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*"Bankruptcy laws were never meant to protect fraudsters rather genuine people who have been hit by factors such as harsh business environment and unavoidable business calamities. The aim is to give such people a fresh start in life and to enable them **"get back to their feet and solder on in life"**. It would be wrong if courts allow themselves to be used to protect fraudsters from being forced to pay for their criminal acts by being shielded with bankruptcy orders."* (paraphrased)

Hon. J. A. Makau J In the matter of Stephen Nyaega Mose [2018] eKLR

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Introduction

The Insolvency Act No. 18 of 2015 [Hereinafter 'the Act'] revolutionized the country's laws on bankruptcy. The key objectives of laws being:

- To secure an equitable distribution of the debtor's property amongst creditors; and
- To relieve the debtor of his liabilities.

It is noted prior to 2010, the High Court exercised exclusive original jurisdiction over all matters pertaining to land. However, following the promulgation of the Constitution of Kenya, 2010, **Article 162(2) established 2 distinct court with similar status as the High Court**, one to hear matters pertaining to **employment and labour relations (ELRC)** and another to hearing matters pertaining to environment and the use and occupation of, and title to, land (ELC). Parliament passed into law specific legislation for each Court; **the Employment and Labour Relations Court (Cap. 8E) and the Environment and Land Court (Cap. 8D)**.

Application by a debtor for a Bankruptcy order

Under **Section 32 of the Act**, a debtor can apply for a Bankruptcy order on account of his inability to pay debts. Such an application ought to be accompanied by the debtor's financial position indicating the nature of assets and liabilities. A key requirement being to notify Creditors of the application through publication in a paper of nationwide circulation and in the Kenya Gazette to allow objections before its hearing.

Deceptive ways used by Debtors to defraud Creditors

Bankruptcy is regarded as an option of last resort because it has serious consequences to both debtors and creditors. It has however become an unfortunate truth that not everyone in a marketplace deals in good faith. **Some debtors deliberately use the law shrewdly to evade servicing their lawful liabilities.** Nowadays, debtors have mastered and perfected the art of using deceptive means to corrupt the sacrosanct bankruptcy laws. The intention being the attainment of a financial gain at the expense of creditors. The two most common practices include:

- Material non-disclosure when making the application, wherein a debtor fails to issue the requisite notices to creditors thus making sure they stay in the dark.
- Concealment of assets.

It is however well settled in law that equity shall not suffer a wrong without a remedy. The Bankruptcy Act has provided a remedy to counter the above dealings, that is, **annulment!**

Annulment of bankruptcy orders

The annulment of a bankruptcy order effectively cancels the original bankruptcy order. The same is aptly captured under **Section 272** of the Act.

The effect of annulment is that it restores **"the bankrupt"** to the position he was before the order was made. Therefore, the debtor will remain liable for all former debts, and any property which vested in the trustee in bankruptcy will revert to the debtor.

The grounds for applying to annul a bankruptcy order

Section 272 of the Act provides that upon an application by either a bankrupt, Official Receiver or creditor(s), a Court may annul a bankruptcy order.

To wit, the application for annulment can be hinged on any of the following grounds, *inter alia*:

- The orders ought not to have been made in the first place;**
- There was a procedural irregularity (for instance, where service of the bankruptcy petition was defective or incomplete, material non-disclosure)**

Notably, the grant for an order of annulment is discretionary in nature and upon the same being granted, the Insolvency Register held at the Office of the Official Receiver ought to be rectified.

A classical case is ***Insolvency Cause No. 6 of 2018: In the matter of Ali Jillo Fallan (Insolvency Cause 6 of 2018) [2021] KEHC 8 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)*** which was handled by the firm and decided by Justice Mativo as he then was. In the case, Gulf African Bank advanced a facility of Kshs 6,554,800.00 to Mr Jillo and whereupon default the Bank filed a debt recovery suit. Upon trial, judgment was entered in favour of the Bank. Before the delivery of the judgment, Mr Jillo filed a Bankruptcy Petition under Section 32 of the Act to defeat an ensuing court decree.

In his Statement of Affairs, he attached assets worth **Kshs. 158,596.92** and liabilities worth **Kshs. 8,457,883.92** including the debt owed to Gulf bank. The Bank opposed the Petition and argued that it was an attempt to evade lawful liabilities and such fell short of the legal threshold. In a Ruling delivered by **Justice JM Mativo**, as he then was, on 10th September 2021, he wisely observed as follows:

- The Law provides a debtor to seek relief from unmanageable debt through bankruptcy;*
- Bankruptcy is as an option of last resort because it has serious consequences.*
- A bankruptcy petition **must be made in good faith and with full material disclosure.***
- The Petition must be **Gazetted in the Kenya Gazette and in the newspaper to afford creditors the opportunity to come forward to either oppose or support the Petition.***
- The Debtor's statement of financial position must attain, **the three-prong test; credibility, reliability and probability.***

In conclusion, the Bankruptcy Petition was found unmerited and was dismissed with costs. If Mr. Jillo had been lucky to be adjudged bankrupt unprocedurally, irregularly and out of material non-disclosure, creditors such as the Bank would still have a remedy under Section 272 by moving the Court accordingly for annulment and restoration of the debtor to his original status as though the orders had never been made.

Conclusion

A Petitioner who bespeaks a Bankruptcy order must be candid and forthright as to his state of affairs and make full and frank disclosure. Since the laws on Bankruptcy have become prone to abuse by fraudsters, its trite to implore upon them of the import of **Section 272 of the Insolvency Act 2015** and remind them of our everyday Swahili adage that **"Dawa ya deni ni kulipa"**.

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