



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

BANKRUPTCY CAUSE NO. 19 OF 2015

RE: MUTHETHIA MWITI alias GIDEON MWITI IREA

Ex-parte: Diamond Trust Bank Kenya, the Judgment Creditor

JUDGEMENT

1. The judgement herein relates to a petition dated 7th July 2015, filed by Diamond Trust Bank Kenya (herein “the Petitioner”), seeking that the court issue a receiving order in respect of the estate of; Muthethia Mwiti alias Gideon Mwiti Irea.

2. It is supported by an affidavit of the even date sworn the Petitioner’s Company Secretary; by Mr. Stephen Kodumbe.

He avers that the Petitioner obtained a final decree dated 4th February 2008, against Muthethia Mwiti alias Gideon Mwiti Irea (herein “the Respondent”) in *Nairobi CMCC No. 12331 of 2005 Diamond Trust Bank Kenya v Kenya Akiba Micro-Finance & 3 other.* That, the execution of the judgment has not been stayed.

3. As a result, the Petitioner, on 14th April 2015, requested for issuance of a bankruptcy notice, which was issued by the Court on 22nd April 2015, No. 5 of 2015 and served upon the Respondent. However, the Respondent has not, within seven (7) days paid the decretal sum of; Kshs. 6,153,685.56 and/or filed an affidavit as per the requirements of Rule 101 of the Bankruptcy Rules and Form No. 7 of the Bankruptcy Rules, or to respond appropriately within seven (7) days of service of the notice, thereby committing an act of Bankruptcy within three (3) months before the presentation of the petition herein..

4. Similarly, he has not satisfied the court that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the decree, and which he could not set up in the action in which the decree was obtained.

5. However, he filed a notice of motion application dated 11th May 2015, seeking for stay of execution but it was not granted. That in the supporting affidavit dated 11th May 2015, he has given notice to the Petitioner that he has suspended payment of his debts pending the determination of; *High Court Civil Suit No. 644 of 2005 Kenya Akiba Micro-finance Limited v Ezekiel Chebii & 14 Others.*, but he has nothing to do with the suit, in that the plaintiff in the suit is a company, which is a separate legal entity from the Respondent.

6. That a period of seven (7) years, has lapsed since the entry of the judgment in 2008, and the Respondent had not paid the decretal sum which is a liquidated sum payable either immediately or at some certain future. That the Petitioner is not a secured creditor.

7. On 1st July 2019, when the matter was before court for directions, the learned counsel Mr. Nyamweya, holding brief for Mr. Njengo for the Respondent, informed the court that he had limited instructions due to lack of the Respondent’s file. The court directed the Petitioner to advertise their petition and move the court accordingly.

8. On 16th January 2020, the petition was fixed for hearing on 5th March 2020 whereupon the matter proceeded for hearing by the Petitioner’s counsel, Mr. Shah, informing the court that, the Petitioner is seeking for a Receiving order pursuant to Section 5 of the Bankruptcy Act (Repealed)(herein “the Act). That, upon the issuance of the order, the Petitioner will be able to commence proceedings for bankruptcy. He averred that, section 7 of the Act, requires that, there be proof of the debt. In that regard the Petitioner has annexed a decree and a copy request for bankruptcy notice. That both are evidence of; an act of bankruptcy.

9. That although the Respondent filed a replying affidavit dated 10th August 2015, relying on the provisions of;7 (4) and (5) of the Act, there is no appeal against the judgment referred to herein, nor ground for stay of the petition proceedings. Further the court can make an order for the security of the uncontested amount. He also referred the court to the provisions of; sections 13, 14 and 15 of the Act.

10. On the hearing day, when matter was called out for confirmation of the hearing; the Respondent was represented by Ms. Arogo, holding brief for Mr. Njengo. However, by the time the hearing commenced, the Learned counsel was not in court and neither was the Respondent represented. Therefore, the petition was heard unopposed.

11. I have considered the petition and note that, it was filed on 10th July 2015, under the repealed Bankruptcy Act and before the commencement of the Insolvency Act, 2015, 30th November 2015. Therefore the applicable provision of the law is the repealed Act. In that regard, section 5 thereof; gives the court the power to issue a receiving order for the protection of the estate of the debtor.

12. However, however there must be a petition filed with proof that the debtor has committed an act of bankruptcy. Section 3 of the Act describes what constitute as the acts of bankruptcy and states as follows: -

(1) A debtor commits an act of bankruptcy in each of the following cases—

(a) if in Kenya or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;

(b) if in Kenya or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof;

(c) if in Kenya or elsewhere he makes any conveyance or transfer of his property, or of any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt;

(d) if with intent to defeat or delay his creditors he does any of the following things, namely, departs out of Kenya, or being out of Kenya remains out of Kenya, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house;

(e) if execution against him has been levied by seizure of his goods in any civil proceeding in any court, and the goods have been either sold or held by the bailiff for twenty-one days: Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which the summons is taken out and the date at which the proceedings on the summons are finally disposed of, settled or abandoned shall not be taken into account in calculating the period of twenty-one days;

(f) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;

(g) if a creditor has obtained a final decree or final order against him for any amount, and, execution thereon not having been stayed, has served on him in Kenya, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, and he does not within seven days after service of the notice, in case the service is effected in Kenya, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the decree or sum ordered to be paid, and which he could not set up in the action in which the decree was obtained, or the proceedings in which the order was obtained; and for the purposes of this paragraph and of section 4, any person who is, for the time being, entitled to enforce a final decree or final order shall be deemed to be a creditor who has obtained a final decree or final order;

(h) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts”

13. In the instant case, the Petitioner is relying on section 7 (2) that require proof of the service of the petition and/or act of bankruptcy, and if more than one act of bankruptcy is alleged in the petition, of some one of the alleged act of bankruptcy before a Receiving order can be made. The said provisions of;

Section 7 of the Act provides that: -

(1) A creditor’s petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner.

(2) At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.

(3) If the court is not satisfied with the proof of the petitioning creditors debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, or sum ordered to be paid, the court may stay or dismiss the petition on the grounds that an appeal is pending from the judgment or order.

(5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(6) Where proceedings are stayed the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed.

(7) A creditor's petition shall not, after presentment, be withdrawn without the leave of the court.

14. I have considered the Petition herein and I note the Petitioner has annexed to the affidavit accompanying the petition, a decree issued on 24th August 2011 in CMCC 12331 of 2005 in favour of the Petitioner. There is no evidence that the decree has been satisfied.

15. Similarly, there is evidence that, a request for issue of bankruptcy notice dated 14th April 2015, was made, it was issued and the same served upon the Respondent pursuant to; Rules 99 and 100 of the Bankruptcy Rules. In that regard, the Petitioner has proved that, the Respondent has committed an act of bankruptcy, due to the inability to settle the decretal sum.

16. As aforesaid, the Respondent was served with the petition and responded by a replying affidavit and a notice of motion dated 11th May 2015, but these documents remain as they are; due to lack of evidence adduced at the hearing to support them. In the same vein, the petition having been heard unopposed, the evidence produced remain rebutted.

17. In the given circumstances, I find that the Petitioner has proved its claim on the required standard of balance of probabilities and I allow the petition as prayed. I hereby order that there be a Receiving order in respect of the estate of; Muthethia Mwiti alias Gideon Mwiti Irea. The costs of the petition are awarded to the Petitioner.

18. Those then are the orders of the court.

Delivered and dated this 22nd day of May 2020

G.L. NZIOKA

JUDGE

In the Presence of:

Mr. Shah for the Creditor

J.M. Njengo for the Debtor

Delivered by virtual communication