



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

BANKRUPTCY CAUSE NO. 7 OF 2014

IN THE MATTER OF BANKRUPTCY OF WILLIAM KIPRONO BUSIENEI

AND

IN THE MATTER OF SECTION 8(1) OF THE BANKRUPTCY RULES

AND

RULE 105 OF THE BANKRUPTCY RULES

RULING

When on 2nd October 2014 the Debtor herein filed this petition for a receiving order Chemitei J declined to grant him the order and directed him to serve the creditors and return for an interpartes hearing on 8th October 2014. Come that day he did not attend but there was an appearance by Mr. Nyakundi, Advocate representing one of the creditors. The Debtor not being present the matter was returned to the registry. Nothing was heard from him again until 23rd October 2014 when he filed a Certificate of Urgency stating that a warrant of arrest had been issued against him in favour of the creditor in Kitale H.C.C.C. 100 of 2009 for a sum of Kshs.10,371,151/= and unless the orders he had sought were granted he risked being arrested and committed to civil jail yet he was totally unable to pay his debt. On 30th October 2015 this Court certified that application as urgent and directed it be heard interpartes on 12th November 2014. The creditor's advocate however applied for adjournment to file some annexures and the application was not heard. It was listed for hearing on one more occasion but it could not proceed as counsel for the debtor was bereaved. It did however finally proceed on 24th September 2015. Mr. Lore Advocate held brief for Mr. Kitur for the Debtor while Mr. Nyakundi appeared for the Creditor – Kenya Seed Company.

Mr. Lore beseeched this Court to issue the receiving order but Mr. Nyakundi vehemently opposed the petition and submitted that the same could not be allowed as firstly it was brought under the wrong provisions of the law and secondly, as no statement of affairs had been filed yet it is mandatory and thirdly because it is an abuse of the Court process as it was made to evade a consent order recorded by the parties in Kitale HCCC No. 100 of 2009. He contended that the petition was filed maliciously to defraud the creditor of the amount owed. He submitted that under Chapter 7 of the Bankruptcy Act the debt here is undischageable as there was fraud involved. He contended that as in the affidavit the debtor has deposed that his company is not owed any money then it means he sold the goods, received the money and diverted the proceeds. He further contended that after the creditor obtained the judgment the debtor formed a company Busienei Enterprises Limited with his children to which he transferred all his assets so that the creditor could not enjoy the fruits of her judgment. He urged this Court to find that this petition is but a back door appeal against the consent order and strike it out. He put his reliance on three High Court decisions **Milimani Bankruptcy Cause No. 16 of 2012 Benard Musyoka V. Mary Nduku Ndunda**. In **Re Al – Moody (A Debtor) [1990] KLR 280** and **Ngure V. Gachoki Gathaga** (reported).

He urged this Court to award the costs of the petition to the Creditor.

Mr. Lore urged the Court to regard the issue of the wrong provisions as a technicality under Article 159 of the Constitution and hence ignore it. On the issue of fraud he submitted that the same was not particularized and proved. He contended that the debtor had satisfied the Court why he qualifies for the order sought and that the Kitale H.C.C.C. No. 100 of 2009 should not be a bar. He noted that they were not asking the Court to set aside the consent order and urged the Court to allow the petition as presented.

A receiving order following a debtor's petition is made under Section 5 of the Bankruptcy Act. The said section leaves it to the discretion of the Court to grant or refuse the order. However I do agree with Mr. Lore's submission that the mere citation of the wrong provision alone ought not to be a ground to refuse the order.

The issue for determination then is whether the debtor herein is deserving of the receiving order. Having heard and considered the rival submissions I am not persuaded that he is. The Creditor has to the replying affidavit annexed a Consent Order recorded by the parties in Kitale H.C.C.C. 100 of 2009 wherein the Judgment Debtor now the debtor had agreed to liquidate the decretal sum by monthly instalments of Kshs.500,000/= starting 30th October 2014. It cannot be the case that he entered into this consent knowing that he could not pay. If that is the case then he was being dishonest and was abusing the Court process. His case is on all fours with that of the debtors in the two causes cited by Mr. Nyakundi, Advocate for the Creditor. In both cases the Courts concluded that the petitions were an abuse of the Court process and declined to grant a receiving order. The debtor here ran to this Court to avoid complying with the consent order which he had freely entered into with the Creditor. I say freely as it was Mr. Lore's submission that they have no intention of having set it aside and when the Court directed him to serve the Creditor he vanished only to re-appear when the Creditor obtained a warrant of arrest against him. If he was genuine he would have appeared before the Court that issued the warrant of arrest and persuaded the Court to make a receiving order instead of a committal order as it could under Section 102 of the Bankruptcy Act. He has not given any explanation for vanishing after being ordered to serve the Creditor. Neither has he sworn a replying affidavit to deny that he did in fact transfer the assets of Soiyet Agrovot to Busienei Enterprises Limited as alleged .

It is my finding that to make the receiving order shall only aid him to abuse the process of the Court even further. The petition is accordingly dismissed with costs to the Creditor.

Signed, dated and delivered at Kisumu this ..29th... day of ...October.... 2015

E. N. MAINA

JUDGE

In presence of:-

N/A for the Debtor)

) Both notified vide letter from Deputy Registrar

N/A for the Creditor)

CA: Felix Magutu