



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
BANKRUPTCY CAUSE NO. 33 OF 2010
IN THE MATTER OF THE BANKRUPTCY ACT
(CHAPTER 53 OF THE LAWS OF KENYA)
RE: PRESTON MATHENGE NYUMU - DEBTOR

RULING

[1] The application that is the subject of this Ruling is the Notice of Motion dated 7 **February 2013**, which was filed herein on 13 **February 2013** by **Diamond Trust Bank Limited**, one of the Creditors herein, for orders that the Court be pleased to rescind the Receiving Order issued on 30 **September 2010**; and that the costs of the application be provided for. It was further prayed that there be liberty to apply. It was filed pursuant to **Section 100** of the **Bankruptcy Act, Chapter 53 of the Laws of Kenya (now repealed but still applicable by dint of Section 733(2) of the Insolvency Act, No. 18 of 2015)**, **Sections 1A, 1B** and **3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Rule 147(1) of the Bankruptcy Rules**. The application was premised on the grounds, *inter alia*, that:

[a] Since the Receiving Order was issued the Debtor/Respondent has failed to provide his Statement of Affairs or an appropriate Settlement Scheme;

[b] That the Debtor has substantial assets and is misusing the Receiving Order as a shield to abscond paying his Creditors, especially **Diamond Trust Bank Kenya Limited**;

[c] That there have only been a handful of Creditors' Meetings, the last one being the meeting of **11 April 2011**, and therefore it is only fair and just that the Receiving Order be rescinded for want of completion of the Bankruptcy Proceedings as their continued pendency is prejudicial to the Applicant;

[d] That it is in the interest of justice that Bankruptcy proceedings once commenced should come to an end within a reasonable period of time.

[2] The application was supported by the Affidavit annexed thereto sworn by the Applicant's Head of Debt Recovery, **Elizabeth Hinga**, in which it was deposed that the Applicant obtained judgment against the Debtor in **Nairobi CMCC No. 930 of 2008: Diamond Trust Bank Kenya Limited vs. Preston Mathenge Nyumu**; and that after spending considerable amount of effort, time and expenses to locate the Debtor so as to proceed with execution, the Debtor petitioned the Court herein on the **10 August 2010** to be adjudged bankrupt on the ground that he was unable to pay his debts. Consequently, a Receiving Order

was made herein on **30 September 2010**.

[3] Upon learning that the first Creditors' Meeting was scheduled for **30 November 2010** vide a Gazette Notice dated **5 November 2010**, the Applicant filed an Affidavit in verification of its debt, then standing at Kshs. 463,367 to enable its participation in the Creditors Meetings; and did attend the Creditors Meeting held on **22 December 2010** at which it emerged that the Debtor had obtained financial facilities from various banks and defaulted in servicing the same. It was further averred that although several Creditors' Meetings were held thereafter, no progress was made towards settlement of the debts and no concrete proposal was made towards that end.

[4] It was further deposed for the Applicant that, given the lapse of time since the Receiving Order was made, it was apparent that the Debtor was mischievously utilizing the Receiving Order as a shield to circumvent the due process, while the Bank continues to incur costs in legal fees due to the continued pendency of this matter. The Applicant thus rooted for the rescission of the Receiving Order, and exhibited copies of the **Kenya Gazette No. 13509** by which the meeting of **30 November 2010** was advertised; its Affidavit Verifying a Debt sworn on **14 December 2010**; the Decree and Certificate of Costs issued in its favour in **CMCC No. 903 of 2008** and the impugned Receiving Order. [5] The application was supported by **NIC Bank Limited** vide the Supporting Affidavit sworn by **Kelvin Mbaabu** on **3 December 2015**. Their contention was that the Debtor is equally indebted to the Bank and that it initiated proceedings in **Nairobi CMCC No. 12 of 2010** to recover the amount then owing in the sum of **Kshs. 1,106,055/=**. It was further averred that the prosecution of that suit, and more particularly the Bank's application for summary judgment dated **31 May 2010**, was stayed upon the issuance of the Receiving Order herein. **NIC Bank Ltd** was particularly unhappy that the Debtor negotiated the settlement of its debt with the Applicant to the exclusion of the other Creditors, thereby evincing preferential treatment, yet the Applicant was not a priority Creditor. The Bank further and urged the Court to treat this as evidence that the Debtor has the means to settle his debts and has been using the Receiving Order to circumvent the due process and evade his duty to pay his debts.

