



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 332 OF 2018

FREDRICK N. WAMALWA.....PLAINTIFF/APPLICANT

VERSUS

JOHN MARIARIA ONGERL.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 29th June 2018 wherein the plaintiff/applicant seeks the following orders: -

1. spent.

2. That the honourable court be pleased to discharge, forthwith, the receiving orders which were given by the Honourable court in favour of the defendant/judgment-debtor herein, on the 23rd day of December 2003, in Milimani High Court Bankruptcy Cause No. 158 of 2003.

3. That upon granting prayer (2) above, the plaintiff/applicant/Decree –holder herein be granted leave to execute, forthwith, the judgment/Decree given herein as against the defendant/judgment –debtor herein.

4. That the costs of this application be borne by the defendant/judgment – debtor/respondent herein.

2. The application is brought under Articles 10, 25, 27, 48 and 159 of the Constitution and is premised on the grounds that: -

a. That upon petitioning the High Court ex parte and being granted receiving orders, on the 23rd December 2003, the defendant/judgment-debtor herein sat back and has never contacted the receiver appointed by the Honourable court under the Bankruptcy Act and accordingly the first meeting of creditors has never been convened or held to date and the said Bankruptcy proceedings have completely stalled and remains unprosecuted to date.

b. That by refusing to prosecute the said Bankruptcy proceedings, for such a long period of time, there is a very strong inference that the defendant/judgment – debtor is misusing the provisions of the Bankruptcy Act in order to [1] unlawfully shield himself from obeying valid court orders [2] to evade valid execution proceedings and court proceedings and, [3] to unlawfully shield himself from meeting his contractual obligations; to the detriment of the decree-holder herein.”

3. The respondent opposed the application through the Grounds of Opposition dated 9th July 2018 wherein he lists the following grounds:-

1. That this suit is a nullity for the reason that a receiving order had been issued by the time the suit was heard and determined.

2. That the application is fatally defective as no leave was sought to proceed with the matter.

3. That this Honourable court does not have the jurisdiction to entertain the application.

4. That the application should have been made in High Court Bankruptcy Cause No. 158 of 2003, which granted the stay and receiving order sought to be discharged.

5. That the plaintiff should prove and pursue his claim against the defendant, if any, in the bankruptcy cause as a creditor in accordance with the Insolvency Act, 2015.
6. That the plaintiff is guilty of laches as he has moved the court with inordinate delay.
7. That the application is misconceived and is otherwise an abuse of the process of the court.
8. That the application in any event ought to have been served upon the Official Receiver.

4. I have considered the instant application and the response filed by the respondent. I note that by consent of the parties herein recorded on 26th July 2018, Njuguna J. transferred HCCC 2580 of 1995 to this Division and directed that the same be consolidated with the Bankruptcy Cause No. 158 of 2003 for the purposes of determining the instant application.

5. I have considered the submissions made by the parties herein over the subject application and I find that the main issues for determination is whether the applicant has made out a case for the discharge of the receiving orders made on 23rd December 2003 in the Bankruptcy cause No. 158 of 2003, and upon granting the said discharge, whether the plaintiff/applicant herein should be granted leave to execute the decree in HCC No. 2580 of 1995.

6. It was not in dispute that the impugned receiving order was issued against the estate of the debtor herein on 23rd December 2003. The applicant contends that upon the granting of the said receiving order, the debtor did not contact the official receiver appointed by the court thereby stalling the first meeting of the creditors which has to-date not being prosecuted.

7. On its part, the debtor argued that since the receiving orders are still in place, the applicant was required to seek and obtain the leave of the court before filing the instant application. The debtor also argued that since the judgment which the applicant seeks to enforce was delivered on 26th September 2005, after the issuance of the receiving order, the said judgment is invalid/irregular.

8. The official Receiver did not file any replying affidavit to the application. At the hearing of the application, **Mr. Otieno**, for the Official Receiver aligned himself with the applicant's submissions. He added that even though the Official Receiver applied for the extension of the time to gazette the Receiving Order so as to enable him call for the first meeting of the Creditors, the said order was not granted and the Debtor did not follow it up.

9. From the above foregoing, the question which then arises is whether the Debtor was responsible for the stalling of the 1st meeting of the Creditors. A perusal of the pleadings filed in the Bankruptcy Cause soon after the granting of the Receiving Order shows through an application dated 10th March 2006, the Official Receiver sought orders for extension of time within which to convene the first meeting of the Creditors. The application was premised on the grounds that *“(a) there wasn't sufficient time within which to hold the meeting of Creditors due to the delay occasioned by failure of this honourable court to serve the office of the Official Receiver with the Receiving Order.*

(b) The Creditors meeting could not be convened within the required time.”

10. As I have already stated in this ruling, **Mr. Otieno** for the Official Receiver stated that the orders sought in the application dated 10th March 2006 were never granted. A perusal of the court file shows that there were no other proceedings in the Bankruptcy Cause.

11. From the above position regarding the application for extension of time within which to convene the first Creditors meeting, it is clear to me that contrary to the applicant's claim that the Debtor stalled the receiving process, the court record shows that it was in fact, the delay by the court in serving the Official Receiver with the Receiving Order that stalled/delayed the holding of the said first meeting.

12. It is also clear to me that the Official Receiver did not pursue or prosecute the application dated 10th March 2006 in which case, it is also clear that the first meeting of the Creditors could not be convened without the extension of time sought in the said application.

13. My finding is that in the circumstances of this case, it cannot be said that the Debtor was responsible for the failure by the Official Receiver to convene the First Meeting of Creditors so as to warrant the granting of the orders for discharge of the Receiving Orders sought herein.

14. In sum, I am not satisfied that the applicant has made out a case for the discharging of the Receiving Orders and I find that perhaps what the Official Receiver needed to have done is to play his role in the Bankruptcy cause in order to bring it to the desired conclusion.

15. Consequently, I find that the application dated 29th June 2018 is not merited and I therefore dismiss it with no orders as to costs. Before I conclude this matter, I am minded to address the second limb of the application which was the prayer for leave to execute the judgment/decreed issued against the debtor in HCCC 2580 OF 1995. I have already noted that while the Receiving Order was issued on 23rd December 2003, the judgment that the applicant seeks to execute was entered on 26th September 2005.

16. Section 9(1) of the Bankruptcy Act stipulates as follows:-

“(1) On the making of a receiving order the official receiver shall be thereby the constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall

commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose.”

17. Having regard to the above provision, this court is of the humble view that any proceedings undertaken against the Debtor after the issuance of the Receiving could only have proceeded with the leave of the court. In view of the present case, it is not clear if such leave was sought and obtained before the suit was prosecuted.

18. In conclusion, I find that the application dated 29th June 2018 is not merited and I therefore dismiss it with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties

Court Assistant: Sylvia

W. A. OKWANY

JUDGE