



**Mertens v Bank of Africa Limited (Insolvency Petition E025 of 2019)  
[2025] KEHC 2191 (KLR) (Commercial and Tax) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 2191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**INSOLVENCY PETITION E025 OF 2019**

**AA VISRAM, J**

**JANUARY 30, 2025**

**IN THE MATTER OF THE INSOLVENCY ACT, NO. 18 OF 2015**

**AND**

**IN THE MATTER OF THE INSOLVENCY REGULATIONS, 2016**

**RE: GUY JAN M. MERTENS - DEBTOR**

**BETWEEN**

**GUY JAN M. MERTENS ..... DEBTOR**

**AND**

**BANK OF AFRICA LIMITED ..... CREDITOR**

**JUDGMENT**

1. The Petitioner filed the liquidation petition dated 26<sup>th</sup> November, 2019, seeking that a bankruptcy order be made in respect of his estate, and an order that he be adjudged bankrupt. He filed a supporting affidavit sworn on 26<sup>th</sup> November, 2019. He also filed two supplementary affidavits sworn on 12<sup>th</sup> May, 2020, and 30<sup>th</sup> October, 2023. He further filed primary and supplementary submissions dated 26<sup>th</sup> January, 2022, and 30<sup>th</sup> September, 2024.
2. The Petition was advertised through a newspaper advertisement in the Standard Newspaper on 8<sup>th</sup> May, 2020.

**Background**

3. The Petitioner, is a Belgian citizen who resided and worked in Kenya for 17 years from the year 2002. He was retained by Kenya Airways as the Director of Air Cargo Business from 2002, and he resigned in 2006. He then set up Air Cargo Businesses through Africair Management & Logistics Limited and



Africair Aero Limited. The companies carried out business in the shipping and logistics sector but unfortunately collapsed, and are no longer operating as going concerns.

4. Based on the record, it appears that the said companies suffered from poor corporate governance practices which eventually led to their collapse. These practices included allegations relating to commingling of funds between the various company accounts; poor debt collection; evidence of numerous declined cheques; and collusion between employees and suppliers, occasioning inflation of costs.
5. At some point the Petitioner took out an overdraft facility of USD. 300,000/- which over time ballooned to USD 1,241,647.12/- from the Creditor, the stated aim of which, was to rescue the companies and streamlining business operations.
6. The Petitioner and his co-directors all issued guarantees and indemnities in the sum of USD. 1,288,000/- as part of the collateral in support of the restructured loan facility. In addition, the terms of the amended conditional offer relating to the facilities included some of the following terms: a provision that the directors issue a personal guarantee and indemnity; and that a further charge be registered against property known as LR No. 26693/14 belonging to Mr. Charles Mbugua Ngugi in favour of Bank Africa Kenya Limited.

### **Evidence**

7. The Petitioner was cross-examined on 24<sup>th</sup> March, 2024, virtually, from Italy. He acknowledged that he was the sole director of Africaire Management and Logistics Limited, incorporated in October, 2005. He confirmed that the company has not applied for liquidation. He also confirmed that the company obtained an overdraft converted into a facility to sustain the company because it had a cash flow issue, and needed access to funds. He testified that the company borrowed the amount and guaranteed the loan.
8. It was his testimony that in 2019, the Creditor commenced recovery proceedings against him following which judgment was entered against him for 1.5 Million USD.
9. The Petitioner acknowledged that the supporting affidavit sworn on 12<sup>th</sup> May, 2020, indicated that it was sworn at Nairobi yet he left Kenya on 31<sup>st</sup> December, 2019. However, he denied that he left the country after the judgment was delivered. He explained that despite the fact that he had applied for an extension of his special pass, file no. 680048 and for permanent residence, he had to leave after his pass expired, and he could not finance his stay in Kenya.
10. The Petitioner swore that the liability was the company's and not his, as an individual. He however admitted that he had a liability to the Creditor, while it was his view that the other liabilities belong to the company. He testified that since he left the country, he has not come back. He also admitted that he had not written to the Creditor to offer or propose a payment plan.
11. The Petitioner testified that he now resided in Parma, Italy, and lived in a one bedroom apartment, for which he pays rent. He admitted that while his Statement of Affairs indicated that the only assets he had was Kshs. 15,000/-, this amount had increased a little bit since then.
12. During re-examination, the Petitioner reiterated that the only liabilities against him are in respect of Bank of Africa and KLM. He admitted that he is indebted to Koninklijke Luchtvaart Maatschappij (KLM), and that a matter, namely HCCC No. 431 of 2018; Koninklijke Luchtvaart Maatschappij N.V v Africair Management & Logistics Limited was filed, and through a Ruling of 13<sup>th</sup> October, 2023, the Court allowed an application seeking to lift the corporate veil, and ordered him to pay the sum of USD. 558,291.69/-. He further explained that the facility granted by the Creditor was a combined facility.