[6] The application was resisted by both the Debtor and the Official Receiver, to which end, reliance was placed on the Replying Affidavit sworn by **Judy Mugo**, a State Counsel in the Office of the Official Receiver, wherein it was averred that the Official Receiver, upon being served with the Receiving Order, gazetted the said Order per **Gazette Notice No. 13509 (Annexure JM-2)** calling for the first Creditors Meeting on **30 November 2010**; and that subsequent meetings were held on **22 December 2010, 7 March 2011, 11 April 2011, 9 August 2011** and **3 November 2011**.

[7] It was further deposed that the Debtor, in compliance with **Section 16** of the **Bankruptcy Act, Chapter 53** of the **Laws of Kenya** (now repealed), lodged with the Official Receiver, a full Statement of Affairs, listing the names and details of his Creditors (marked **Annexure JM-3**). She therefore averred the continued pendency of this cause is no hindrance to the payment of the outstanding debts by the Debtor, but provides an opportunity for the Debtor to pay. On behalf of the Official Receiver, it was urged that the application is lacking in merit and therefore ought to be dismissed to let this Bankruptcy Cause run its full course. Replying Affidavits along similar lines were filed herein by **Equity Bank** and **K-Rep Bank** (now **Sidian Bank Limited**, but for purposes of the application will be referred to as **K-Rep Bank Limited**).

[8] The brief background of the application is that the Debtor filed the Bankruptcy Petition dated **10 August 2010** on **17 August 2010**; whereupon a Receiving Order was issued on **30 September 2010** and the Official Receiver was thereby constituted the Receiver of the Debtor's estate. In his Petition, the Debtor listed the following as his Creditors:

[a] **Diamond Trust Kenya Limited**

[b] **NIC Bank Limited**

[c] **K-Rep Bank Limited**

[d] CFC Stanbic Bank Limited

[e] Equity Bank Limited

[9] The Official Receiver then proceeded to publish the Receiving Order in the Kenya Gazette, notifying all the creditors of the Debtor of the first Creditors' Meeting, which was scheduled for **30 November 2010**. It is evident that in addition to the gazette, the Official Receiver also wrote letters dated **29 October 2010** to the Debtor and the Creditors, notifying them of the meeting of **30 November 2010** and requiring proof of debt in the prescribed form. There is no dispute that **K-Rep Bank** was the only Creditor that attended that first meeting with the Debtor; or that only the Applicant and **CFC Stanbic Bank Limited** filed their Proof of Debt forms.

[10] There is further no contention that, in the course of time, the Applicant became restless and filed the instant application dated **7 February 2013** on **13 February 2013**, on the basis that the Debtor did not seem keen on progressing the matter or settling the debts due. This prompted the Debtor to initiate negotiations with the Applicant, Diamond Trust (K) Ltd through the Official Receiver. According to the Official Receiver, the Debtor initiated the negotiations vide a letter dated **29 October 2014** and that Counsel for the Applicant, **M/s Mohammed Madhani & Co. Advocates**, agreed to the payment by the Debtor of a sum of **Kshs. 300,000/=** as full and final settlement, inclusive of legal fees; which sum has since been paid by the Debtor.

[11] It was following the payment that Counsel for the Applicant urged the Court, on **9 October 2015**, to have the Receiving Order rescinded and the Debtor discharged from his obligations herein. At the instance of the Court, this turn of events was brought to the attention of the other Creditors, who then opposed the move (save for **NIC Bank Limited**), insisting that their debts be similarly cleared, failing which the matter be proceeded with to conclusion. It is also evident that although **NIC Bank Limited** supported the application, it was on the ground that since the Debtor appeared to be in possession of the means to pay his debts, he should not be allowed to hind behind a Receiving Order; and therefore that the lifting of the Receiving Order would enable it to pursue the recovery of its debt unencumbered. Accordingly, the single issue to resolve herein is **whether sufficient cause has been shown for the Court to rescind the Receiving Order issued herein on 30 September 2010**.

[12] The application was canvassed by way of written submissions which I have carefully considered, including the authorities relied on by learned Counsel. **Section 100(2) of the Bankruptcy Act** pursuant to which the application was filed provides as follows:

"Where default is made by a trustee, debtor or other person in obeying any order or direction given by the official receiver, the court may on the application of the official receiver order the defaulting trustee, debtor or person to comply with the order or directions so given; and the court may also, if it thinks fit upon any such application, make an immediate order for the committal of the defaulting trustee, debtor or person:

provided that the power given by this subsection shall be in addition to and not in substitution for any other right or remedy in respect of the default."

