THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

M.A No. 1003 of 2021

(Arising out of EMA No. 143 of 2021)

(Arising from Civil Suit No. 481 of 2019)

NKABIRWA SAMUEL::APPLICANT

VERSUS

VEGOL LIMITED::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

[1] This is a ruling on an application brought under Section 98, 40(4) of the CPA, Order 52 rules 2 and 3 CPR for orders that; *an order be issued staying any action, execution or other legal process against the applicant/debtor pending the final disposal of Bankruptcy Petition No.004 of 2021; an order be issued releasing the judgment debtor from civil prison of Kitalya pending the final disposal of Bankruptcy Petition No. 004 of 2021; an order prohibiting any further arrests in relation to the judgment debtor's debts and that costs of the application be provided for.*

[2] The grounds of the application were stated in the affidavit of **Nkabirwa Samuel (a debtor)** and were briefly that; *the applicant is unable to pay his debts and has petitioned for bankruptcy vide Bankruptcy Petition No.*

004 of 2021; that the applicant is currently in civil prison of Kitalya in respect of a debt pursuant to execution in ***Commercial Court Civil Suit No. 481 of 2019, Vegol Limited Vs Nkabirwa Samuel****; that the applicant is currently indebted to the following Civil debtors:* ***Vegol Limited to the tune of Ugx 96,915,681/=, Stanbic Bank Uganda Ltd to the tune of Ugx 120,000,000/=, True Finance Services Ltd to the tune of Ugx 45,000,000/=, Rapid Advisory Services Limited to the tune of Ugx 55,664,500/=; Topline Investments Ltd to the tune of Ugx 26,000,000/=*** *and* ***Mount Meru Millers to the tune of Ugx 97,528,672/=****. That the applicant is however unable to pay the debts because he is unemployed and does not have enough assets to clear the said debts; that he has one property comprised in Plot 1136, Block 338, land at Kiwatule Busiro and the same is insufficient to fully cater for all his said creditors; that the said property currently mortgaged with Stanbic Bank is the gist of the application; that one of the applicant's creditors, Rapid Advisory Limited has obtained an order of attachment of the said property vide* ***Civil Suit No. 203 of 2020 in the Chief Magistrates Court of Kampala at Mengo; Rapid Advisory Services Ltd Vs Nkabirwa Samuel****; that the other creditors named herein are as well threatening to attach and sell the said property; that the applicant shall suffer irreparable injury if the said property is attached in execution and sold by any of his creditors and that as such his bankruptcy petition will be rendered nugatory; that the applicant has a fixed place of abode within the jurisdiction of this court and will not in any way abscond any proceedings and undertakes to appear in all proceedings pertaining to his bankruptcy petition and that it is in the interest of justice that this application be granted.*

[3] This application raises one issue to wit;

Whether the applicant satisfies conditions for release from civil prison and or stay of execution upon filing bankruptcy petition No. 4 of 2021?

[4] The respondent raised **two preliminary objections** that I will first deal with before proceeding to the merits of the application.

[5] The respondent raised a preliminary objection to the effect that the affidavit in support of the application is tainted with deliberate falsehoods that this court needs to examine and further determine whether the affidavit in support of the application is competent before this court. That the affidavit in paragraph 7 introduces an annexure marked C that is actually not attached to the affidavit. That as such it is a lie that renders the entire affidavit defective and the same should therefore be expunged from the record.

[6] In reply thereof it was submitted that there was no deliberate falsehood regarding the affidavit in support since the same annexure was attached to the affidavit as annexure C. further that whether facts stated in the affidavit are a falsehood can only be determined by cross examination of the deponent of the said affidavit and in absence of that, the respondent cannot determine that a paragraph is tainted with falsehoods. Also that a defective paragraph does not render the entire affidavit defective but that the defective parts can be severed. See **Ernest Kiiza Vs Kabakumba Labwani Masiko, Election Petition Appeal No. 44 of 2016.**

[7] I am inclined to agree with the applicant on the fact that determining of whether there were any falsehoods in an affidavit is an outcome of cross examination on the deponent of the particular affidavit. In addition, going

by the authority of **Ernest Kiiza Vs Kabakumba Matsiko** (supra) the false or offending paragraph can be severed from the affidavit which therefore does not render the entire affidavit false or defective. I further find that even though the annexure was stated to have been attached to the affidavit, that the same is a curable defect if it is indeed confirmed that the said annexure was in existence at the time of filing this application. In the circumstances therefore, this preliminary objection is overruled.

[8] **Secondly that the affidavit** in support of the application contravenes the mandatory rules relating to identification of exhibits or attachments to affidavits under Rule 8 and 9 of the Commissioner for Oaths (Advocates), Cap 5 Laws of Uganda since the annexures to the affidavit are not in the prescribed form as the commissioner for oath/ justice for the peace did not mark the attachments to the affidavit as prescribed.

In response thereof it was submitted by the applicant that it is indeed that a justice of the peace did not mark the annexures owing to the fact that the said affidavits were deponed in Kitalya Mini Max Prison where they could only get a stamp of the officer in charge. Moreover, this is a defect that is curable under Article 126 (2)(e) of the Constitution of the Republic of Uganda 1995, see **Amoru Paul and Electoral Commission Vs John Baptist Okello, Election Appeal Nos. 39 and 95 of 2016.**

[9] It is indeed the law that a commissioner for oath or Justice of the peace ought to mark and seal annexures to an affidavit. In the particular circumstances, the applicant's counsel contends that the affidavits were sworn before a Justice of the peace, Officer in charge of Kitalya Mini Max Prison who only had a stamp. I am of the view that dwelling on such a technicality would not only delay the resolution of the matter but also

have the effect of denying the applicant his quest for justice owing to a technicality that can be cured under **Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995**. I should perhaps add that the circumstances in prison where the affidavit was sworn are not the same as those outside where everything seems to be perfect. That was the best the deponent could get while in prison and for that reason I am not prepared fault him and disregard his affidavit. This preliminary objection is also overruled.

