

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
IN THE MATTER OF HELLEN KAKYO (A DEBTOR)
AND
IN THE MATTER OF INSOLVENCY ACT NO. 14 OF 2011
AND IN THE MATTER OF THE INSOLVENCY REGULATIONS, STATUTORY
INSTRUMENT NO 36 OF 2013
BANKRUPTCY CAUSE NO.4 OF 2014**

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO:

RULING:

1. FACTS:

M/s Joan Traders Limited (hereinafter referred to as “the company”) obtained a loan dated 14th May 2006 in the sum of Uganda Shillings Seven Hundred Fourty Million Only (Ug Shs. 740, 000,000/=) to enable her carry out her business as working capital from M/s Groffin East African Fund LLC (“the Respondent”) around 2006 as working capital subject to specified terms and conditions which she failed to pay within the stipulated time given. The loan was secured by a third party legal mortgage on land comprised in Kyadondo Block 185, Plot 2746 and 2747 Namugongo, Mengo which was registered in the name of Hellen Kakyo, the instant Petitioner. A deed of surety ship was executed between the Petitioner and M/s Groffin East African Fund LLC by which the Petitioner guaranteed the company’s loan obligations. The company failed to fulfill its repayment loan obligations despite demands for payment.

Subsequently by a deed of accession dated 19th June 2006 and signed by the Petitioner, the M/s Groffin East African Fund LLC and DFCU Bank Limited, DFCU Bank Ltd assumed 50 percent of the lending rights and obligations under the previous loan obligations of Joan Traders Limited to the extent of Uganda Shillings Three Hundred Seventy Million Only (Ug Shs 370,000,000/=). However, in the intervening period the Petitioner attempted to sell the mortgaged property to a one Peter Katwebaze seemingly for purposes of meeting the loan obligation of Joan Traders Limited an act which was without the authorization of M/s Groffin East African Fund LLC and

DFCU Bank Limited resulting in M/s Groffin East African Fund LLC and DFCU Bank in 2008 instituting and filing HCCS No. 268 of 2008 against the defaulting company and the Petitioner seeking repayment of the money owed and due. This state of affairs resulted with a consent judgment being entered into dated the 20th day of June 2012 by which M/s Groffin East African Fund LLC was awarded 190,701,803.5/= respectively to be paid by the company and the Petitioner jointly and severally. However, M/s Joan Traders the company and the Petitioner did not pay the sums awarded as ordered with the Petitioner soon thereafter filing this petition for bankruptcy stating that she is unable to pay her debts. A public notice of the petition was published in **The Observer** newspapers of 17th to 18th November 2013 following which a statement of affairs of the Petitioner dated the 30th day of April 2014 was filed. In addition, a public examination of the Petitioner was conducted with her creditors being represented in court.

2. Issues:

- a) Whether the Petitioner is unable to pay her debts.
- b) Whether court can grant a bankruptcy order in the circumstances.
- c) Whether the Petitioner has any properties to be administered by a trustee in bankruptcy.

3. Whether the Petitioner is unable to pay her debts.

In a petition of this nature which is for orders that a petitioner be declared by court to be bankrupt, a petitioner is required by law to first and foremost prove by way of evidence that he or she is unable to pay his or her debts with such a debt exceeding Uganda Shillings Fifty Million Only for this court to entertain. That requirement is found under **Section 3 of The Insolvency Act No 14 of 2011** which for clarity I reproduce here;

Section 3(1) (c) and (d);

“(1) Subject to subsection (2) and unless the contrary is proved, a debtor is presumed unable to pay the debtor’s debt if;

- (a)**
- (b) the execution issued against the debtor in respect of a judgment debt has returned unsatisfied in whole or in part;**
- (c) All or substantially all the property of the debtor is in possession or control of a receiver or some other person enforcing a charge over that property.”**

The Petitioner here states that she is unable to pay her debts. From the evidence received in this court which is undisputed by both the petitioner and her creditors the petitioner is stated to have failed to pay her debts amounting to **Uganda Shillings Three Hundred Seventy Million Only (Ug Shs 370,000,000/=)** . That amount is the subject of this petition and since it is more than Uganda Shillings Fifty Million Only it thus falls within the jurisdiction of this Honorable Court with this court being further clothed with the powers to grant the orders sought or not sought and other reliefs that it deems fit.

The fact presented in support of this petition are on record the most important of which relates to certain financial difficulties arising from an earlier securing of a loan to enable a business flourish but which unfortunately did not due to the fact that the said business was stated to have been supplied with sub standard goods which then rendered it to go under thus leading to the circumstances which made it to fail to meet its loan obligation which was guaranteed by the petitioner among other requirements. The company's financial difficulties is best summarised by the testimony of the petitioner who stated in paragraph 4 of this bankruptcy petition as follows;

“I made an order from my usual suppliers in South Africa for merchandise worth over Ugx 2,000,000,000/= (Uganda Shillings Two Billion Only) and the same goods on delivery turned out not to be fit for purpose and counterfeits, whereupon Uganda National Bureau of Standards refused to clear them but I paid taxes for the same”.

