

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
IN THE MATTER OF OMAR SHEIKH MOHAMED (A DEBTOR)
AND
IN THE MATTER OF THE INSOLVENCY ACT, 2011
INSOLVENCY CAUSE NO.13 OF 2023

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

RULING

Introduction

Mr. Omar Sheikh Mohamed (herein referred to as “the Petitioner”) filed this Petition under **Sections 3(1), (3) and (4), 20 and 21 of the Insolvency Act, 2011** and **Regulations 7 and 24 of the Insolvency Regulations, 2013**, seeking an order of this Court to declare him bankrupt.

Background

The background of the Petition is contained in the grounds as deponed by the Petitioner in his affidavit in support of the Petition for bankruptcy, and is summarised below:

1. That the Petitioner is the Managing Director of Dahable Ltd, a Company dealing in the business of petroleum.

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2. That through a series of loan facilities, Dahable Ltd acquired loan facilities to the tune of UGX 9,000,000,000/= (Uganda Shillings Nine Billion Only) from Stanbic Bank (U) Ltd.

3. That as security for the loan, Dahable Ltd pledged securities including but not limited to six (6) petrol stations at Kagoma-Bombo Road, Namulanda-Entebbe Road, Nyanama-Suuna Road, Kawala-Jinja Karoli Road, Iganga and Arua plus vacant land at Kyengera.

4. That the Petitioner executed a personal guarantee for the loan facilities as the Managing Director of the principal borrower and as further security for the aforesaid loans.

5. That Stanbic Bank (U) Ltd has since attached all the above properties of Dahable Ltd and is in the process of releasing the mortgaged properties, by way of public auction.

6. That the Petitioner is unable to pay his debts arising out of a personal guarantee in favour of Dahable Ltd for the loan facilities to the tune of UGX 9,000,000,000/= from Stanbic Bank (U) Ltd.

7. That based on the forced sale value, the above-mortgaged properties are not sufficient to settle Dahable Ltd's loan exposure with Stanbic Bank (U) Ltd.

8. That as a personal guarantor, the Petitioner has no capacity either financially or otherwise to pay off the loans to the lender bank.

Representation

The Petitioner was represented by Learned Counsel Mugabi Silas Kahima of M/s Mugabi, Shyaka & Co. Advocates.

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The Petitioner was directed to file written submissions which he did and the same have been considered by this Court.

Issues for determination

5 In his submissions, Counsel for the Petitioner raised the following issues for determination by this Court;

1. Whether the Petitioner is unable to pay his debts?
2. Whether the Court can grant a bankruptcy order in the circumstances?

Issue No.1: Whether the Petitioner is unable to pay his debts?

10 Petitioner's submissions

Counsel for the Petitioner first referred to the case of; ***In the matter of Petition for Receiving Order by Uzairu Ahamed Magala (A Debtor) Bankruptcy Petition No.2 of 2016***, in which **Hon. Justice David Wangutusi** observed that the law necessitates a Petitioner to prove by way
15 of evidence that he or she is unable to pay his or her debts with such debt exceeding UGX 50,000,000/= (Uganda Shillings Fifty Million Only), for this Court to entertain the Petition.

Counsel for the Petitioner also referred to the case of; ***In the matter of Hellen Kakyo (A Debtor) Bankruptcy Cause No.4 of 2014***, as cited with
20 approval; ***In the matter of Petition for Receiving Order by Uzairu Ahamed Magala (A Debtor) (supra)*** wherein **Hon. Justice David Wangutusi** further observed that the above requirement is found under **Section 3 of the Insolvency Act, 2011** which provides for inability to pay debts.

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Counsel for the Petitioner submitted that in the instant case, the Petitioner has demonstrated to the Court that as the Managing Director of Dahable Ltd, he executed a personal guarantee for loan facilities in favour of Stanbic Bank (U) Ltd to the tune of UGX 9,000,000,000/= and Dahable Ltd as the principal borrower defaulted on its obligation. Stanbic Bank (U) Ltd in a bid to recover the loans, attached the pledged securities including but not limited to six (6) petrol stations at Kagoma-Bombo Road, Namulanda-Entebbe Road, Nyanama-Suuna Road, Kawala-Jinja Karoli Road, Iganga and Arua plus vacant land at Kyengera, and that upon sale, the same was insufficient to settle the loan granted to Dahable Ltd by Stanbic Bank (U) Ltd.

Counsel further submitted that a copy of the Petitioner's statement of affairs was lodged in the office of the Official Receiver, the Registrar General, Uganda Registration Services Bureau as required by law.