Merits of the application.

[10] It was submitted for the applicant that he had stated in paragraphs 3 and 4 of his application that he is unable to pay his debts because he is unemployed and has no assets to clear the debt and has as such petitioned for bankruptcy. That this was further confirmed by the respondent in his affidavit in reply, in paragraph 8. That the applicant's filing for individual bankruptcy is proof that the applicant is unable to pay the judgment debt and his continued detention does not serve the purpose for execution since to date he has not made a single payment and it is further legally baseless but also unfair and unjust. That the same was meant to coerce Judgment debtors to pay their debtors but not a punishment. See **Maria K. Mutesi Vs Official Receiver (In Bankruptcy), M.A No. 706 of 2011**. Also that Section 40(4) CPA provides for two conditions; the applicant's expression of an intention to apply to be declared insolvent, furnishing security in case he has not applied to be declared insolvent and thereafter court is obliged to release the applicant upon fulfilling the following conditions. That the debtor has filed for bankruptcy and as such there is no legally justifiable reason as to why he should remain in detention.

[11] It was submitted for the respondent that in summary, the law requires the applicant to notify the court executing the decree that the applicant intends to apply for insolvency within 30 days; comply with the law of insolvency for the time being in force; has not committed any act of bad faith regarding the subject of the application; furnish security to the satisfaction of the court; guarantee that he/she will appear when called upon by court. That the applicant was brought to this court on the **03/05/2021** and only thought about applying for bankruptcy on **04/08/2021**. That this was beyond the 30 days provided for by the law. The applicant did not also notify the court about his intention to file such a petition. Further, that the applicant has not complied with the insolvency law since **Bankruptcy petition No.04 of 2021** is an attempt to abuse court process as the applicant has not filed a statement of affairs with the application, there is no application for a receiving order, there is no evidence of outstanding debts evidenced by statutory demands or orders of court, the petition has not been published and the listed creditors in the petition have not been served with the petition and yet insolvency law demands that these are very important steps to filing a petition for bankruptcy. See **Regulation 21 of the Insolvency Regulations 2013.**

[12] It was submitted that arrest and detention is a mode of execution and as such, it is erroneous for the applicant to state that he should be released for failure to pay his debts. Also that upon arrest, the applicant made a repayment plan which he has just refused to honour. That the applicant has willfully refused to pay his debts. That the applicant will abscond the jurisdiction of this honorable court. Further, that the applicant plans to abandon the application and have it dismissed with no bankruptcy order

granted against him nor a receiving order and that in the absence of security for attendance of the petition, the applicant will dodge the execution process and the bankruptcy petition since even no security has been provided and no guarantee has been furnished that the applicant will not abscond the jurisdiction of this court. That the applicant has indeed failed to fulfill all the conditions for the grant of this application. That in the alternative, any payment or release of the applicant should be made in accordance with Section 40(4) CPA upon the applicant presenting sureties that he will not abscond from the jurisdiction of this court and security should be deposited.

[13] In rejoinder thereof, it was submitted by the applicant that there is no mandatory requirement of law that requires the applicant to notify court that he intends to apply for insolvency within 30 days, comply with the law of insolvency, furnish security or guarantee appearance. That Section 40(4) is very distinct from Section 40(3) and the former is not a qualifier of the latter. That the applicant has already filed Bankruptcy Petition No, 04 of 2021 which is the only requirement for a debtor to be released from Civil Prison. See **Maria K. Mutesi Vs Official Receiver (In Bankruptcy)** (supra). That proof of one debt is sufficient to enable court to declare one bankrupt. That there is no legal requirement for one to prove several debts. That Bankruptcy Petition No. 4 of 2021 is not bound to be dismissed since it was duly filed with a statement of affairs attached as annexure "G" on the bankruptcy petition. The applicant then reiterated his prayer that this application be granted.

[14] **Section 40(4) of the Civil Procedure Act, Cap 71** is to the effect that;

"where a judgment debtor expresses an intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the court, that he or she will within one month so apply, and that he or she will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he or she was arrested, the court shall release the judgment debtor from arrest, and, if he or she fails so to apply and to appear, the court may either direct the security to be realized or commit the judgment debtor to prison in execution of the decree."(Emphasis mine)

[15] I have diligently perused the application and the submissions of both the applicant and the respondent. While it is true that arrest and detention is a mode of execution, I am however of the view that it does not serve its intended purpose if the person arrested and detained ends up not paying what is owed or is totally and genuinely unable to pay up the outstanding debt. The applicant has in the circumstances indicated his inability to pay the debt by going a step ahead to apply to be declared an insolvent. I am therefore of the view that it is in interest of justice that this application be granted, to enable the applicant appear and be heard on his application for bankruptcy. However, as required by Section 40(4) (supra) the applicant will be required to furnish security of Ugx 10,000,0000/= (Uganda shillings ten million only), before being released from civil detention.

[16] I shall make no order as to costs.

I so order

Dated, signed and delivered at Kampala this 24th day of January 2022

Duncan Gaswaga

JUDGE