



**Kenneth Mutembei Mugambi (t/a Markfive Supplies) v Galaxy Merchants Ltd (Civil Appeal E042 of 2022) [2024] KEHC 2097 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E042 OF 2022  
EM MURIITHI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**KENNETH MUTEMBEI MUGAMBI (T/A MARKFIVE SUPPLIES) APPELLANT**

**AND**

**GALAXY MERCHANTS LTD ..... RESPONDENT**

*(An appeal from the Ruling of Hon. J. Njoroge (C.M)  
in Meru CMCC No.40 of 2014 delivered on 2/3/2022)*

**JUDGMENT**

1. This is an appeal from a decision of the trial court refusing to grant a stay of execution upon an application by the Appellant dated 18/1/2022 seeking specific orders that:
  - “2. This honourable court gives a stay of execution order for the warrant of attachment dated 16<sup>th</sup> December 2021 which is premised on a decree ordered by the court on 8<sup>th</sup> February 2017 a judgment; 3. The honourable court issues orders restraining the Judgment Creditor from further harassing the Judgment Debtor and his host in the guise of executing a warrant.”
2. The application for stay of execution in the trial court followed the Appellant’s unsuccessful appeal against the trial court’s judgment of 8/2/2017 by a judgment of this court (Thuranira Jaden J.) delivered on 30/7/2018 in Meru HCCA No. 20 of 2017.
3. In the ruling subject of the present appeal delivered on 2/3/2022, the trial court ruled as follows:

“The applicant was found to have issued cheques with the knowledge that he had sufficient funds to support the payments. Indeed 18 postdated were dishonoured by the Bank. The applicant lodged an appeal before the High Court which was dismissed on 30/7/2018. The



court has considered the provisions of the *Insolvency Act*, No 18 of 2015, which provides that the appeal receive shall adopt a debt a debtor to the No Asset Procedure is satisfied that:- “(a) The Debtor has no realistic assets; (b) The Debtor had not previously been adjudged bankrupt to the No Asset Procedure; (c) The Debtor had total debts that are not less than one hundred Thousand Shillings and not more than Four Million Shillings, and (d) The Debtor does not have the means to repay any amount towards these debts.....”

The Act provides under Section 359(1) that:- “A Debtor who is participating in the No Asset Procedure is automatically discharged from that procedure at the end of twelve months after the date when the debtors are addressed to it...”

In my view, that admission to No Asset Procedure, automatically lapsed after a period of 12 months and the applicant has since been discharged and the applicant is relied on the provisions of Section 360(1), which provides that upon discharge:- “(a) The Debtors debt that become unenforceable on the debtors entry to the No Asset Procedure are uncalled; and (b) The debtor is no longer liable to pay any part of the debts indicating the penalties and interest that may have accrued...”

The respondent/Decree holder on the other hand has argued that the debt clarified 2<sup>nd</sup> liability based on fraud, and are therefore enforceable. The respondent for further stated that the applicant obtained credit by false pretense...Due to the above, reasoning, I find that though the applicant was automatically discharged from the No Asset Procedure, who accrued debt or liability, remains enforceable, under Section 360(2) of the Act. The applicant has objected to the proclamation as the goods belong to a host. The applicant has not established any connection to the ownership of his attached goods or chattels. He doesn't disclose who that host is. The host has not challenged or objected to the attachment and is not a party to the current proceedings. I find that the application dated 18/1/22 to be without merits and the same is dismissed with costs.”

## **The Appeal**

4. On appeal, the Appellant filed his Memorandum of Appeal on 30/3/2022 listing 7 grounds as follows:
  1. The Learned Chief Magistrate erred in law and fact by denying me a stay of execution order, thereby allowing the respondent to continue execution of the decree, yet with full knowledge that the decree and its costs, interest and penalties had been cancelled in October 2019 by virtue of my automatic discharge from the No Asset Procedure.
  2. The Learned Chief Magistrate erred in law and fact by condemning me unheard, through entertaining new evidence delivered to the court only in the plaintiffs written submissions, and later giving a ruling in favour of the plaintiff purely based on the said introduced new evidence.
  3. The Learned Chief Magistrate erred in law and fact by allowing the plaintiff to bring back to court matters that had been previously tried and dispensed off by the trial Magistrate, four years previously.
  4. The Learned Chief Magistrate erred in law and fact by finding that I had committed the crime of fraud (Obtaining by false pretense) and delivered a ruling in favour of the plaintiff, without a shred of evidence of my such conviction, for the said crime, in a competent court of law.
  5. The Learned Chief Magistrate erred in law and fact by finding that my issuance of Postdated Cheques to the respondent, bearing different maturity dates, and which bounced upon being maliciously banked on the same day, amounted to criminality on my part.



