



REPUBLIC OF KENYA



KENYA LAW
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**In re Lucy Njeri Waguchu (Insolvency Cause E040 of 2022)
[2025] KEHC 477 (KLR) (Commercial and Tax) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E040 OF 2022
BM MUSYOKI, J
JANUARY 24, 2025
IN THE MATTER OF INSOLVENCY ACT, 2015
AND
IN THE MATTER OF LUCY NJERI WAGUCHU**

RULING

1. A bankruptcy order was made by this court on 2-03-2023 and the official receiver appointed as the bankruptcy trustee of the debtor's estate. It has not been indicated whether there have been any further proceedings in respect of the management of the debtor's estate as the receiver has chosen not to make any responses and the debtor has remained silent about it.
2. The applicant, Synergy Industrial Credit Limited came to learn of the bankruptcy order on 4-04-2023 following which it filed the application dated 9th May 2023 asking for the following orders;
 - a. This honourable court do issue an order rescinding, revoking, setting aside, annulling and/or vacating the bankruptcy order issued herein on the 2nd March 2023 against the estate of Lucy Njeri Waguchu.
 - b. The adjudication of the bankruptcy order given and issued herein on the 2nd March 2023 be annulled.
 - c. Additionally and/or in the alternative, this Honourable Court be pleased to order that insolvency petition herein be heard de novo as if no bankruptcy order had been made against the estate of Lucy Njeri Waguchu, the debtor/respondent.
 - d. The costs of this application be borne by the debtor/respondent herein.
3. The application is premised on the grounds that the bankruptcy order was obtained through concealing of the true state of affairs of the debtor and that there was no evidence that the debtor was truly, factually and commercially insolvent. Further, the applicant claims that the debtor's intention



in filing this cause was to frustrate settlement of decretal sum in this court's commercial case number 389 of 2015. The applicant states that it was not served with the petition or proceedings in this matter and only came to learn of the same when it sought to execute the decree aforesaid.

4. The application is supported by an affidavit sworn by one Jacob Mbae Meeme on 9th May 2023. In it, the deponent gives the history of the case number 389 of 2015 which culminated to decree against the debtor for a sum of Kshs 8,836,395/= and claims that this is the decree the debtor sought to evade by filing this cause. The applicant adds that on 4/04/2023 when the said commercial case was coming for a notice to show cause, the debtor came up with grounds of opposition which disclosed existence of the bankruptcy order herein. The applicant also claims that the petition was filed in conspiracy with an officer working in the office of the official receiver because the filing fees was paid through the mobile telephone number for the officer.
5. According to the applicant, the debtor did not disclose full inventory of her assets which she had owned in the last five years preceding the filing of the petition and her statement of affairs showed half-truths. In particular, it is averred that the debtor did not disclose that she held 10% shares in Dagenfreight Limited and the income she earned from that company. The deponent describes the debtor as a cunning debtor and a serial fraudster together with her husband, Daniel Waguchu Ng'ang'a who has also been adjudged bankrupt but automatically discharged after the three years statutory period. Other assets the applicant claims the debtor owns are motor vehicle registration number KAH 901T and trailers registration numbers ZC 1257 and ZC 7586.
6. The applicant takes the position that the official receiver is acting impartially in favour of the debtor and her husband. The deponent concludes by stating that the petition was an abuse of the insolvency process as the debtor had no intention of repaying her liabilities even before the commencement of these proceedings. Finally, the applicant claims that the debtor and her husband live luxurious lives while keeping their creditors at bay on pretext that they are unable to pay their debts.
7. The debtor has opposed the application through her replying affidavit dated 16th May 2023. She depones that the averments made by the applicant are but maligning of her name and casting aspersions on her character. She denies that her petition was prepared and filed by an officer in the Official Receiver's office as alleged and aver that the said officer just assisted her in the process of filing as she was a lay person. The debtor reiterates that she does not have assets capable of settling her liabilities including the decretal sum owed to the applicant and the company she is said to have shares has no assets as well. As to her living a luxurious life, the debtor states that whatever comfort she enjoys comes from her children and she runs no business. She adds that the petition was procedurally filed and that she disclosed all her liabilities but no one came up to prove their debts including the applicant.
8. The application was heard by way of written submissions. The applicant filed its submissions dated 19th September 2024 while the debtor filed her submissions dated 5th November 2024. There are also submissions filed by Kingdom Bank (the interested party) which are dated 20th October 2024. The Official Receiver opted not to participate in the application.
9. The applicant submits that the debtor abused the insolvency process as she did not file this cause in good faith. The proposition that the debtor did not act in good faith is premised on the applicant's claims that it was not served with the documents, the debtor did not disclose her true worth and the cause was filed with the sole purpose of avoiding settlement of decretal sum due to the applicant. It is the applicant's contention that it only came to learn of this matter when it moved to execute the decree against the debtor decree in the case number 389 of 2015. The applicant argues further that the debtor's conduct in these proceedings amount to offences under the *Insolvency Act* viz material concealment