This statement in itself summarise the predicament of the Petitioner for it shows that she was involved in a terrible business misfortune having been supplied with unsatisfactory products which rendered the said business to become insolvent.

These facts are not refuted by the creditors though they state that upon the petitioner realizing that the stated products imported were of substandard she should have sued its suppliers in a court of law which the Petitioner did not do so. The petitioner explains this inability for she informed the court that she could not do so since she lost all her capital in the fraud in addition to the supplier metamorphosed in its legal status having been taken over by its parent company. The creditors though do not buy this explanation as they argue that the petitioner act of not taking any action against the suppliers was contrary to the provisions of **Section 198 of the Companies Act 2012** which requires directors of a company to handle company's affairs in such a manner which should not prejudice the interests of either the company and or its creditors thus since she did not do so that fact would not count towards her inability to repay her debts properly leveled against

her. This contention in my view is correct and I suppose it is the very reason why the petitioner was found by court which found against as the one responsible for the failure of her company to meet its liabilities having not properly conducted the business of the company as a director.

This bankruptcy court thus is therefore not competent to inquire into the reasons why the petitioner was unable to meet her's or her company's indebtedness for that is a given as the she has already been adjudged a debtor in addition to the fact that when she in her own wisdom decided to secure a loan from her creditors the creditors M/s Groffin Fund LLC and DFCU Bank Ltd did due diligence and examined her financial situation together with that of her company and thus granted the loans. That being the case therefore, I would find the submission by the creditors that the petitioner did not show good faith while obtaining the credits which they granted would be of no consequence for the fact those arguments by themselves cannot e seen to negate the responsibility of a creditor to protect own interests while giving out credit as it is the usual practice that a creditor will go to such an extent to guarantee own interests upon deciding to give out any kind of credit by ensuring that it applies its mind to issues such registering own interests on any security such as land or motor vehicle tendered upon giving out any credit thus the argument pondered to the fact that the petitioner tried even tried to sell the mortgaged land without permission or knowledge of the creditors or hid important information regarding the ownership of the assets offered as security vehicles would add not reduce the onus which lay on such creditors to ensure that they take appropriate measures to ensure the truthfulness and genuineness of such security or information as they are considered to be at a higher level in such arrangements with appropriate means to verified any of the information given to them from verified sources which would then result of in the creditor proceeding to determine whether to give the required loan or not thus due diligence would be the only option left for a creditor.

Having stated the above, I will now turn to the real question before this court which is whether the Petitioner is unable to pay her debts and whether court can grant a bankruptcy order in the circumstances as prayed for in the petition before this court.

It is clear that this court is vested with the jurisdiction to handle and determine a matter of this nature as it deems fit as can be seen from the powers conferred upon it by the provisions of **Section 254(3) of the Insolvency Act**. Indeed **Section 20(1)** goes on to provide that when a debtor petitions a court for bankruptcy on allegations of that he or she is unable to pay his or her

debts, then the court “**may**” grant the bankruptcy order subject to the statement of affairs of the debtor being presented during a public examination.

The provisions of the law uses the word “**may**” which is a catch word for it apparently confers discretion to the court with the interpretation of this discretionary power of a court being an issue which my learned brother **E.M Githinji, J** of the High Court of Kenya had to contend with when handling a petition before him known as **Re: Al-Moody (A Debtor) Bankruptcy Cause No. 4 Of 1989 Page 2**. In order to come to terms with the import of that word “**may**” under the Kenyan Bankruptcy Act, the learned judge did resort to the English case of **Re: Bond (1888) 21QBD 17**, a classical case which had the task of interpreting **Section 8 of the English Bankruptcy Act** with the judge then concluding that the interpretation in **Re: Bond** I(above) was material and applicable under the Kenyan Act as he went on to state at page 20 of his judgment where there vis evidently a petition supported by a statement of affairs by a debtor then where a public examination has been carried out then undoubtedly the duty of the court was to make a receiving order if the petition is a proper petition.

This conclusion is relevant to our Ugandan law for since Uganda shares a common legal inheritance with its Kenya under the common law with the facts herein showing that the Petitioner here has made a proper application before this court which is supported not only by an affidavit verifying those facts but by a clear statement of her affairs together and has been duly examined under a public examination conducted to verify her statement of affairs which a key elements for court of this nature to consider when making its decision and taking into account that indeed the petitioner has actually been an adjudged debtor by a competent court and that her debts remains unsatisfied then this court’s duty would by necessity result in the grant the orders sought by the Petitioner for the law in this respect is very clear in that **Section 3(1) and (c) Insolvency Act** commands that where a petitioner has indeed proved by evidence that he or she is a judgment debtor then the resulting orders would be that an act of had occurred and the appropriate orders made to follow.

In proof of these legal requirements , the petitioner here has shown that she is a judgment debtor as she attached orders in a case known as **M/s Groffin East African Fund LLC v Joan Traders Limited and Hellen Kakyo High Court Civil Suit No. 268 of 2008** which was a suit instituted in 2008 filed against her and her company which has a decree made against her and her

company with even proof that the process of execution having commenced but has since remained unsatisfied to date thus warranting the orders sought.

