Eliud v Wekesa (Civil Appeal 79 of 2022) [2025] KEHC 9147 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9147 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 79 OF 2022

MS SHARIFF, J

JUNE 26, 2025

BETWEEN

KIMANI ELIUD ..... APPELLANT

AND

JOSEPH WAFULA WEKESA ..... RESPONDENT

JUDGMENT

1. The Appellant herein was sued in Kimilili Principal Magistrate's Court in a number of suits resulting from a road traffic accident. The Respondent's suit being Kimilili PMCC No. 129 of 2016 was selected as a test suit. Judgement was delivered in favour of the Respondent herein and the same was to be applied to the other related suits being Kimilili PMCC No. 115 of 2016, 127 of 2019, 128 of 2016 and 24 of 2017.

2. Before the Respondent and other respective parties in the above-mentioned suits could enforce their Judgements, the Appellant herein was declared bankrupt vide an order issued on 17th March 2022, by a High Court in Kitale in Bankruptcy Cause No. 1 of 2021.

3. Subject to the above order, the Appellant herein proceeded to institute a Motion application dated 2nd June 2022, before the trial Court wherein he sought orders ceasing the execution in all the above-mentioned suits pursuant to Section 22, 23, 41 & 48 (i) of the *Insolvency Act*, No. 18 of 2015.

4. In response to the application, the Respondent herein filed their Notice of Preliminary Objection dated 14th June 2022, on the ground that the Motion application offended the mandatory provisions of Section 304 and 305 of the *Insolvency Act* No. 18 of 2015.

5. The Notice of Preliminary Objection was canvassed by way of written submissions and vide a Ruling delivered on 25th August 2022, while been guided by the dints of Section 304 and 305 of the *Insolvency Act* No. 18 of 2015 and the decision of Samuel Kamau Macharia & 2 Others vs John Kamau & 2 Others (2021) eKLR, the trial Court found that the Appellant herein was adjudged bankrupt thus his property and liabilities were placed under the official receiver and the Appellant had no capacity to plead or

institute proceedings /applications in his own capacity. The trial Court held that the Preliminary Objection dated 14th June 2022 was merit and proceeded to dismiss the Motion application dated 2nd June 2022.

Appeal

6. Aggrieved by the ruling of the trial magistrate, the Appellant herein lodged his record of appeal dated 9th August 2023 and filed in Court on 10th August 2023. Vide his memorandum of appeal dated 8th September 2022, he preferred the following grounds:

    a. The learned Resident Magistrate erred in law and fact in allowing the said Preliminary Objection based on the wrong legal principles.

    b. The learned Resident Magistrate erred in law and fact in allowing the said objection without takin g into consideration the Plaintiff's submissions.

    c. The learned Resident Magistrate erred in law and fact in arriving at the said decision despite the overwhelming evidence indicating that the Appellant was already declared bankrupt.

7. The Appellant beseeched this Honourable Court to allow his appeal with costs and have his Motion application dated 2nd June 2022 be reinstated and heard afresh before another trial Court.

8. The appeal was canvassed by way of written submissions and both parties complied with the Court directives.

Analysis and Determination

9. Having read through the grounds of appeal as set out in the memorandum of appeal and perused the trial Court record herein, I find the issue for determination being whether this appeal has merit?

10. This Honourable Court is meant to examine whether the Appellant having been adjudged bankrupt has the legal capacity to sue or be sued. The *Insolvency Act*, 2015 provides the legal frame for managing the affairs of bankrupt individuals, including their capacity to sue and be sued. However, any legal action involving the bankrupt's estate must be handled by the bankruptcy trustee or the Official Receiver. It is not in dispute that the Appellant herein while filing the Motion application dated 2nd June 2022, had been adjudged bankrupt. The bankruptcy order was issued vide an order on 17th March 2022 which is almost 3 months prior to the filing of the Motion application on 3rd June 2022.

11. Section 48 (1) and (2) of the *Insolvency Act* gives guidelines on what ought to happen upon the institution of bankruptcy proceedings.

    (1) When a bankruptcy order commences—

        a. all proceedings to recover the bankrupt's debts are stayed; and

        b. the property of the bankrupt (whether in or outside Kenya), and the powers that the bankrupt could have exercised in respect of that property for the bankrupt's own benefit, vest in the Official Receiver.

    (2) Despite subsection (1), the Court may, on the application by a creditor or other person interested in the bankruptcy, allow proceedings that had already begun before the bankruptcy commenced to continue on such terms as the Court considers appropriate.

12. The above provision is intended to ensure that when a bankruptcy order commences all proceedings to recover the bankrupt's debt are stayed to avoid a multiplicity of applications. This position was

reiterated in the case of Re Akbarali Karim Kurji (Debtor) [2017] eKLR where this Court came to the same conclusion and held that:

> "As to whether an order of stay can issue before the making of a bankruptcy order, the respondents cited Sections 41 and 48 (1) (a) of the *Insolvency Act* to support their argument that it is only when a bankruptcy order commences that proceedings to recover the bankrupt's debts can be stayed. I would agree entirely with the respondents' argument that: '...when a bankruptcy order commences all proceedings to recover the bankrupt's debts are stayed.' So that, it is no longer necessary to file an interlocutory application for a stay along with a petition for bankruptcy as used to be the case under Section 11 of the repealed Bankruptcy Act, Chapter 53 of the Laws of Kenya."

