Shimanyula v Al Husnain Motors Limited (Insolvency Cause E001 of 2024) [2025] KEHC 11262 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11262 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

INSOLVENCY CAUSE E001 OF 2024

JRA WANANDA, J

JULY 31, 2025

BETWEEN

THOMAS LEVI SHIMANYULA ..... PETITIONER

AND

AL HUSNAIN MOTORS LIMITED ..... APPLICANT

RULING

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 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*.

3. Upon perusing the Application ex parte in the first instance, and satisfying myself that the Petitioner had obtained a Certificate of Compliance from the Official Receiver, I issued orders as follows:

    "(i) Petitioner to comply with all other directions required under the *Insolvency Act*, including gazettement. The Petitioner shall therefore liaise with the Official Receiver.

(ii) To ensure compliance with the statutory timelines, I will have this matter mentioned before me on 14/01/2025 to ascertain progress.

(iii) In the interim, I grant prayer 2 and grant a stay of execution and proceedings"

4. It is seemingly directive (iii) above, grant of interim stay of execution, that triggered the instant Application the subject of this Ruling, namely, the Applicant's Notice of Motion dated 17/12/2024. The same is filed through Messrs Okong'o Wandago & Co. Advocates, and seeks orders as follows:

i. [.....] spent.

ii. [.....] spent.

iii. [.....] spent.

iv. The ex parte order issued pursuant to Section 48(1) of the *Insolvency Act*, staying all proceedings to recover the bankrupt's debts and staying execution and proceedings and in particular the concluded proceedings in Kakamega Insolvency Petition No. E003 of 2024 and Kakamega CMCC No.409 of 2016 be stayed pending the hearing and determination of this Petition.

v. The ex parte order issued pursuant to Section 48(1) of the *Insolvency Act*, staying all proceedings to recover the bankrupt's debts and staying execution proceedings be set aside, discharged and or otherwise vacated.

vi. The Applicant be awarded costs of this Application.

5. The Application is supported by the Affidavit sworn by one Kasif Riaz, who described himself as a Manager with the Applicant. 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 pays 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.

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*.

9. The Application was then canvassed by way of written Submissions. The Applicant filed the Submissions dated 12/02/2025 while the Respondent filed the Submissions dated 18/02/2025.

Applicant's submissions

10. Counsel for the Applicant, in respect to the issue of alleged non-disclosure of previous proceedings by the Petitioner, submitted that bankruptcy protection is an extraordinary relief, and that one of the corollaries to the two conflictual twin goals of bankruptcy law - protection of creditors, and the provision of a fresh start for the honest but unfortunate debtor - is that an individual seeking bankruptcy protection is required to scrupulously demonstrate that he is acting in good faith and

disclose all his financial information. He then however introduced new matters and/or grounds not contained in the Application, namely, pointing out information which he submitted, is missing from the Debtor's "Statement of Financial Position" and thus seemingly rendering the Petition defective. I will not therefore recount these newly introduced matters. On non-disclosure, Counsel cited several authorities. In the remaining part of his Submissions, Counsel basically repeated and reiterated the contents of the Supporting Affidavit save that he seems to have gone "hammer and tongs" at the Court heavily criticizing it for granting the ex parte stay orders in total disregard of the law and before hearing the creditors and terming the Applicant's "forum shopping" as successful in eventually getting a "friendly Court". Counsel in effect appeared to be questioning this Court's competence.

11. On this point of hearing creditors before issuing ex parte orders of stay, Counsel cited the case of In Re Akbarali Karim Kurji (Debtor) [2017] eKLR, the case of Re Shadrack Kipyatich J. Kibor-Debtor [2019] eKLR and also the case of Re Patrick Maina Waweru [2019] eKLR.

Respondent's Submissions

12. Counsel for the Respondent, on his part, cited Section 15 and 32 of the *Insolvency Act* and submitted that these provisions give him the right to present a Debtor's own Insolvency Petition on the ground of his inability to pay his debts and also reiterated the averments in the Respondent's Replying Affidavit. I equally find no reason to reproduce the same.

Proceedings after filing of Submissions

13. I had fixed this Ruling for delivery on 20/06/2025. However, in the course of studying the file, I realized that there was no evidence that the Debtor had served the Application upon the Official Receiver and other creditors as I had directed. In the circumstances, I adjourned delivery of the Ruling and directed the Debtor to, among others, first comply by serving the Official Receiver. When the matter came up in Court on 14/07/2025, satisfied that such service had been effected, but there being no response from the Official Receiver, I fixed the Ruling for delivery.

Determination

14. The issue for determination is basically "whether the Court should set aside the ex parte orders of stay of execution that it issued on 2/12/2024."

15. That this Court, and any other Court for that matter, possesses the power to vacate its own orders is not in dispute. The principles upon which the Court exercises its jurisdiction to set aside or vacate ex-parte orders was considered in the case of Aga Khan Education Service Kenya vs Republic Exparte Ali Seif & 3 Others [2004] eKLR, in which the Court of Appeal, though dealing with the issue of ex parte grant of leave to operate as a stay in a Judicial Review proceedings, made the following statement, which is equally applicable hereto:

> " We would, however, caution practitioners that even though leave granted ex-parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases …."