## Response

13. The Creditor/ Respondent, Bank of Africa Limited, opposed the Petition through a replying affidavit sworn by its Senior Recoveries Officer, Charles Waiyaki. It also filed initial and supplementary written submissions dated 20<sup>th</sup> April, 2022, and 25<sup>th</sup> September, 2024.
14. The Creditor's case was that through a series of letters of offer issued between the years 2010 and 2018, it extended various loan facilities to Africair Management & Logistics Limited, where the Petitioner is a director. The Petitioner guaranteed to repay the facilities in the event of default. The said company defaulted prompting it to institute recovery proceedings in HCCOMM No. 170 of 2019 *Bank of Africa Limited v Africair Management & Logistics Limited, Guy Martens & 2 Others* to recover the outstanding sum of USD. 1,597,415.81/- and Kshs. 27,325.96/- together with interest at 13.5% and 13% on the amounts respectively from 24<sup>th</sup> June, 2019, until payment in full.
15. Mr. Waiyaki testified that the Creditor duly extracted the decree, and served it upon the Petitioner, requesting him to settle the decretal sum. However, the Petitioner neither settled the same and nor has he attempted to do so. Accordingly, the Creditor sought redress, including the issuing warrants of attachment for the Petitioner's moveable properties.
16. Mr. Waiyaki testified that the Petitioner has evaded judgment severally by leaving the jurisdiction of the Court to escape paying the decretal sum leading to the application for warrants of arrest against him. On 2<sup>nd</sup> November, 2020, the Court ordered the Director of Immigration Services and the Officer Commanding Station JKIA to execute warrants of arrest. He stated that to date, the Petitioner is not within this Court's jurisdiction, despite the huge outstanding sums borrowed, showing that he has no intention of ever paying the same.
17. Mr. Waiyaki pointed out that the Petitioner has never approached the Creditor with a proposal to settle his liabilities, and that it was his view that the present petition aims to evade his obligations and liabilities. Moreover, the Petitioner has not demonstrated his inability to pay the decretal sums, and highlighted the fact that the Petitioner has not yet filed a Statement of Affairs as required by Regulation 18(2) of the *Insolvency Regulations, 2016*.
18. He testified that in his view, the Petitioner is a person of means, and is capable of settling the decretal amount. In the alternative, his assets and properties in Belgium ought to be attached in satisfaction of the decretal sum against him. He stated that he had reason to believe that the Petitioner borrowed monies and has since diverted the same to Belgium, where he currently resides. In his view, if the petition is allowed, the Bank will suffer irreparable loss which cannot be compensated.

## Analysis and Determination

19. I have considered the Petition, the respective affidavits in support and in opposition to the same, the rival submissions, and the relevant law.
20. The issue for determination is whether the Petitioner has met the threshold for the grant of a bankruptcy order.
21. The Petition is made under Section 32 (1) of the *Insolvency Act*, which reads as follows:-
  32. 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.



22. The High Court in *Osman v First Community Bank & 2 others* (Insolvency Petition E037 of 2020) [2022] KEHC 13825 (KLR) (Commercial and Tax) (23 September 2022) (Judgment) stated that:-

“27. Inability to pay debts is a fact to be proved by evidence. It is not to be assumed that because the Petitioner says that he is unable to pay debts the court should believe his word of mouth. 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. The court cannot act as an aid instrument to allow a person run away from his financial obligation towards his Creditors. This is so because once adjudged bankrupt, the debtor is tossed beyond his Creditors’ reach.

28. 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 favour should however go to a person who is genuinely bankrupt and unable to pay debts.

29. In *Stephen Nyaega Mose* [2018] eKLR, the court observed that Bankruptcy laws were never meant to protect people who are in debt because of their own act of fraud or professional misconduct. The laws are meant to protect genuine debtors who have unfortunately found themselves in debt out of innocent factors such as harsh business environment and unavoidable business calamities.

“The aim is to give such people a fresh start in life to enable them ‘get back to their feet and solder on in life.

23. The Petitioner submitted that he has met the conditions to be declared bankrupt as evidenced in his affidavits. He produced a Statement of Affairs dated 26<sup>th</sup> November, 2019.

24. On the other hand, the Creditor asserted that the Petitioner failed to comply with the informational requirements under Regulation 18(3) of the *Insolvency Regulations, 2016* for omitting an itemised statement of the Petitioner’s income and expenses. It also asserted that the Petitioner omitted assets of his estate in Belgium; his status of shareholding in the company; and a home in Karen from the statement of all the Petitioner’s current assets.

25. Looking at the Statement of Affairs, it is true that the same does not include an itemised statement of the Petitioner’s income and expenses. The same only lists the Petitioner’s assets and liabilities, notably, the Petitioner stated that his cash at hand was the sum of Kshs. 15,000/-. This sum, by his own admission had since increased. He did however say, and it is not clear, how much it had since increased to.

26. Additionally, looking at the Statement, it is not clear what the status of the Petitioner’s shareholding is in the two companies in question. Moreover, vital sections of the Statement have also been left blank, including; real estate, property, and immovables. A reading of the Statement coupled with the Petitioner’s testimony still leaves many questions unanswered. Such questions could have been answered by the production of audited financial returns for the last three to five years. No such statements however, have been filed by the Petitioner.