and falsifying statement of affairs in order to obtain a bankruptcy order and evade payment of due and just debts to her creditors.

10. Kingdom Bank Limited (the interested party), one of the disclosed creditors has filed submissions in support of annulment of the bankruptcy order. In addition to what the applicant has submitted, the interested party argues that the debtor clandestinely filed the petition and deliberately failed to serve the creditors in order to evade payment of her debts. It argues that the Official Receiver has failed to call for creditor's meeting and for these reasons, the court should annul the bankruptcy order under section 272 of the *Insolvency Act*. It is also its argument that there was no public examination of the debtor as the creditors were not aware of the proceedings.
11. The statement of affairs dated 24th April 2020 filed by the debtor disclosed that the debtor owed the applicant Kshs 12,343,420.00 and the interested party Kshs 12,000,000.00 among others. In the current application and submissions, the applicant indicates the debtor owes it Kshs 17,676,979.75 while the interested party states that the debtor owes them Kshs 11,340,859.40. Noting that the principal sum in the applicant's claim was Kshs 8,836,395.00 which was the same amount indicated in the notice to execute dated 28th November 2022 served upon the debtor, it is apparent that the debtor gave figures which were reasonably justifiable within her knowledge. I do not therefore think that it can be said that the debtor misled or misrepresented the status of affairs as regards her liability to the applicant and the interested party.
12. The debtor indicated in her petition that she was worth Kshs 30,000.00. The applicant and the interested party have not exhibited any evidence showing that the debtor owns the motor vehicle and the trailers mentioned in the supporting affidavit or any business. The alleged acts of luxurious life have not been proved. The applicant and the interested party have also not shown that the debtor earns anything from the company in which she is said to hold 10% shares. It is notable that the debtor has stated that the company does not do any business. The only evidence of asset the applicant has exhibited is a search from the registrar showing the shareholding. This is enough not proof that the debtor concealed her assets or abused the court process as alleged by the applicant. The relevant position is that the debtor's liabilities outweigh her assets. The issue of what assets the debtor has can be taken up with the Official Receiver during the management or liquidation process and if need be, the applicant would have the right to challenge the process.
13. The law is that, once a petition has been presented, the same shall be advertised in a newspaper with wide circulation. It is my considered opinion that this advertisement which invites all the creditors including those not disclosed in the statement of affairs to come up and participate either in opposing or supporting the petition, is as good if not better than any other mode of service. It is the mode of service provided and anticipated in the law and the court cannot impose a different mode of service unless the circumstances of the case dictate otherwise.
14. It is not disputed that the petition was advertised in the standard newspaper on 15th December 2022. I find the argument by the applicant and the interested party that they were not served with the petition insufficient to warrant setting aside of the bankruptcy order. The interested party has cited to me holding of Justice Mulwa in *Re Mary Nduta (2017) eKLR* where the Judge declined to grant a bankruptcy order because the creditors had not been served. However, in my opinion, the advertisement of the petition was as good as service. Actually, in that cause, the Judge had observed that there was no indication that the petition had been published meaning that if it had been published as in the instant case, the court would not have declined the petition for the same reason. In the cause before me, the petition was advertised and a certificate of compliance issued by the Official Receiver. The debtor cannot be blamed for the failure by the applicant and the interested party to react to the publication.