6. The Learned Chief Magistrate erred in law and fact by delivering a ruling that denied me my constitutional right arising from my admission to the No Asset Procedure by the Official Receiver, and my subsequent discharge from the said procedure in accordance to section 360 (1) (a) and (b) of the *Insolvency Act* 2015.
7. The Learned Chief Magistrate erred in law and fact by not finding that the plaintiffs execution of the decree dated 16<sup>th</sup> December 2021, had been overtaken by time in accordance to the statute of limitations as well outlined by the provisions of the *Insolvency Act* 2015.

### **Submissions**

5. The Appellant urges that his eventual discharge from the No Asset Procedure in 2019 under sections 359 and 360 of the *Insolvency Act* cancelled the debt. He faults the trial court for condemning him unheard on the issue of fraud which was belatedly introduced by the Respondent in its submissions. He urges that the impugned ruling removed him from the protection of the *Insolvency Act*, and gave way for the Respondent to proceed with execution of the decree. He faults the trial court for declaring that he had defrauded the decree holder when he issued the post dated cheques with knowledge that he did not have funds to support the payments, and cites *R v Dent* (1975) 2 all E.R. 806, *Joseph Wanyonyi v R* (2004) eKLR, *Oware v Republic* (1989) eKLR, *Francis Mwangi & Another v Republic* (2015) eKLR and *Joseph Wafukho v Republic* (2014) eKLR. He faults the Respondent for failing to prove that he fraudulently applied for the No Asset Procedure and got forbearance of the debt. He urges that the Respondent was well notified of his application and subsequent admission to the No Asset Procedure, but it ignored all the summons and notifications from the Official Receiver. He urges that the *Insolvency Act* 2015 rightfully gave him a second chance in life to recover from the traumatic ordeals that he underwent which unfortunately culminated in the closure of his once lucrative hardware business.
6. The Respondent urges that the orders obtained by the Appellant under section 359(1) of the *Insolvency Act* were to last for only 12 months. It urges that the debt owed by the Appellant arose out of a fraudulent credit whereby the Appellant upon being supplied with goods issued 18 cheques which were dishonoured upon presentation. It urges that the issuance of the bad cheques by the Appellant squarely falls under conditions contained in section 360 (2) of the *Insolvency Act* that can warrant enforcement of the debt after the expiry of 12 months. It urges that the Appellant committed the offence of obtaining credit by false pretence and through issuance of bounced cheques which amounted to fraud, and cites *Samat Bhima Keswala v Republic* (1992) eKLR. It urges that section 360 (2) of the *Insolvency Act* was specifically promulgated to ensure that people do not incur liability fraudulently and then subject themselves to the no asset procedure, and that is why the said section stipulates that any liability and/or debt earlier incurred by fraud shall become enforceable. It urges that the act of presenting cheques which were dishonoured amounts to acts of fraud and consequently the court was right to rule that section 360 (2) of the *Insolvency Act* allowed it to execute. It prays for the dismissal of the appeal with costs and put this matter, which has been in the corridors of justice since 2014, to rest.

### **Analysis and Determination**

7. The Appellant's application and subsequent admission to the No Asset Procedure in accordance with the section 345 of the *Insolvency Act* (henceforth called the Act), is not disputed. What is in dispute is whether the Appellant got a forbearance of the debt.



