



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
BANKRUPTCY CAUSE NO. 1 OF 2010

ABUBAKAR A.H. MOHAMED.....JUDGEMENT CREDITOR

VERSUS

AHMED MOHAMED SAID ALAMOUDY.....JUDGEMENT DEBTOR

RULING

On 14.7.2015 a warrant of seizure was issued by the court to enable the trustee seize the bankrupt's property. The trustee who is the judgement creditor appointed Malindi Real Agency Ltd to effect the warrant. The agent seized a house without land on Plot Number 682, Barani Malindi as well as a running hotel known as Shukran Case in Malindi. The seizure led to the filing of two objections by alledged owners of the property.

In view of the long running battles, I did direct that the objectors adduce oral evidence to prove that the seized properties belonged to them. The trustee who is the judgement creditor was of the view that the bankrupt was colluding with other people and hiding his properties.

The first objector is MOHAMED OMAR MOHAMED. His counsel, Richard Otara, filed an application dated 21st August, 2015 seeking the following orders: -

- i. THAT this application be certified as urgent and service of the same be dispensed with in the first instance.
- ii. THAT there be a temporary stay of execution decree herein against the applicant by opening all the padlocks placed on the applicant's business premises on Plot Number 4090 Malindi pending the hearing and determination of this application inter-parties.
- iii. THAT upon inter-parties herein the execution herein be set aside and/or vacated.
- iv. THAT the proprietor or directors of Malindi real agent agencies (a rent collecting agency) who are not court brokers and/or bailiffs be summoned to appear in court and show cause under what capacity they are executing court warrants.
- v. THAT costs for this application be provided for.

The second objector is AHMED OMAR SAID. The objector filed an application dated 28.8.2016 through the firm of NDEGWA KATISYA SITONIK & ASSOCIATES. The application seeks the following orders: -

i. THAT the court be pleased to enjoin Ahmed Oar Said as an interested party in these proceedings.

ii. THAT the court be pleased to restrain the Trustees by themselves, their servants, employees and/or agents from dispossessing the applicant the suit property, locking up, entering into, occupying, evicting the applicant and/or his tenants, demanding rent from the tenants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any other development or demolishing any structures or buildings in the suit property or in any other way interfering with the property and/or applicants quiet possession and enjoyment all that house without land situate on Plot No. 4090 along Mombasa – Malindi Road pending the hearing and determination of this application inter-parties.

iii. THAT the house without land situate on Plot No. 4090/207 along Mombasa – Malindi Road does not form part of the debtor’s property.

iv. THAT the court be pleased to issue a permanent injunction restraining the Trustees by themselves, their servants, employees and/or agents from dispossessing the applicant the suit property, entering into, occupying, evicting the applicant tenants, demanding rent from the tenants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any other development or demolishing any structures or buildings in the suit property or in any other way interfering with the property and/or applicants quiet possession and enjoyment all that house without land situate on Plot No. 4090/207 along Mombasa – Malindi road.

OMAR MOHAMED SAID is the third objector. He filed an application dated 20.8.2015 seeking the following orders: -

i. THAT the Honourable Curt be pleased to issue an interim order restraining the objector from attaching of all those goods in the house and the house without land on Plot No. 682 Barani Malindi until the inter-parties hearing of this application.

ii. THAT an interim order do issue staying the execution of the warrant of seizure issued by the court in favour of the creditor ABUBAKAR A.H. AHMED dated 4th July, 2015 until the hearing and determination of this application.

iii. THAT all the goods taken form house and the house without land on Plot No. 682 Barani, Malindi be restituted to the object.

The creditor who is also the trustee raised preliminary objection through his advocates Katsole & Co. The objection raised is in relation to the objection dated 26.8.2015. It is stated in the objection dated 4.9.2015 that the objector’s application is fatally defective and offends the provisions of the Bankruptcy Act and Rules, that a bankruptcy suit is for the creditor and debtors and therefore the applicant lacks total capacity to enjoin himself without seeking leave of the court by way of formal application and that the application is in total violation of the Rules of law, vexatious, abuse of court process and bad in law crafted by the debtor to mislead and frustrate justice as the advocate who attested the annexures to the application did not have a practicing certificate.

The objection proceedings were listed for hearing on 9.5.2016. I gave directions on 19.4.2016 to the effect that all objectors appear in court during the hearing so as to be cross-examined on their respective allegations.

MOHAMED OMAR MOHAMED testified that he is the proprietor of the hotel known as Shukrani Cafe. He lives in Mombasa but the hotel is in Malindi. He has another hotel in Mombasa. He produced his single business permit for the years 2015 and 2016 together with payment receipts. He also produced health licences for the two years which are in his name. On 20.8.2015 someone went to the hotel and closed it alleging that it belonged to the bankrupt. The hotel was closed for ten (10) days. He incurred heavy losses as his stock was locked in for ten days. His interest is the hotel business and does not own the building.

