



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

BANKRUPTCY CAUSE No. 1 OF 2018

IN THE MATTER OF THE MATTER OF THE INSOLVENCY ACT No 18 of 2015

AND IN THE MATTER OF ABDALLAH CHITECHI MUNYENDO

RULING

1. The Petitioner before the Court petitioning for bankruptcy is the Debtor himself, Abdallah Chitechi Munyendo. **Section 13** of the **Insolvency Act No 18 of 2015** (hereinafter referred to as “**the Act**”) envisages such a petition. It is to be made in accordance with **Section 32** of the Act. The only ground under which the Court can make an order for bankruptcy is that the debtor is unable to pay his/her debts.

2. Before the Court can exercise its jurisdiction, it must be satisfied that the Debtor has complied with **Section 32(2)** of **the Act**, in particular that the Application must be accompanied by a statement of the debtor’s financial position. The Statement of Financial Position must contain the following:

(a) Such particulars of the debtor’s creditors and of the debtor’s debts and other liabilities and assets as may be prescribed by the insolvency regulations; and

(b) Such other information as may be so prescribed.

3. The importance of the Statement of Financial Position can be seen by the fact that **sub-section (3)** provides that the Court may reject a statement of the debtor’s financial position if of the opinion that it is incorrect or incomplete. Further under **Sub-Section 4** the debtor must publish the notice in a local newspaper and such other publication as the Rules provide. In this case the Kenya Gazette.

4. Dealing with the particulars of the case before the Court. The Petition is brought by the Debtor Abdallah Chitechi Munyendo of Matungu. He says he is unable to pay his debts. The Petition was to be served on Kenya Commercial Bank Bungoma Branch and the Official Receiver. The Petition is dated 1st July 2018 and filed on 3rd July 2018. As required there is a statement attached. The statement states simply that it the Debtor considers that he is unable to pay his debts. It does not contain any financial information. The Debtor has also filed an affidavit. In his Affidavit the Petitioner states:

“2. THAT I make this oath and say the statement of affairs filed with the Petition are full and true complete state of affairs at the date of filing this Petition.

3. THAT in the year 2008, I secured a loan thorthy Kshs 990,476.70/= from Kenya Commercial Bank. See a copy of the plaint and request for judgment (Annexed and marked ACM-1)

4. *THAT of late I have been struggling to meet my ends financially.*
5. *THAT I have tried to consult my family members seeking their assistance to settle the loan facility but in vain.*
6. *THAT I seek protection from my Creditor by virtue of this application because I am unable to service my loan facility at the moment until further notice.*
7. *THAT the affairs filed is true to the best of my Petition for Bankruptcy order.*
8. *That what I have deponed herein above is true to the best of my knowledge, information and belief.”.*

5. The Plaintiff that is exhibited informs the Court that the Petitioner applied for and obtained a business loan from Kenya Commercial Bank. The Loan was for KShs.500,000/= . It was to be secured by a charge over the stock and a guarantee. The Guarantor was a Ali Malala Muchinyi. The guarantor is named as the Second Defendant. The Loan was made on 13th March 2008. By 31st May 2013 it had grown to KShs.990,476.70. The Debtor has not filed a Defence and the Creditor Bank has filed a Request for Judgment dated 25th September 2014. The Petition is dated 1st July 2018, that is four years later.

6. The Creditor was served with a copy of the Petition on 30th October 2019 but has not filed a response. The Petition came before the Court for Hearing on 29th July 2021. The Creditor was served with a Hearing Notice but the Creditor did not attend. The Petitioner says he had a business but it failed and he cannot pay his debts. He is asking the Court to declare him Bankrupt.

7. The scheme of the Insolvency Act was explained clearly and succinctly in ***Insolvency Case No. 4 of 2019 IN THE MATTER OF JAMES MAINA KABATHA (DEBTOR/APPLICANT)***. By Hon Mr Justice j. Ngugi. That explanation is adopted here. The Learned Judge states that:

1. The twin goals of consumer or individual bankruptcy law are to protect creditors and ensure optimal payment to them where possible; and the provision of shelter and a "fresh start" to individual debtors overburdened by debt. There is no doubt that these twin goals run through the Insolvency Act, 2015 and the Insolvency Regulations, 2016.

*2. The US Supreme Court explained the fundamental goal of bankruptcy law in **Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)** thus:*

[Bankruptcy law] gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

3. The “fresh start” goal is accomplished through the bankruptcy discharge, which usually releases the debtor from personal liability from certain debts and prevents creditors from taking any action against the debtor to collect those debts.

4. Consequently, bankruptcy protection being an extraordinary relief, one of the corollaries to the these seemingly conflictual twin goals of bankruptcy law – the protection of creditors and the provision of 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.

8. The Petitioning Creditor has not filed a Financial Statement at all. That raises questions as to his bona fides. He has not set out what are his sources of income. He has not said whether or not he has any other debts. He has not explained why, if there was a guarantor, why the bank have chosen to pursue him and not the guarantor if that is the case. Those are all very pertinent facts that the Court must consider in order to decide whether the debtor is making the application in good faith in order to obtain some breathing space to get back on his feet before he is discharged. A possible alternative is that he is simply relying on the loan (if one still exist) to avoid paying all his debts.

9. In the circumstances the Petition is dismissed.

DATED 3RD FEBRUARY 2022

ORDER ACCORDINGLY,

FARAH S. AMIN

JUDGE

DELIVERED, DATED AND SIGNED IN KAKAMEGA HIGH COURT THIS THE 10TH DAY OF MARCH 2022

In the Presence of:

Court Assistant: Clement Okoit

Applicant/Petitioner: Present in Person



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