In conclusion, Counsel for the Petitioner submitted that in determining whether a debtor is unable to pay his debts, contingent or prospective debts may be taken into account. Counsel for the Petitioner further submitted that as the record shows, it goes without saying that with the foreclosure on the properties of Dahable Ltd, where the Petitioner is the Managing Director, the Petitioner has no other known source of income to meet his obligation as a guarantor.

Analysis and Determination

I have considered the Petition, the affidavit in support, and Counsel's submissions together with the authorities cited therein.

Section 20 (1) of the Insolvency Act, 2011 and Regulation 7 (b) of the Insolvency Regulations, 2013 permit a debtor to petition the Court for

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bankruptcy alleging that he or she is unable to pay his or her debts and the Court may, subject to **Section 21 and 22 of the Insolvency Act, 2011** make a bankruptcy order in respect of the debtor.

Section 21 of the Insolvency Act, 2011 also requires a debtor in respect of whom a petition has been presented under **Section 20 of the Insolvency Act, 2011** to file a statement of his or her affairs verified by an affidavit.

Furthermore, **Section 3 (1) of the Insolvency Act, 2011** provides that:

(1) Subject to subsection (2) and unless the contrary is proved, a debtor is presumed to be unable to pay the debtor's debts if-

- a) The debtor has failed to comply with a statutory demand;*
- b) The execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part; or*
- c) all or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property.*

In the instant case, the Petitioner is a Director of Dahable Ltd, a Company that entered into a loan facility with Stanbic Bank (U) Ltd amounting to UGX 9,000,000,000/= (Uganda Shillings Nine Billion Only) and secured the loans with six (6) petrol stations at Kagoma-Bombo Road, Namulanda-Entebbe Road, Nyanama-Suuna Road, Kawala-Jinja Karoli Road, Iganga and Arua, plus vacant land at Kyengera. The Petitioner also contends that as a Managing Director of Dahable Ltd, he further executed a personal guarantee as additional security for the said loan. In evidence, he attached copies of the facility letters as annexures **"A"**, **"B"** and **"C"**.

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The Petitioner further contended that Stanbic Bank (U) Ltd has since attached all the Company's properties and is in the process of releasing them by public auction. In evidence, the Petitioner tendered in an advert by Armstrong Limited in the Daily Monitor Newspaper dated 26th April, 2023 and annexed to the affidavit in support of the Petition as annexure "D". The Petitioner stated that based on the forced sale value, the above-mortgaged properties are not sufficient to settle the loans in issue and as a personal guarantor, the Petitioner has no capacity either financially or otherwise to pay the loans in issue. To this end, the Petitioner attached his statement of affairs.

In establishing whether the Petitioner is unable to pay his debts, I have read all the documents attached to the affidavit in support of the Petition and observed the following:

Though annexures "A", "B" and "C" refer to a personal guarantee, the same was not adduced in evidence for the Court to ascertain the terms and conditions therein to determine the Petitioner's inability to pay the said debt. Clause 11.2 of the 2nd facility letter (annexure "B") required a personal guarantee together with a personal statement of the Petitioner's assets and liabilities which I believe were handed over to the bank because the same is reflected in the 3rd facility letter (annexure "C") as part of the securities held by the bank. However, the same has not been tendered in Court.

Further, the Petitioner did not adduce evidence regarding the current market value of the mortgaged properties yet he alleges under paragraph 8 of his affidavit in support of the Petition that based on the forced sale value, the mortgaged properties are insufficient to settle the Company's loan. Additionally, the Petitioner did not provide any information to this

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Court relating to whether or not the said properties were sold and if indeed the properties were sold, the Petitioner should have provided information as to what was realized from the sale to enable Court establish the exact amount of the debt that is still outstanding. This would also enable Court
5 to assess the Petitioner's inability to pay the debt.

Further, the Petitioner was rather speculative in his affidavit in support of the Petition and did not provide any actual information relating to the extent of the debt and specifically, he stated in paragraph 8 of the affidavit in support of the Petition that he is "worried". Paragraph 8 of the
10 Petitioner's affidavit for emphasis states as follows:

"THAT, I am worried, that on the basis of a forced sale value, the above mortgaged properties are not sufficient to settle to Ms Dahable Limited's loan exposure with Ms Stanbic Bank Limited."