15. There is also an argument advanced by the applicant and the interested party that the debtor filed the petition for the sole purpose of avoiding payment of the decretal sum in their two cases, that is Cmcc number 513 of 2013 and this court's commercial case number 389 of 2015. The averments in the said parties' affidavit and submissions do not in my opinion disclose deliberate acts of fraud. The law is that a bankruptcy order is issued where the applicant is unable to pay their debts or their liabilities exceeds their assets. A casual look at the state of affairs and the evidence produced by the applicant and the interested party, shows that the debtor's liabilities far exceed her assets. The total amount claimed by the applicant and the interested party is sum is 29,017,839.15 not mention the other three creditors shown in the debtor's statement of affairs. Other than general statement that the debtor owns vehicles and businesses, the applicant and the interested party have not demonstrated any assets belonging to the debtor which could be valued at more than her liabilities. In these circumstances, I do not see any element of fraud in filing of this petition.
16. The interested party has accused the Official Receiver for failure to call for a creditor's meeting. I agree with the debtor that the Official Receiver was not given enough time to call for a creditors' meeting as this application was filed barely two months after the bankruptcy order was issued. After bankruptcy order is issued the process of administration of the estate of the bankrupt kicks off with service of the order upon the Official Receiver under Section 49 of the *Insolvency Act*. Upon service of the bankruptcy order on him, the Official Receiver is required to within thirty days call upon the bankrupt to file their financial statement within fourteen days.
17. Going by chronology of timelines given in sections 49 to 52, I believe the Official Receiver in this matter cannot be accused of failing to call the first creditors' meeting. The date on which the Official Receiver was served with the bankruptcy order herein has not been given. In any event, failure by the Official Receiver to discharge his statutory duties cannot be a basis for setting aside or annulling the bankruptcy order. The law has provisions which give the applicant and the interested party ways of dealing with a public officer who fails to perform their public duties.
18. The interested party has submitted that the bankruptcy order should be annulled under Section 272 (2) of the *Insolvency Act*. That Section provides as follows;

‘On the hearing of an application made under subsection (1), the Court may annul a bankruptcy order made in respect of a bankrupt if—

 - a. on reconsideration it finds that the bankrupt should not have been adjudged bankrupt;
 - b. it is satisfied that the bankrupt's debts have been fully paid or satisfied and that the bankruptcy trustee's fees and costs incurred in the bankruptcy have been paid;
 - c. it considers that the liability of the bankrupt to pay the bankrupt's debts should be revived because there has been a substantial change in the bankrupt's financial circumstances since the bankruptcy commenced; or
 - d. it has approved a deed of composition under Division 24 of Part III or a voluntary arrangement under Division 1 of Part IV.
19. In my considered opinion, this application qualifies to be considered under subsection 2(a). As analysed above, the applicants and interested party have not placed before me any material that would convince me that the bankruptcy order should not have been issued. The procedures provided in the law were followed and it is clear that the debtor herein is unable to meet her liabilities.



20. The doors to articulate their claims has not been closed on the applicant and the interested party and any other creditors. The debtor remains an undischarged bankrupt as the statutory period of three years provided for under Section 254 of the *Insolvency Act* has not lapsed and the applicant, interested party and other creditors can still take advantage of Section 256 of the said Act. Now that the applicant and the interested party are active in the proceedings, they can proceed and prove their debts before the Official Receiver and make attempts to recover their dues through the receivership or administration process.
21. The totality of the above is that, I find no merit in the application dated 9th May 2023 and the same is hereby dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

**RULING DELIVERED IN PRESENCE OF MR. MATHENGE FOR THE APPLICANT/DEBTOR,
MR. NADIO FOR THE INTERESTED PARTY AND IN ABSENCE OF THE COUNSEL FOR
THE RESPONDENT/CREDITOR.**