[13] It is evident that the aforesaid provision is only available and can only be invoked by the Official Receiver for compliance purposes. It is accordingly not available to an aggrieved Creditor. But even assuming that it was, it is a provision that can only be invoked in the event of disobedience of any order or direction given by the Official Receiver for the purpose of ensuring compliance with such order or direction. It is evident then that **Section 100** of the **Bankruptcy Act** is not applicable to the facts hereof. Nevertheless, **Section 103(1)** of the **Bankruptcy Act** imbued the Court with powers to **"...review, rescind or vary any order made by it..."** and therefore the application would still be competently before the Court by dint of **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, as read with **Rule 147** of the Bankruptcy Rules.

[14] The Applicant faulted the Debtor for not cooperating with the Official Receiver after the issuance of

the Receiving Order, in that he failed to comply with the strict provisions of the Bankruptcy Act and the Rules thereunder in failing to submit his Statement of Affairs to the Official Receiver, and in failing to attend scheduled Creditors' Meetings. A fine explication of the obligations of a Debtor against whom a Receiving Order has been made is to be found in **Halsbury's Laws of England, Third Edition, Volume 2 at paragraph 649** wherein the learned authors of the treatise state thus:

"The first duty of a debtor after a receiving order has been made against him is to attend on the official receiver at his office immediately after service of the order. The official receiver or some person deputed by him must forthwith hold a personal interview with the debtor for the purpose of investigating his affairs. The official receiver should then furnish him with instructions for the preparation of his statement of affairs. The debtor must prepare his statement of affairs; he must further unless prevented by sickness or other sufficient cause, attend the first meeting of creditors, submit to such examination and give such information as the meeting may require, and must attend his public examination and answer question. He must also give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the official special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the official receiver, special manager, or trustee, or are prescribed by general rules, or may be directed by the court. If he is adjudged bankrupt, he must aid to the utmost of his power in realization to his property and the distribution of the proceeds among his creditors."

[15] Contrary to the Applicant's allegations of non-compliance, the Official Receiver deposed, at paragraph 5 of the Replying Affidavit, thus:

"That in compliance with Section 16 of the Bankruptcy Act, CAP 53 Laws of Kenya, ... the Debtor lodged with the Official Receiver a full statement of affairs listing the names and details of his creditors. (Attached herewith and marked JM-3 is a true copy of the Debtor's Statement of Affairs dated 10th August, 2010.)"

[16] It was further confirmed by the Official Receiver that the Debtor attended the first Creditors' Meeting; and that none of the listed Creditors was in attendance at that meeting other than the Applicant, as confirmed by the Minutes **marked JM-5**. It was thus the submission of the Official Receiver that the Debtor has been compliant thus far. As to the settlement of the Applicant's debt to the exclusion of others, the Official Receiver contended that it was a requirement for all the Creditors to file Proof of Debt form; which had not been done by NIC Bank Ltd or the other Creditors, (save for **K-Rep Bank Ltd**) by the time of the filing of the instant application. The Official Receiver added that Creditors being Secured Creditors, it was imperative for them to surrender the securities to the Official Receiver, or give proof of sale and the proceed thereof to the Official Receiver before the first Creditors' Meeting.

[17] From the foregoing, it is manifest that neither the Applicant nor NIC Bank Limited, has demonstrated any default on the part of the Debtor to warrant the rescission of the Receiving Order as sought. Moreover, the Applicant's debt having been settled, there would be no basis for it to insist on the lifting of the Receiving Order, when the other Creditors are yet to be paid. In the same vein, I would agree with the stance taken by the Debtor and the Official Receiver that in so far as NIC Bank Ltd was not a party to the instant application, it would have no *locus standi* to insist on the orders sought therein being granted to the detriment of the other Creditors; noting too that the Applicant, having been paid its debt, would have nothing to lose.

[18] The foregoing being my view of the matter, I would dismiss the Notice of Motion dated **7 February 2010** and direct that a Meeting of Creditors be convened forthwith by the Official Receiver, with a view of progressing this Bankruptcy Cause in respect of the debts owing to the other Creditors, namely:

[a] NIC Bank Limited

[b] K-Rep Bank Limited (Sidian Bank Limited)

[c] CFC Stanbic Bank Limited

[d] Equity Bank Limited

It is further directed that the aforesaid Creditors do ensure compliance with the requirements of Rule 207 and 210 of the bankruptcy Rules ... as to the filing of Proof of Debt form and accounting for the securities provided by the Debtor to secure the respective borrowings. The costs of the application to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2017

OLGA SEWE

JUDGE