REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

BANKRUPTCY CAUSE NO. 6 OF 2015

PEER CORET……..……..…CREDITOR/APPLICANT

VERSUS

DONALD DICKSON GOOSENS

ALIAS DON GOOSENS…….....……RESPONDENT

RULING

1. The application before me is brought pursuant to the provisions of Section 103 of the Bankruptcy Act. By dint of that section, the court was granted the power to review, rescind or vary any orders which it had made.

2. The applicant, **PEER CORET,** has sworn an affidavit to support the application. He deponed that he was served with a copy of the Receiving Order on 20th March 2015.

3. Prior to that, the applicant had obtained a Judgement against the respondent, **DONALD DICKSON GOOSENS** Alias **DON GOOSENS.** The said judgement was granted by Hon. Muchelule, Chief Magistrate *(as he then was)*, on 27th August 2008.

4. The trial court awarded to the plaintiff the sum of Euros 24,064, which was equivalent to Kshs. 2,237,952/-. The plaintiff was also awarded interest at court rates, together with the costs of the suit.

5. The defendant did not settle the decretal amount.

6. Instead, he lodged a petition at the Judicial Review Division of the High Court, to have the judgement and the consequential orders declared a nullity.

7. The defendant also sought an order for the re-trial of the case, before a court of competent jurisdiction.

8. The issue of jurisdiction is said to have arisen because the judgement was read out in court by a Senior Principal Magistrate, Hon. Miss E.N. Maina.

9. At the material time, the pecuniary jurisdiction of the Senior Principal Magistrate was Kshs. 3,000,000/-. Meanwhile, when the judgement sum was converted into Kenya Shillings, the quantum was Kshs. 3,376,595/46.

10. The High Court held that when one magistrate reads a judgement which was written by his predecessor, he would be merely performing an administrative task.

11. Therefore, as the trial court was presided over by a Chief Magistrate, who had the requisite pecuniary jurisdiction, Hon. Lady Justice Gacheche held that the Senior Principal Magistrate cannot be faulted for simply reading out the judgement which had been written by the Chief Magistrate.

12. In her considered opinion, the learned Judge said that if the defendant believed that the trial court lacked jurisdiction, he could have lodged an appeal. However, the defendant had even filed an application for Review, before the very same court, which he then said, had not had the requisite jurisdiction.

13. The defendant was still not yet content with the turn of events. He moved to the Court of Appeal, seeking an order for the stay of the execution proceedings, which the plaintiff intended to pursue.

14. The Court of Appeal held, on a *prima facie* basis, that the Chief Magistrate entered into the matter, clothed with the requisite pecuniary jurisdiction. The learned Judges of Appeal went on to say;

> **"It is our view, at this time and age, the Civil Procedure Act and Rules concerning the formal parts of any judgement must be considered within the letter and spirit of the overriding objective".**

15. They noted that the applicant did not seriously dispute the Judgement-debt. In those circumstances, the court declined to stay execution. In its decision;

> **"…we think it would not be fair, just or proportionate to grant a stay in a matter involving a debt which is not seriously contested?.**

16. Considering that the decision by the Court of Appeal was made on 28th January 2011, it is evident that that stage was reached about two-and-a-half years after the trial court delivered its judgement.

17. Thereafter, the respondent entered into a consent, indicating how he proposed to pay the decretal amount. The respondent conceded, in his Replying Affidavit that both he and his advocates, gave to the applicant, proposals for payment.

18. However, he states that his decision to file for bankruptcy was only motivated by his real inability to pay the debt.

19. But the applicant believes that the respondent had obtained the receiving order fraudulently, after he had concealed material facts.

20. As far as the applicant was concerned, the respondent failed to disclose that he was a Director in a company named **MUSCANT.** The applicant believes that the respondent was obliged to disclose the income he earned from that company.

21. As the applicant deems the respondent as having been guilty of material non-disclosure, he should be held to be un-deserving of the court's protection.

22. In answer, the respondent said that he did not conceal any material facts. His position was that on 20th May 2015, he made a full disclosure at a meeting which was held at the office of the Official Receiver.

23. Of course, as the applicant pointed out, that meeting was held after the court had granted the Receiving Order. Therefore, even if the respondent made a full disclosure at that stage, it would mean that such information may not have been available to the court at the time when the Receiving Order was made.

24. Right now, the respondent has deponed that he does not own any business either in Kenya or in Holland.

25. It is common ground that the respondent has not remitted any payments to the applicant since 2015.

26. To my mind, that fact would not, of itself, be evidence of the respondent's refusal to remit payment. I say so because, as soon as the Receiving Order was made on 20th March 2015, the Official Receiver was constituted as the receiver of the respondent's assets. From that date onwards, the law prohibited the respondent from making payments to any creditor, without appropriate reference to the Official Receiver and to the Court.

27. Any payments which are made by a person against whom a Receiving Order has been made, may well be unlawful, as they would constitute preferential payments.

28. A person who is the subject of a Receiving Order does not have any authority or mandate to conduct his financial affairs in the manner he desires.

29. Pursuant to section 9(1) of the Bankruptcy Act;

> **"On the making of a receiving order the Official Receiver shall thereby be 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?.**

30. In the light of the foregoing, it was not open to the respondent to choose whether or not to make any payments, after the receiving order was made. The law barred him from making payments, and the law also barred creditors from having a go against either the property or the person against whom a receiving order had been made.

31. I believe that that is what Mrs. Guserwa, the learned advocate for the applicant described as *"the protection"* that which the court accorded to the respondent.

32. After the receiving order was made, the Official Receiver called the First Meeting of Creditors. That meeting was called in line with section 14 of the Bankruptcy Act.

33. A Public Examination of the debtor should also have followed, in accordance with section 16 of the Bankruptcy Act. It is during such Public Examination that creditors would have had an opportunity to tender proof concerning the affairs of the debtor and the debtor's cause of failure.

34. But before the Public Examination, the debtor is obliged to file his Statement of Affairs, which is verified by an affidavit. It is in that Statement of Affairs that the debtor provides particulars of his assets, debts, liabilities, particulars of creditors, and securities held.

35. In effect, the grant of a receiving order is not an end in itself. The law provides procedures and rules which any creditor can use so as to bring the debtor to account.

36. At this moment in time, the applicant has not satisfied me that he has put to good use the law which could enable him hold the respondent to account.

37. Accordingly, there is no merit in the application dated 4th June 2015. It is therefore dismissed, with costs to the respondent.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **20th** day of **September** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Museve for Mrs. Guserwa for the Creditor/Applicant

Waiganjo for the Respondent

Collins Odhiambo – Court clerk.