



**Anyega v Gulf Africa Bank Limited & another (Insolvency Petition
E056 of 2021) [2023] KEHC 22008 (KLR) (5 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
INSOLVENCY PETITION E056 OF 2021
A MABEYA, J
SEPTEMBER 5, 2023**

BETWEEN

LYDIA BOSIBORI ANYEGA APPLICANT

AND

GULF AFRICA BANK LIMITED 1ST RESPONDENT

HUBAAL TRAVEL AGENCY LIMITED 2ND RESPONDENT

RULING

1. By a Motion on Notice brought under sections 304, 305 and 306 of the *Insolvency Act* dated August 24, 2021, the applicant sought leave of court to be allowed to make a Scheme of Arrangement to pay creditors under section 304 (1) of the *Insolvency Act* (“the Act”). She also sought stay of any execution process against her or any of her properties.
2. The grounds were set out in the body of the Motion and in her supporting affidavit sworn on August 24, 2021. These were that she operates a business at Ongata Rongai and she is the owner of LR Ngong Ngong/91959 (“the suit property”). That in or about 2018, the 2nd respondent approached her to guarantee a loan from the 1st respondent which she did by offering the suit property as security therefor.
3. That the loan had been repaid and there was a balance of Kshs 12m. That she had given proposals to the 1st respondent on how to settle the amount including subdividing the suit property and selling parts thereof. That in the premises, she sought that an official receiver be appointed the supervisor or manager in the voluntary arrangement.
4. The application was opposed by the 1st respondent vide a replying affidavit of Lawi Sato sworn on September 1, 2021. It was contended that the application was an abuse of Court process. That the applicant had challenged the 1st respondents Statutory Power of Sale in Kajiado HCCC No 17 of 2020 but the same was dismissed on December 11, 2020 by Chacha Mwita J.



5. That the applicant once again lodged Milimani CMCC No E 7989 of 2021 seeking similar injunctive orders but the same was dismissed on February 24, 2021. That the applicant had sworn on August 17, 2020 that the suit property was valued at Kshs 63,561,000/= and her statement of affairs disclosed that her total liabilities were Kshs 28m. That the declaration to the Official Receiver had inconsistencies on the value of the suit property her occupational status and the outstanding amounts owed to the 1st respondent.
6. That the applicant had been given indulgencies severally by the 1st respondent ever since April 2020. That her proposals to sell 3rd party properties is incomprehensible as there was no evidence of such agreement with the subject 3rd parties. That the 1st respondent should be allowed to recover the outstanding sum of Kshs16,944,483/42 owed as at September 9, 2021.

7. Section 304 of the *Insolvency Act*, 2015 provides:-

- “(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 insatisfaction 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 authorized insolvency practitioner is eligible to act as supervisor of a voluntary arrangement
...”
8. From the foregoing, it is clear that the Court has jurisdiction to make an interim order as sought by the applicant. However, before making such an order in terms of section 306 of the Act, the Court must be satisfied that the applicant intends to make a proposal, that on the day of the making of the order, the applicant is able to make an application for own bankruptcy or is bankrupt that no similar application has been made during 12 months immediately before such application and that the designated supervisor is willing to act as such.
 9. In the view of this Court, the cumulative effect of the conditions set out in section 306 of the *Act* is that, Such an application should be made bona fides. That the application should not be made mischievously or with a view to defeat reasonable and lawful efforts of creditors in realizing the debts. There must be prove that the applicant is either a bankrupt or an order to that effect can be made on his or her status as at the time of making the application.
 10. In the present case, the applicant sought the Official Receiver to be the supervisor. That satisfies the condition in section 306 (1) (d) of the *Act*. The applicant also satisfied the Court that she intended to make a proposal under Division 1 of Part IV of the Act. There was also no evidence that any such application had been made within 12 months immediately before the application was made. The issue is whether the applicant was a bankrupt or was in a position to apply for her own bankruptcy.
 11. In its replying affidavit, the 1st respondent complained that the applicant was giving inconsistent statements on her assets and liabilities, occupation as well as had failed to disclose that her previous challenges to its exercise of its statutory power of sale had failed. Despite the applicant being granted leave to file a further affidavit on September 1, 2021 to refute those allegations, none was filed.



12. The Court has seen the applicant's supporting affidavit filed in the Kajiado HCCC No 17 of 2020. In para 16 thereof, she swore:-

“(16) That the stealth and irregular approach by the Defendants is calculated to undermine the cost and value of the property which is fully developed and currently valued at Kshs 63,561,000/=.”

13. In her petition to the Official Receiver, the applicant gave the following information: -

- a. That she is unemployed
- b. That her total debts amounted to Kshs 21.5m
- c. Her assets
 - i. Suit property – Kshs 12m
 - ii. LR Thika Municipality Block 6/1108 – Kshs 30m
- d. That she proposes to settle the debts by disposing off properties owned by Cliff Lumumba to Michael Makori and ¼ acre of the suit property.

14. In the present application, the applicant stated that she was undertaking business at Rongai and not unemployed as stated in the petition. She did not clarify and or deny that she had told another Court that the value of the suit property was Kshs 63.1m and not Kshs 12 m as stated to the Official Receiver. She also failed to offer evidence that the 3rd parties were willing to dispose off their subject properties to settle her debt.

15. For the foregoing reasons, the Court's opinion is that the application was not made in good faith. On the material on record, it cannot be said that the applicant is bankrupt or could make an application for her own bankruptcy as at the time of making the application. The application is but an attempt to challenge and prevent the 1st respondent from exercising its statutory power of sale.

16. In any event, during the pendency of the present application, the applicant requested and was granted over 1 year period to excise and sell a ¼ of an acre from the suit property to settle the debt. However, she took no steps to achieve that objective.

17. Accordingly, for the foregoing reasons, the Court finds the application dated August 24, 2021 to be without merit and dismisses the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER, 2023.

A. MABEYA, FCIArb

JUDGE