8. The Respondent contends that after the Appellant's automatic discharge from the No Asset Procedure after 12 months, the decretal sum became enforceable while the Appellant contends that the said discharge cancelled his debt and gave him a clean slate.
9. Section 354 of the Act provides for how a debtor's participation in the No-Asset Procedure is terminated as follows:- "A debtor's participation in the no-asset procedure terminates when— (a) the Official Receiver terminates the debtor's participation under section 355; (b) the debtor is discharged under section 359; (c) the debtor applies for the debtor's own bankruptcy; or (d) a creditor who is entitled to do so (for example, because the creditor's debt is enforceable as a debt specified in section 351(2) applies for the debtor's bankruptcy and the debtor is adjudged bankrupt."
10. Section 357 of the Act provides for the effect of termination of a debtor's participation in the No-Asset Procedure as follows:-
  - "(1) On termination of the debtor's participation in the no-asset procedure— (a) the debtor's debts that became unenforceable on the debtor's entry to the no-asset procedure become again enforceable; and (b) the debtor becomes liable to pay any penalties and interest that may have accrued. (2) Subsection (1) does not apply if the debtor's entry to the no-asset procedure is terminated by discharge under section 359."
11. Section 359 of the Act provides for discharge of a debtor's participation in the No-Asset Procedure as follows:-
  - "(1) A debtor who is participating in the no-asset procedure is automatically discharged from that procedure at the end of twelve months after the date when the debtor was admitted to it."
12. Section 360 of the Act provides for the effect of discharge of a debtor's participation in the No-Asset Procedure as follows:-
  - "(1) On discharge under section 359—
    - (a) the debtor's debts that became unenforceable on the debtor's entry to the no-asset procedure are cancelled; and
    - (b) the debtor is no longer liable to pay any part of the debts, including any penalties and interest that may have accrued.
  - (2) Subsection (1) does not apply—
    - (a) to any debt or liability incurred by fraud or fraudulent breach of trust to which the debtor was a party; or
    - (b) any debt or liability for which the debtor has obtained forbearance through fraud to which the debtor was a party.
  - (3) The debts and liabilities referred to in subsection (2) again become enforceable on discharge under section 359, and the debtor is liable to pay any penalty or interest that may have accrued."
13. The Respondent contends that since the Appellant's debt arose out of a fraudulent credit of issuance of post-dated cheques which were dishonoured upon presentation, the Appellant is fully liable to settle



the decretal sum. On his part, the Appellant denies any fraud in his dealings with the Respondent and seeks forbearance under section 360 (1) of the Act.

14. The offence of obtaining credit by false pretences is defined under section 316 of the Penal Code as follows:-

“316. Any person who—

- (a) in incurring any debt or liability, obtains credit by any false pretence or by means of any other fraud; or
- (b) with intent to defraud his creditors or any of them, makes or causes to be made any gift, delivery or transfer of or any charge on his property; or
- (c) with intent to defraud his creditors or any of them, conceals, sells or removes any part of his property, after or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him, is guilty of a misdemeanour and is liable to imprisonment for one year.

15. Section 316A of the Penal Code provides for bad cheques as follows:-

“(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person—

- (a) knows that the account has insufficient funds;
- (b) knows that the account has been closed; or
- (c) has previously instructed the bank or other institution at which the account is held not to honour the cheque.

(2) Subsection (1) (a) does not apply with respect to a post-dated cheque.”

16. When PW1 Vinit Arwind Salva, was cross examined by the Appellant on when the post-dated cheques were presented for payment, he stated that –

“The cheques were 18 in number and they were for different dates. When I deposited the cheques the date had already passed. They were post-dated cheques.”

17. In his testimony, the Appellant vehemently denied owing the Respondent any money, and although he admitted that when he was finally paid by one of his major debtors Nyambene County Council, he still did not pay the Respondent. He further confirmed that:

“Letters dated 8/1/2013 and 9/1/2013 they acknowledges there were no funds in my account but its not for goods supplied to me...When cheques were presented and dishonoured I believe plaintiff paid a penalty. I do not deny the 18 cheques were issued by me.”

18. The court finds that the Respondent proved on a balance of probabilities that the Appellant, fully aware that he had insufficient funds in his account, issued the Respondent with post-dated cheques which bounced upon presentation on their maturity date. The Appellant’s contention that the Respondent presented the cheques maliciously before their date of maturity is, therefore, rejected.



19. It is clear from the foregoing that the Appellant does not enjoy the protection under section 360 (1) of the Act, and he must be called upon to settle the decretal sum, now that he has already been discharged from the No Asset Procedure.
20. This court does not find on the facts of this case any error of law or principle by the trial court as would justify appellate interference with the exercise of discretion of the trial court.

### **Orders**

21. Accordingly, for the reasons set out hereinabove, the Appellant's appeal is without merit and it is hereby dismissed.

Order accordingly.

**DATED AND DELIVERED ON 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Appellant in person.

Mr. K. Muriuki, Advocate for the Respondent.

