14. The policy behind insolvency legislation was very well explained by **Mativo J (as he then was)**, in the case of **In the matter of Ali Jillo Fallan (Insolvency Cause 6 of 2018) [2021] KEHC 8 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)**, in which he stated the following:

“23. The policy underpinning insolvency legislation and practice is that a debtor is entitled to seek relief from unmanageable debt through bankruptcy if the debtor is unable to resolve his or her financial difficulties through other means. However, bankruptcy is regarded as an option of last resort because it has serious consequences.

24. Even though it is imperative that a debtor be shielded through a bankruptcy order, the Petition must be made in good faith and there should be no material non-disclosure. There must be clear proof of actual insolvency.⁷ The Petitioner's case must firmly be asserted in the founding affidavit. The assertion must demonstrate that the Petitioner is “factually and commercially”

insolvent. But commercial insolvency, another way of saying that a debtor cannot pay his debts as and when they fall due for payment, is no more than an onus-shifting device, which then burdens the debtor to show that his assets exceed his liabilities. It does not serve as a standalone ground for an insolvency order to issue.”

15. The Judge, in the same case, stated further as follows:

“36. A bankruptcy Petition triggers judicial scrutiny into the merits of the Petition and conformity with the substantive law and Regulations. It enables the court to evaluate, at an early stage, the Petitioner’s standing (‘locus standi’) and to consider the prima facie merits of the Petition. The Petition is subjected to court scrutiny, and an unjustified or unmerited Petition is identified and declined.”

16. Back to this instant matter, it is brought under the provisions **Sections 32(1)** of the **Insolvency Act, 2015** which is premised in the following terms:

(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.”

17. Together with the Petition, the Debtor is required to file a Statement of Affairs outlining the state of his financial health. To this end, **Sections 32(2)** and **(3)** provide that:

(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.

18. **Sections 32(4)** and **(5)** then requires the Petitioner to bring the filing of the Petition to the attention of the public, a step which is meant to allow any other creditor not listed in the Petition, or any other interested person to come forward. The provisions are premised as follows:

(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.

19. The Insolvency Regulations, 2016, at Regulation 18 also contains further provisions. Among these is **Regulation 18(3)** which requires the Statement of Affairs to accompany the Petition to include, among others, the following:

(f) the debtor’s Kenya Revenue Authority Personal Identification Number;

(g) if the debtor has a current passport, his nationality and the passport number;

.....

(j) an itemised statement of the debtor’s expenses;

.....

(l) a statement of the partner’s income;

(m) a statement of the debtor’s current assets, including the description, value, and location of those assets;

(n) a statement of any assets that the debtor has disposed of in the previous three years;

(o) a statement of the debtor’s liabilities, including any contingent liabilities, with the following details for each liability—

(i) the amount;

(ii) whether the liability includes goods and services tax;

(iii) how liability was incurred;

(iv) whether the liability is secured;

(v) if the liability is secured, a description of the security;

(vi) whether the liability is a preferential debt;

(p) a statement of all financial transactions by the debtor during the previous three years.

20. Regarding publication of the Notice of filing of the Petition, **Regulation 18(4)** and **(5)** then impose the following requirements and obligations on the debtor:

(4) to sign and date the statement of the debtor's financial position and arrange for the publication of the statement in the Kenya Gazette.

(5) The debtor shall be responsible for the costs of publishing the statement in the Gazette.

21. Upon assessing the matter closely, I agree with Counsel for the Creditor that the Petitioner is guilty of non-compliance with the above cited provisions of the **Insolvency Regulations**.

22. First, the Statement of Affairs did not disclose financial transactions for 3 years preceding the Petition, and it is also not supported by any documentary evidence to substantiate the particulars alleged. There is also that no evidence of the market value of the Petitioner's assets, and also no clear demonstration of the expenses incurred by the Petitioner. The Petitioner has also not disclosed an estimate of his partner's (or partners') income, if any. Further, although the Petitioner has alleged being indebted to two banks, he has not provided bank statements, and has also not disclosed the amount of debt that remains unpaid. The most noticeable omission however is the Petitioner's failure to demonstrate evidence of publication in the Kenya Gazette of the Notice of filing of the Petition. This is despite the Court's express directions given on 20/06/2025. I say so because the only copy of publication of the Notice demonstrated is the one made in the Standard Newspaper, none in the Kenya Gazette.

23. For the above reasons, I find the Petition herein to be incompetent and I have no reason to interrogate it on merits as well.

Final Orders

24. For the above reasons, the Debtor's Petition dated 28/11/2024, and by extension, this entire Insolvency Cause is struck out with costs to the Creditor, **Al-Husnain Motors Limited**.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Wachilonga for the Debtor

Ms. Achieng for the Creditor – Al-Husnain Motors Ltd

Court Assistant: Brian Kimathi