16. Courts have also held that they are entitled to discharge orders issued ex parte on the ground of non-disclosure of material facts or that the application was an abuse of the Court process or that it is in the public interest to discharge the orders (see Esther Muthoni Passaris vs Charles Kanyuga & 2 Others [2015] eKLR)

17. The Court of Appeal, again, in the case of Judicial Commission of Inquiry to the Goldenberg Affair & Others vs Job Kilach [2003] eKLR, also quoted with approval the following excerpt from the English case of R v Secretary of State, ex parte Harbage 1 ALL ER 324, which again, though dealing with the issue of ex parte grant of leave to operate as a stay in Judicial Review proceedings, is still applicable hereto:

> " I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application, this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case, it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision."

18. The Court's power to vacate its own ex parte orders is therefore discretionary but the Court, in doing so, must exercise such discretion judiciously while also ensuring that justice has been done.

19. The Petition in this matter has been brought pursuant to Sections 32 of the *Insolvency Act*, 2015. Section 32(1) provides that:

> " 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."

20. The Applicant urges that the ex parte orders of stay of execution obtained by the Petitioner on 2/12/2024 should be vacated because they were granted when the matter was sub-judice and pending before the High Court sitting at Kakamega, namely Kakamega Petition No. E003 of 2024. While I agree that this may have been an irregularity on the part of the Petitioner, and possibly an act of non-disclosure which this Court frowns upon and does not in any way condone, I note that the Applicant agrees that the Petitioner withdrew the said Kakamega Petition No. E003 of 2024 on or about 4/12/2024, 2 days later. As at now therefore, only these proceedings are in existence.

21. The Applicant has also contended that this Court had no powers to issue the interim ex parte orders before hearing the creditors. In making his argument, Counsel cited the case of In Re Akbarali Karim Kurji (Debtor) [2017] eKLR, the case of Re Shadrack Kipyatich J. Kibor-Debtor [2019] eKLR and also the case of Re Patrick Maina Wawweru [2019] eKLR. However, a look at all these cases reveals that they do contain any such holding. Counsel seems to have interpreted the authorities out of context.

22. In regard to the Petitioner's conduct, which the Applicant heavily criticized, while I agree that the Petitioner's conduct may not attract much admiration, weighing the competing interests between the parties at this stage, I find that the Petitioner would suffer more if the stay orders are lifted than the Applicant will suffer if the orders are not lifted. This is because the Petitioner having come forward and pleaded his insolvency, and having notified the Official Receiver as required by law, I think that he should be allowed to argue his case as he seeks that the Official Receiver takes over his estate and manages it. There being no dispute that this was, in the first place, one of the noble intentions of the *Insolvency Act*, I believe that it will be too drastic to lift the orders at this stage since, there being existing

warrants of arrest issued against the Petitioner for failure to settle a Court decree, the immediate result of lifting the orders would be that the Petitioner will be arrested and hurled to civil jail.

23. While I do not excuse the Petitioner's conduct, particularly on the issue of non-disclosure, I think that it will be too harsh to punish him by lifting the orders, which, at the moment, is his only protection from going to civil jail. If the Court at the end of the day, grants the Bankruptcy Order, the Official Receiver will take over the Debtor's estate and oversee the possible settlement of the all the debts owed to the Creditors as provided in law. If it however turns out that there is no possibility of settlement as a result of the insolvency, that, too, will be an eventuality, though a painful one for the Creditors.

24. While it is true that experience has shown that not all debtors who seek refuge under Section 32 of the *Insolvency Act* are genuine in doing so, as many financially sound debtors often misuse that provision to abuse the judicial process and frustrate Creditors, at this stage, I do not have sufficient material before me to outrightly declare the Petitioner to be one such debtor. Whether the Debtor is genuinely insolvent or not will only come out clearly when this matter is fully heard, during which stage the Applicant and other creditors will have a chance to cross-examine the Debtor and the Court will then be in a vantage position to make an informed conclusive determination. If it therefore becomes apparent that the Debtor is not acting in good faith, then woe unto him since the Petition will be certainly dismissed, and all that he will have succeeded in doing is that he will have delayed the date of reckoning.

25. Vacating the orders of stay at this early stage will technically render this Petition nugatory and merely academic. For the above reasons, I am prepared to grant the Debtor the benefit of doubt for now. I will therefore direct that the Petition do proceed to full hearing before the Court makes final determinations and orders. I would therefore still vouch for maintenance of the status quo pending the hearing and determination of the Petition.

Final Orders:

26. In the premises, I rule and order as follows:

    i. The Notice of Motion dated 17/12/2024 is hereby dismissed.

    ii. Costs shall be in the Cause.

    iii. The parties should now take steps to fast-track the conclusion of the Petition.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Wachilonga for Petitioner-Debtor

Ms. Achieng h/b for Mr. Okongo for Creditor – Al Husnain Motors Ltd

Court Assistant: Brian Kimathi