



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**BANKRUPTCY CAUSE NO. 23 OF 2014**

**(As consolidated with BANKRUPTCY CAUSE NO.24 OF 2014)**

**NAAZ HAROON ISMAIL**

**HANIF KASSAMALI HIRJI.....DEBTORS**

**AND**

**PBM NOMINEES .....CREDITOR**

**RULING**

1. This Ruling concerns two Petitions which were consolidated by Gikonyo Judge on 17<sup>th</sup> October 2014.
2. The foundations of the Petitions are Bankruptcy Notices 10 and 11 of 2013 which were served on the Petitioner on 26<sup>th</sup> July 2013.
3. The Debtors are indebted to the Creditor in the sum of Kshs.7,079,618.50 being the balance due under a decree obtained by the Creditor against the Debtors in the High Court Civil Suit No. 574 of 2010. Those debts are not disputed.
4. An attempt by the Debtors to set aside the Bankruptcy Notices was dismissed by Gikonyo Judge on 20<sup>th</sup> May 2014.
5. The consolidated Petitions were presented on 8<sup>th</sup> August 2014 prior to the coming into force of The Insolvency Act and by dint of Section 733 thereof the Bankruptcy Act is the statute applicable to this dispute.
6. Rule 128 of The Bankruptcy Rules provides as follows:

“Where a debtor intends to show cause against a petition, he shall file a notice with the registrar, specifying the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor and his advocate, if known, a copy of the notice three days before the day on which the petition is to be heard”.

It is not in dispute that the Debtors have not given any notice denying or disputing any of the Statements in the Petitions.

7. In the submissions filed by the Debtors in resistance to the Petitions they cite Section 7 (3) of the Bankruptcy Act which provides:-

“If the Court is not satisfied with the proof of the Petitioners 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”.

8. It is then submitted on their behalf as follows:

“Your Lordship, rules are made pursuant to statutory provisions, and the rules cannot supersede the enabling statutory provision under which they are made. The above statutory provision therefore supersedes any provision of the bankruptcy rules and we submit that in determining these petitions the court ought to bear in mind efforts made by the petitioners prior to and during the course of these proceedings in making good the claim by the creditor”.

9. Have the Debtors made any real effort to settle the debt?

10. The Court record shows that prior to this matter being listed for hearing indulgence had been given to the Debtors on several occasions.

11. On 30<sup>th</sup> January 2015 the Debtors were granted 14 days to file Affidavits disputing or conceding to the averments in the Petition. This was however not done.

12. On 27<sup>th</sup> February 2015, Counsel for parties appeared before Court and indicated that they were likely to settle the matter. Then on 6<sup>th</sup> March 2015 Mr. Fraser told Court as follows:

**“We have agreed that they will pay some lesser amount”.**

13. On 8<sup>th</sup> June 2015 Mr. Fraser informed Court that he was yet to receive a Consent from the Debtors’ lawyers. This was not disputed by Mr. Odoyo who was holding brief for Mr. Kimathi.

14. The Creditors Application of 15<sup>th</sup> October 2014 came up for hearing on 25<sup>th</sup> August 2015. The Summons under Rule 132 of the Bankruptcy Act was for an order that the attendance of the Petitioning Creditor and of the witnesses to prove the debt and act of Bankruptcy be dispensed with at the hearing of the Petition and the affidavit of Atul Shah be admitted in evidence. That Application was allowed by consent. But of significance was that the Debtors were still asking for time to resolve the matter.

15. The history of the matter speaks for itself. Although the Debtors have been indulged time and time again, they have not made any serious attempts to settle the undisputed debt. And while they talk of making various attempts to settle, no iota of evidence was placed before this Court in proof thereof.

16. The inevitable result this Court must reach is that the Debtors have committed an Act of Bankruptcy in terms of Section 3 (1) (g) of the Bankruptcy Act which provides:

“3 (1) A person commits an Act of Bankruptcy in each of the following cases:

(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 counter-claim, 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 order 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”.

17. On the undisputed facts of this case I make the following orders:-

1) A receiving Order in Bankruptcy is hereby issued pursuant to Section 7(2) of the Bankruptcy Act.

2) The Office Receiver is hereby appointed as Receiver of the property of the Debtors.

3) The Petitioner’s costs including the cost of the Bankruptcy Notice shall be taxed and paid out of the Estate of the Debtors in accordance with Rule 146(2) of the Bankruptcy Rules.

**Dated, Signed and Delivered in Court at Nairobi this 20<sup>th</sup> Day of December, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Fraser for Petitioner

Alex - Court clerk