AHMED OMAR SAID testified that he owns the house without land located on Plot Number 4090, Malindi. He bought the house on 15.1.2013 and a sale agreement was signed before Kupalia Advocate. He had conducted a search in December, 2012 before buying the house. He renovated the house and started a hotel business. He let the hotel to a tenant who later left. The hotel is now let to MOHAMED OMAR MOHAMED. On 20.8.2015 people invaded the building claiming it belongs to Ahmed Mohamed said, the judgement debtor. He is not related to him. He bought the building and added two more floors on top.

AHMED MOHAMED SAID, the judgement debtor informed the court that he used to own the building where Shukrani Café is located. He built the building in 1996 but reached the lentel level. He then sold the building to his wife. His brother was indebted and he wanted to sell the house to pay the debt. His wife took the house and paid the debt. In 2010 his wife sold the building to SAID MBARAK. He does not own any share in Shukrani Café.

It is his evidence that on 18.12.2013 he entered into an agreement with the judgment creditor, who accepted to take Kshs.600,000/=. He was to be paid a deposit of Kshs.450,000/= which amount was paid by his family and the balance was to be paid in 2015. He went to Kituo Cha Sheria for assistance and was referred to Mr. Kimani Advocate. The balance of Kshs.150,000/= is deposited with the said advocates. He does not own the building housing Shukrani Café now. The creditor was awarded Kshs.1.2 million by the Court of Appeal.

JOSHUA MALINGI MKAMI, OMAR SAID ALI, and MOHAMED ALI ALAUSSI also testified. They all testified that they witnessed the agreement between the judgement debtor and creditor signed on 18.12.2013. They also witnessed payment of Kshs.450,000/= to the judgement creditor. The agreement is titled "*Consent Order*". It was signed before the Barani sub-location Assistant Chief, Joshua Malingi Mkami.

Section 54 of the Bankruptcy Act, Cap 53 states as follows: -

“Any person acting under warrant of the court may seize any part of the property of a bankrupt, or of a debtor against whom a receiving order has been made, in the custody or possession of the bankrupt or the debtor, or of any other person, and with a view to seizure may break open any house, building or room of the bankrupt or the debtor where the bankrupt or the debtor is supposed to be, or any building or receptacle of the bankrupt or the debtor where any of his property is supposed to be; and, where the court is satisfied that there is reason to believe that property of a bankrupt, or of a debtor against whom a receiving order has been made, is concealed in a house or place not belonging to him, the court may grant a search warrant to any police officer or officer of the court, who may execute it according to its tenor.”

The issue for determination is whether the objection proceedings are properly before the court and whether the objections should be upheld. The preliminary objection is to the effect that the objection dated 26.8.2016 is defective as it was brought under the Civil Procedure Rules which do not apply. I have seen the application and it is brought both under the Civil Procedure Rules as well as sections 47, 82, 100 and 103 of the Bankruptcy Act and rules 15 and 16 of the Bankruptcy rules. The main gist of the objection is that the trustee is executing or seizing property belonging to third parties. This entitles any person whose property is wrongly attached to approach the court and seek its release.

I have noted that the warrant of seizure dated 14.7.2015 indicates that it was issued to "*Kinyua Auctioneer or Agent*." A warrant of the court should be issued to a licenced auctioneer who is answerable to the court. It is not clear whether Malindi Real Agency Ltd is a duly licenced Auctioneer. It is alleged that they are debt collectors. Court warrants cannot be executed by auctioneer's agents. They have to be executed by a licenced auctioneer duly appointed by the court.

Turning to the objection raised on the execution, it is clear that the properties attached do not belong to the judgement debtor. On 16.6.2016 the trustee who is the judgment creditor informed the court that he

did not attach immovable property. He only attached movable items.

The objectors have proved that Shukrani Cafe does not belong to the judgement debtor. They have also proved that the building where the Shukrani Cafe is located also does not belong to the judgement debtor. I am satisfied that the attached properties do not belong to the judgement debtor. I will not dwell on the issue of payment arrangements between the judgement debtor and the trustee as there is an application pending in relation to that issue. The evidence shows that the building housing Shukrani Cafe belongs to Ahmed Omar Said while the Cafe belongs to Mohamed Omar Mohamed. There is no concealment of the judgement debtor's properties.

In the end, all the objector's applications are granted to the extent that the seizure of their respective properties is hereby lifted. The warrant of seizure dated 14.7.2015 is hereby cancelled as it is not being executed by the court appointed auctioneer. Costs to the objectors.

Dated and delivered in Malindi this 27th day of October, 2016.

S.J. CHITEMBWE

JUDGE