13. Sections 304, 305 and 306, all of the *Insolvency Act* provides as follows;

Section 304 provides that:-

(1) An application to the Court for an interim order may be made if the debtor intends to make a proposal to the debtor's creditors under this Division for a composition in satisfaction of the debtor's debts or a scheme of arrangement of the debtor's financial affairs.

(2) The debtor shall ensure that the proposal provides for a person to act as supervisor of the voluntary arrangement to which the proposal relates.

(3) Only an authorised insolvency practitioner is eligible to act as supervisor of a voluntary arrangement.

(4) Subject to subsection (2), such an application may be made-

a. if the debtor is an undischarged bankrupt-by the debtor, the bankruptcy trustee of the debtor's estate or the Official Receiver; and

b. in any other case-by the debtor.

(5) An application may be made by a debtor who is an undischarged bankrupt only if the debtor has given notice of the proposal to the Official Receiver and, if there is one, the bankruptcy trustee of the debtor's estate.

(6) An application may not be made while a bankruptcy application made by the debtor is pending, if the Court has, under section 33, appointed an authorized insolvency practitioner to inquire into the debtor's financial affairs and to report on those affairs to the Court.

Section 305 goes on to provide that:-

1) While an application under section 304 for an interim order is pending, the following provisions apply:

a) a landlord or other person to whom rent is payable by the debtor may exercise a right of forfeiture in relation to premises let to the debtor for a failure of the debtor to comply with a term of the tenancy—

i) only with the approval of the Court; and

ii) if in giving approval the Court has imposed conditions-only if those conditions are complied with;

b) the Court—

i) may prohibit distress from being levied on the debtor's property or its subsequent sale, or both; and

ii) may stay any action, execution or other legal process against the property or person of the debtor.

(2) A Court in which proceedings are pending against the debtor may, on proof that an application has been made under section 304 in respect of the debtor, either stay the proceedings or allow them to continue on such terms as it considers appropriate.

Section 306 then provides that:-

(1) On the hearing of an application made under section 304, the Court may make an interim order if satisfied—

(a) that the debtor intends to make a proposal under this Division;

(b) that on the day of the making of the application the debtor was an undischarged bankrupt or was able to make an application for the debtor's own bankruptcy;

(c) that no previous application has been made by the debtor for an interim order during the twelve months immediately preceding that day; and

(d) that the supervisor designated under the debtor's proposal is willing to act in relation to the proposal.

14. In the case of Re: Joyce Wanjiku (Debtor) [2020] eKLR, where the Court was dealing with similar circumstances, it held as follows,

> " From the facts I have set out above, I am satisfied that the Applicant if financially distressed. She intends to make a proposal to her creditors for a composition in satisfaction of her debts. Under Section 305(1) (b) of the Act, the Court may stay any action, execution or other legal process against the property or person of the debtor.
>
> The powers of the Court are provided for under Section 306 of the Act which states as follows:
>
> 306 (1) On the hearing of an application made under Section 304, the Court may make an interim order if satisfied—
>
> (a) that the debtor intends to make a proposal under this Division;
>
> (b) that on the day of the making of the application the debtor was an undischarged bankrupt or was able to make an application for the debtor's own bankruptcy;
>
> (c) that no previous application has been made by the debtor for an interim order during the twelve months immediately preceding that day; and
>
> (d) that the supervisor designated under the debtor's proposal is willing to act in relation to the proposal."

15. In this particular case, it is noteworthy that the on 17th March 2022, Kitale High Court under the stewardship of Justice L. Kimaru issued orders declaring the Appellant herein bankrupt. In my humble

view, the Appellant could not rely on the dints under Section 48 of the *Insolvency Act* as the bankruptcy proceedings had already concluded and he was adjudged bankrupt. It was the duty of the Appellant herein to therefore move this Court under the dints of Section 304 as read with 305 of the *Insolvency Act*, seeking to place his estate under the management of the receiver as he is currently unable to raise any monies to liquidate his debts and crave for stay of any execution proceedings against him so as to allow him time to make a proposal to his creditors for a composition in satisfaction of his debts. It is clear that the appellant's Motion application did not crave for such orders and the appellant moved the court in total disregard of the bankruptcy order issued in his favour; that order has not been discharged wherefore the appellant's legal capacity to sue is subject to compliance with the bankruptcy order.

16. In view of the findings as stated above, this Court finds that the Appellant failed to satisfy the conditions set out under Section 306 of the Act. In the circumstances, this Court finds that the trial Court's holding that the Notice of Preliminary Objection dated 14th June 2022 was merited is upheld.

17. It is absurd that a man who has been adjudged bankrupt has opted to expose himself to further costs instead of focusing on how to make a proposal for a composition in satisfaction of his debts.

18. On the balance I do find that this appeal is devoid of merit and I dismiss it with costs to the respondent

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JUNE 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Gemenet for Appellant

No attendance by Omundi Bwonchiri for Respondent

Peter Court Assistant