This is the conclusion I would make considering the fact that such a given scenario was one in which James Munange Ogoola, J (as he then was) had to grapple with found himself in **RE: In The Matter of a Petition for a Receiving Order by Thomas I. Kato Bankruptcy Petition No. 13/2002 Pages 1 and 2** in which he went on to conclude similarly that where a petitioner had proved his indebtedness by attaching court judgments which showed decretal sums which were against him or her as remaining unsatisfied and which fact that very petitioner had indicated so in his or her statement of affairs then the court's conclusion would be that the petitioner had committed an act of bankruptcy and therefore consequential orders should follow.

I find that rationale not only educative but persuasive and would concur with its conclusion for indeed in the instant matter the petitioner has attached evidence to show that she is a judgment debtor under **High Court Civil Suit No. 268 of 2008** the orders from which remains unsatisfied and this is a factual situation obtaining with no contrary evidence yet it is apparent that the petitioner through various efforts had tried to revive her livelihood by not only undertaking courses in South Africa related to the business she was involved to better her management skills but has proven that indeed she make demand notices to her previous suppliers who had actually caused her business to run into trouble to make good the unworthy goods in vain in addition to showing that she even threatened legal action against the said suppliers but to avail yet her predicaments continued to worsen with the indebtedness remaining a situation which was not controverted during her public examination.

Furthermore, the petitioner shown that she has even tried to pay off her creditors using monies gotten from sale of her family home and en engaging in a profitable poultry farming to even the selling of the few trading goods she had remained with but has to date been unable to meet her indebtedness with even all her remaining assets which had been used as security for the loans she had obtained from her creditors like land situate at Namugongo Block 185 Kyadondo measuring one and a half acres was no accessible to her for one of her creditors which is DFCU Bank had ordered her out of the same and had even changed its ownership on top of freezing her company business account with the bank.

More important to this court is the fact that there was nothing substantial to controvert the public examination of the petitioner's which ably showed that she was indebted and was not capable of

meeting her debt obligations for even paragraph 12 of her affidavit in support of this petition clearly averred to the fact that she has been left with no assets or any liquidated amounts to service the debts or to sustain any visible business let alone the ability to survive financially.

Arising from these factual and proven considerations, I would conclude that the Petitioner has committed an act of bankruptcy for she is unable to pay her debts which even have been ordered against her by a competent court and she also has no tangible movable and immovable assets which could go towards ameliorating the situation thus proving unequivocally that she a proven debtor and thus is bankrupt.

4. Whether the Petitioner has any properties to be administered by the trustee in bankruptcy:

Section 27(1) (a) and (b) Insolvency Act requires that where a competent a court has found a petitioner to have committed an act off bankruptcy and has declared such a petitioner bankrupt then such a court would vest the bankrupt's estate first and foremost unto the official receiver who would hold the same in trust without any conveyance, assignment or transfer and such properties would according to **Section 2 of the Act** include money, goods things in action, proceeds, land and includes every description of property wherever situated, obligations, interest, whether present future, vested or contingent, arising out of or incidental to property and such property owned by the bankrupt but in exclusion of such properties as defined by **Section 31(2)** which are for personal use by the bankrupt, or for satisfying domestic needs of the bankrupt or properties held in trust, a matrimonial home or any other properties that court deem fit to exempt. From the averments in the petition herein, the lists out in her statement of affairs at pages from 788-798 items 22 and 24 the following properties

a. Motor vehicles;

- Toyota Hiace UAD 122U
- Carib UAD 819K
- Short UAF 360L
- UAG 872R

b. 55% shares in M/s Joan Traders Ltd as indicated and no other properties.

However with regards to the motor vehicles the petitioner avers that and this was corroborated during her public examination that these chattels belonged to South African companies called Royale South Africa and EpiCare Ltd for which she worked as a representative with the said cars

only registered in her names as such thus these properties can be stated to be held in trust for the said companies and would thus be exempted from attachment as they do not form part of her properties and cannot form part of her estate.

5. Orders:

The overall conclusion of this court is that the Petitioner herein known as Hellen Kakyo has indeed by failing to meet her adjudicated debts has committed an act of bankruptcy as defined in **Section 3(1)(b) and (c) of The Insolvency Act** and since she has satisfied the conditions which a certified bankrupt can be declared then this court proceeds to issue a receiving order in respect of her estate accordingly for the protection of the said estate with the Official Receiver constituted to be the receiver of her estate and to further require the said Hellen Kakyo to attend to the Official Receiver at his offices at the Uganda Registration Services Bureau in Kampala forthwith and not later than fourteen (14) days from the date of the issuance of this declaration that she is a bankrupt and the issuance of this receiving orders.

These orders are made accordingly at the High Court of Uganda, Commercial Division, Kampala.

HENRY PETER ADONYO

JUDGE

23RD OCTOBER, 2015