



REPUBLIC OF KENYA



**Matakwa v Mburu & 2 others (Bankruptcy Cause 2 of 2009)
[2022] KEHC 11979 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
BANKRUPTCY CAUSE 2 OF 2009
FA OCHIENG, J
JUNE 23, 2022**

BETWEEN

DEFINA KHAYOSA MATAKWA APPLICANT

AND

SIMON NG'ANG'A MBURU 1ST RESPONDENT

OFFICIAL RECEIVER 2ND RESPONDENT

KENYA COMMERCIAL BANK LTD 3RD RESPONDENT

RULING

1. The application before me is dated August 23, 2021. It is an application which was brought by Defina Khayosa Matakwa.
2. The applicant sought orders to have the Bungoma County Registrar enjoined to these proceedings, as a respondent.
3. Secondly, the applicant sought orders to have the petitioner, Simon Ng'ang'a Mburu and the Bungoma County Registrar cited for contempt of court.
4. The reason why the applicant sought those orders is that the petitioner and the registrar had effected registrations on the titles LR No Ndivisi/Khalumuli/4613 and LR No Ndivisi/ Khalumuli/4614, in violation of the orders issued by this court on September 3, 2020.
5. The applicant is a judgment creditor against the petitioner.
6. She filed the current application after discovering that the petitioner and the registrar had transferred the two parcels of land to third parties.
7. The court records show that on March 9, 2009, a receiving order was issued against the petitioner.



8. On August 18, 2016, the court dismissed the case. The said dismissal was made after the parties had failed to show cause why the matter ought not to be dismissed.
9. On February 20, 2019 the petitioner filed an application for the reinstatement of the petition.
10. On May 22, 2019, the court reinstated the Bankruptcy Petition. At the time when reinstating the petition, the court noted that;

“..... a dismissal of the cause after the court had issued a receiving order would be of no legal consequence.”
11. I reiterate that finding because the issuance of the receiving order constituted the determination of the petition. Therefore, after the petition had been determined by the court, it cannot thereafter be dismissed.
12. Pursuant to section 9 (1) of the *Bankruptcy Act*, (which was in force at the material time; but which was thereafter repealed), the official receiver was constituted the receiver of the property of the debtor, when the receiving order was made.
13. It was the applicant’s case that the court ought not to have issued the receiving order, in the first instance. She said that the only reason why the applicant instituted these proceedings was to frustrate her efforts to execute the decree which she obtained in *VihigaSRM Civil Suit No 25 of 2012*.
14. The decree arose from the case in which the applicant herein had sued the petitioner after she had sustained serious injuries in an accident involving the petitioner’s motor vehicle.
15. According to the applicant, she had not been informed by the petitioner that the court herein had issued a receiving order against him.
16. The applicant told this court that it was only after she had applied for the execution of the decree, on August 21, 2020, that she became aware of the receiving order.
17. The applicant emphasized that the petitioner has substantial assets. Therefore, the applicant believes that the petitioner was simply abusing the court process, by shielding himself from the creditors.
18. As an example of how the petitioner was abusing the court process, the applicant told this court that the petitioner had sub-divided his parcel of land LR Ndivisi/Khalumuli/4299. After carrying out the said sub-division, the petitioner allegedly utilized one of the resultant parcels of land as security for a financial facility of Kshs 1,942,319/= from the Kenya Commercial Bank Limited.
19. If indeed, the petitioner caused his parcel of land to be sub-divided; and then utilized one of the resultant parcels as security, that would be an outrageous act of impunity. I so find because when the assets of the petitioner are supposed to be in the hands of the official receiver, the debtor lacks legal capacity to enter into any contractual relationship which impacts any of his properties.
20. The applicant stated the position very succinctly, when she said;

“..... the receiving order issued against the estate of the petitioner herein on March 9, 2009 acts as a stay, and no legal action, execution or other legal process may be commenced or continued against the person or estate in respect of which a receiving order has been made, without leave of the court.”



21. Although the applicant submitted that she had been permitted to participate in the proceedings, leading to the settlement of her application dated September 17, 2020, I must emphasize that the official receiver lacked the capacity to do that which the law mandates only the Court to do.
22. In this case, the applicant had not expressly sought the leave of the court prior to filing her application. If she had done so, the court would have been called upon to make a determination on the said application.
23. When a person files an application in court, ordinarily the court would not simply shut its doors to the application, even where it appeared that the court had not been moved properly.
24. In this case, the applicant and the official receiver compromised the application dated September 17, 2020. The details of the settlement were not disclosed to the court. However, by consent of the applicant and the official receiver, the applicant was recognized as one of the creditors to the estate of the debtor.
25. Secondly, all the restrictions and any other encumbrances were ordered to be vacated against the titles to the properties which constitute the estate of the debtor.
26. And, as a matter of abundant caution, it was ordered that the Debtor was barred from dealing with the titles, in any manner.
27. Although it might appear like KCB were not accorded a hearing in this matter, the fact is that they actively participated in the application dated August 23, 2020. In that application, the applicant sought orders to compel KCB to disclose the details of the debtor's Bank Account whose facilities were allegedly secured by charge instruments registered against titles which had been carved out from the debtor's property.
28. KCB filed a Replying Affidavit, through Charles Kilaho, (the bank's Assistant Manager at its Webuye Branch). Mr Kilaho stated that unless the debtor waived the Bank/Customer duty of confidentiality, or until the court issued an order against the bank, it would be wrong for them to disclose the statements of account which the debtor held at the bank.
29. When the applicant withdrew the application, Mr Ragot, the learned advocate for KCB informed the court that his client had no interest in the case.
30. On November 30, 2021, Miss F Osewe, the learned advocate for KCB reiterated that following the withdrawal of the application which sought to have them enjoined to the suit, the bank sought to be discharged from further proceedings herein.
31. As the court never enjoined KCB to the suit, and because the applicant abandoned the application seeking the said joinder, KCB never became a party to the suit. Accordingly, there was no requirement that the bank be discharged from these proceedings.
32. Meanwhile, the applicant has now told the court that the titles carved out from L R No Ndivisi/Khamululi/4299, had been transferred to third parties.
33. In the circumstances, I find that the orders that could have the original title revert to the name of the debtor may occasion prejudice to persons who are not parties to this case.
34. I hold the considered view that the Land Registrar is a necessary party to the case, to help unravel the web. Accordingly, I order that the Land Registrar Bungoma, be summoned to the proceedings forthwith. The said summons shall be served by the applicant.



35. Immediately after this Ruling is delivered, the court will set an appropriate date, when the Land Registrar shall, (initially) be required to make available the records of LR No Ndivisi/Khalumuli/4299.
36. Meanwhile, the official receiver is directed to inform the court about the steps he has taken to take charge of all the properties of the debtor; how soon he will convene the creditors meeting; and his projection of how long it will take to finalize this process of either having the Debtor adjudged insolvent or alternatively discharged.
37. Finally, the debtor is directed to file an Affidavit within the next seven(7) days, detailing the actions he took, leading to the sub-division of Parcel No 4299.
38. As already indicated herein, the court will set a date for the next court sessions.
39. The issue of the costs shall be determined after the court gives due consideration to the affidavits to be filed by the Land Registrar Bungoma and the debtor.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE 2022

FRED A OCHIENG

JUDGE