27. To the contrary, the Statement of Affairs appears limited in detail. It does not list any assets belonging to the Petitioner in Belgium whatsoever, where the Petitioner has now resided for several years, and does provide details of a home in Kenya, which was alleged to be located in Karen.
28. While I take note that the Creditor did not provide any evidence of the existence of a Karen home to corroborate his testimony, it does not help that the Petitioner's material before this court is equally limited.
29. In my view, the Petitioner bears the burden of showing he has made full and frank disclosure to the best of his ability, and to ensure that the court has before it, sufficient material to make an informed decision in relation to orders sought by the Petitioner. The court must be convinced that the Petitioner is honest and deserving of a fresh start. Unfortunately, I do not think the material before the court, and on the record, is sufficient to reach such a conclusion.
30. Moreover, beyond the Statement of Affairs, it is also incumbent on me to consider whether the Petition is made in good faith? In this regard, I cannot help but take note of the findings of the court in HCCC No. 431 of 2018; *Koninklijke Luchtvaart Maatschappij N.V v Africair Management & Logistics Limited*, concerning the Petitioner's subject company. The court stated as follows:-

“ 13. The applicants rely on two grounds to justify piercing the veil of incorporation in this instance. They have submitted that there was no distinct separation of the affairs of the judgment debtor and the directors and that there had been fraud and mismanagement of the Respondent by the directors and shareholders, to warrant the director being made personally liable for the debt.

14. The applicant avers that the director had chosen to intermingle his personal affairs with those of the company as evidenced from the Statement of Affairs presented in the bankruptcy petition. They suspected the same to have been done with the aim of fraudulently avoiding, frustrating and delaying the recovery of the sums owed to the decree holder and other Creditors. The applicants also contend that it would be unjust for Mr. Guy Jan Mertens the founder, director and owner of the company to simply walk away from the significant financial liabilities he created in the company after mismanaging the same, to the detriment of the decree holder.

15. In his defence, the director acknowledged that the financial problems of the company were caused by collusion between the employees and the suppliers of the judgment debtor, which led to its insolvency.

16. The main issue for consideration is whether the failure of the company should be wholly placed on the shoulders of Guy Jan Mertens by so lifting the corporate veil.

17. I have perused the audit report presented to the court for the year ended 31<sup>st</sup> December 2016 prepared by Ms. Catherine and Associates, Certified Public Accountants. The report raises serious financial mismanagement issues such as lumping together of suppliers' accounts, income that was not being accounted for either from bank drawings or cash sales, the absence of a cash register, missing invoices, lack of proper documentation on transactions such as rent payments, tax irregularities, high operational costs that riddled the company with heavy debts from loans and overdraft facilities, unusually high medical



covers for directors that could not be explained and lack of internal control systems. (Emphasis mine)

18. These findings raise serious questions on the integrity of the judgment debtor's financial transactions. The fact that the director herein was the founder, majority shareholder and director of the company leaves no doubt that he was the mind, heart beat and hands of the company. He was literally in control of the activities and decisions made by the company and must therefore have sanctioned these activities. The reason given by the director of the mismanagement of the company by the staff is not feasible. As director and founder, he would be the one responsible for the strategies and running of the commercial undertakings of the company. (Emphasis mine)

19. The audit report's findings are not controverted. Those findings would lend credence to the applicant's claim that there may have been fraudulent dealings which led to the financial problems and insolvency of the Respondent company thereby frustrating the applicant's realization of the fruits of its decree. I am left with no doubt but to find that he had knowledge of the fraudulent activities and that he ought to be made personally liable for the loss occasioned by the judgment Creditor. (Emphasis mine)

20. For the avoidance of any doubt, I adopt the definition of fraud as held by the Court of Appeal in *Arthi Highway Developers Ltd v West End Butchery Limited & others*. It was stated that:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.” (Emphasis mine)

31. Based on the finding above, I am persuaded that the Petitioner engaged in both deceitful and fraudulent activity for his commercial benefit, and to the detriment of his Creditors.

32. The Petitioner may not come to the court with unclean hands. He ought not benefit from his own misgivings. And this court may not grant an order providing cover and protection to a Petitioner who has not approached the court in good faith, which in my view, is absent.

33. On the contrary, based on the record, it appears more likely than not, that the purpose of the Petition is to evade personal liability that was uncovered during cross examination of the Petitioner, and following the orders of the court lifting of the corporate veil. I do not think that the court may shield the Petitioner from such liability in circumstances such as the present one. Guided by the decision in *Osman v First Community Bank (supra)*, such a reprieve ought to be granted only in the most genuine



and most unfortunate cases, and to preserve fairness in the justice system. I do not think this is such a case.

34. Based on the reasons set out above, I find and hold that the Petition dated 26<sup>th</sup> November, 2019, is without merit. The same is dismissed with costs to the Creditor.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

..... Court Assistant

..... For the Petitioner

..... For Creditor/Respondent