Court cannot ascertain the extent of the debt outstanding and as seen
15 above, the Petitioner was only worried but the worry is not supported by any actual information relating to the extent of the debt that he claims he is unable to pay. In addition, the Petitioner did not attach any form of demand for instance; a letter or notice from Stanbic Bank (U) Ltd for payment of the loan in his capacity as a guarantor nor did he attach any
20 form of evidence to show that the loan amount was still outstanding. The evidence in my view is lacking and Court is not in position to ascertain the extent of the outstanding debt nor the inability of the Petitioner to pay the debt.

I have also considered the statement of affairs tendered in by the Petitioner
25 in fulfilment of **Regulation 21 of the Insolvency Regulations, 2013**. The said statement is deficient for failure to forward a full disclosure of the

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Petitioner's affairs. I refer to annexures "B" and "C" that reflect that the bank was holding a personal statement of the Petitioner's assets in respect of the loan. These assets have not been disclosed in the statement of affairs yet there is no evidence to show that they are no longer in existence to
5 ascertain whether all the property of the Petitioner and the principal debtor; Dahable Ltd is in the hands of Stanbic Bank (U) Ltd for purposes of Section 3 (1) (c) of the Insolvency Act, 2011.

Furthermore, the said statement of affairs was not completely filled. There is information missing in material aspects for instance under question 25,
10 the Petitioner ticked yes in response to the question as to whether he has any managed investments, insurance bonds, debentures or other investments. However, he did not fill the part for details of the investment. Questions 6, 19, 31 and 36 are also blank.

In addition, **Regulation 21(3) (f) of the Insolvency Regulations, 2013**
15 provides that the statement of affairs shall contain;

"a list of the debtor's assets, divided into such categories as are appropriate for easy identification, with estimated values assigned to each category."

In respect to question 24 under the statement of affairs, the Petitioner
20 stated that he has 75% shares however the information as to the Company's name, its address, shareholder number, date acquired and market value were all left blank and yet this is vital information that would enable Court determine the extent of the Petitioner's inability to pay the debt in issue.

25 I also note that the Petitioner did not effect service on Stanbic Bank (U) Ltd, a known creditor of the debtor in accordance with the law.

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Regulation 11 (1) of the Insolvency Regulations, 2013 provides that a debtor's petition shall be served on every known creditor of the debtor.

In the premises, the Petitioner has not provided sufficient evidence for this Court to rely on to establish his inability to pay the debt. The Petitioner did not provide any information relating to the portion of the debt that Stanbic Bank (U) Ltd recovered upon sale of the listed securities to ascertain the outstanding debt nor was any demand from Stanbic Bank (U) Ltd for settlement of the balance sent to the Petitioner in his capacity as a guarantor attached.

Counsel for the Petitioner relied on the case of **Re Petition for Receiving Order by Uzairu Ahamed Magala (supra)**, wherein **Hon. Justice David Wangutusi** stated that:

*"The Petitioner has in this proved indebtedness by attaching statements of account that speak for themselves. It is also clear that he has failed to service them and or failed to pay them. The foregoing are acts of bankruptcy which attract such orders as petitioned for; In the Matter of a Petition for a **Receiving Order by Thomas I. Kato Bankruptcy Petition No. 13//2002 pages 1 and 2.**"*

The above case is distinguishable from the instant case to the extent that the Petitioner in this Petition, before me, did not attach any evidence showing his inability to pay or service the loan or any demand notices sent to him in his capacity as a guarantor for payment of the debt from Stanbic Bank (U) Ltd and efforts made to clear the outstanding loan. In the case relied upon by Counsel for the Petitioner above, the Petitioner attached demand letters from the bank, evidence of dishonoured cheques, breach

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of contract and outstanding arrears resulting from outstanding loans among others.

In light of the above, the Petitioner has not demonstrated that he is unable to pay the debt nor has he provided details of the outstanding debt.

5 Issue No.2: Whether the Court can grant a bankruptcy order in the circumstances?

As illustrated above and as enshrined under **Section 20 (1) of the Insolvency Act, 2011** upon presentation of a bankruptcy petition by a debtor, this Court may subject to Sections 21 and 22, grant a bankruptcy
10 order in respect of the debtor.

In the instant case, as resolved above under Issue No.1, the Petitioner has failed to prove by way of evidence his inability to pay the debt. The Petitioner further failed to adduce evidence relating to the outstanding debt. In the circumstances, this Court declines to grant an order declaring
15 the Petitioner bankrupt as prayed for. Accordingly, this Petition is dismissed.

I so order.

Dated, signed and delivered electronically this **12th** day of **March, 2024**.



20 Patience T. E. Rubagumya

JUDGE

12/03/2024

7:15am