



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

BANKRUPTCY CAUSE NO. 14 OF 2009

JOHN MACHARIA PETITIONER

VERSUS

NIC BANK APPLICANT/CREDITOR

RULING

On 31st July 2009 this Court issued a receiving order pursuant to the Debtor's petition for bankruptcy dated 10th July 2009 but presented herein three days later and pursuant to that Receiving Order the official receiver was on 5th August 2009 constituted receiver of the debtor's estate.

On 15th December 2011 NIC Bank through Kalya & Company Advocates filed an application for an order to rescind, revoke, vacate, set aside and/or annul the receiving order which stayed execution of all civil legal process against the debtor's property or person, in any Court and that the Court do permit the creditor to execute the decree issued in Kitale H.C.C. No. 18 of 2009.

The application which is expressed to be made under Section 33 and 10 of the Bankruptcy Act and Rules 15 and 147 of the Act is premised on grounds that:-

- 1. The Petitioner-debtor is guilty of failing to provide full discovery of his assets in his statement of affairs filed herein.**
- 2. The Petitioner-debtor has sufficient assests to meet and settle his liabilities.**
- 3. The Petition has been filed with the sole intention of frustrating creditors, including the applicant/respondent herein from enforcing recovery of their just and lawful debts from him and this amounts to abuse of the process of the Court.**
- 4. The Petitioner-debtor by failing to provide full discovery of his property to this Court has committed an offence under Section 138(1) of the Bankruptcy Act.**
- 5. It is more than two years since the date when the receiving order was made and the Petitioner has taken action to conclude the bankruptcy proceedings.**

The application is supported by the affidavit of Lilian Sogo, Legal Officer of the applicant, sworn on 15th December 2011. She deposes inter alia that the statement of affairs filed by the Petitioner is on the face of it not incredible (sic); that the receiving order was obtained on the basis of falsehood and non-disclosure of material facts and with the sole intention of frustrating the applicant from enforcing its just and lawful debts from him and this amounts to abuse of the Court process. At paragraph 5(a)-(c) she demonstrates why this is so and cites the facts that the Petitioner has failed to respond to this application

despite being served; the fact that he only presented his petition upon being served with a Notice to Show Cause and the fact that he has not made any effort to have this petition heard and concluded. She further deposes that had he been truly bankrupt he should have filed the petition for bankruptcy upon being served with a demand notice. She therefore urges this Court to grant the order sought.

The Official Receiver filed a Replying Affidavit in which he states that he does not oppose the application. He deposes that the Debtor has failed to comply with the provisions of the Bankruptcy Act on several occasions when called upon to do so and that his letters to the Debtor have gone unanswered. To this effect he has annexed two letters dated 24th September 2012 and 28th August 2014. He also accuses the Debtor of failing to attend the 1st Creditor's meeting, submit to examination and giving of such inventory of his property; Also of failing to inform him of his residential and postal address and for not acting diligently to have this matter concluded.

At the hearing of the application Mr. Kamau, Learned Advocate for the applicant/creditor relied on the grounds and depositions in the supporting affidavit.

Mr. Mayaka, the Official Receiver submitted that they did not oppose the application.

Under Section 5 of the Bankruptcy Act a Court may make a receiving order upon a petition being presented either by a creditor or a debtor if a debtor commits an act of bankruptcy. One of the instances where a debtor commits an act of bankruptcy is where as in this case he files in Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself – see section 3 (1)(f) of the Act. Section 8 (1) of the Act provides that upon presentation of the Debtor's petition the Court shall make a receiving Order which is what transpired in this case. Section 9 then provides that on the making of a receiving Order the official receiver shall be thereby constituted receiver of the property of the debtor. The Registrar is thereafter required under Section 13 to advertise the receiving Order by publication in the Gazette. Once a receiving Order is made the first meeting of the creditors is then held. That meeting is held "for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be accepted or whether it is expedient that the debtor shall be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property." Rule 161 of the Bankruptcy Rules provides that where the creditors have accepted a composition or scheme and the public examination of the debtor has been concluded the receiver or debtor may apply to the Court to fix a day for hearing of an application for approval of the composition or scheme. The public examination of the Debtor is provided for under Section 17 of the Act and is in my view mandatory. Rule 151 makes it the responsibility of the Official Receiver to apply to the Court to appoint a day and hour for holding the public examination. Under Rule 153 of the Bankruptcy Rules it is the Official Receiver who serves notice of the public meeting upon the debtor as well as the creditors. He is also required to send a notice of the order to one of the local papers and forward notice of the order to be gazetted. It appears that all the aforesaid has not been done in this case. If it was done the Official Receiver has not availed any evidence of it. He cannot therefore be heard to blame the debtor for the inaction in this case. Note that a receiving order is discharged once the scheme is approved – see rule 171 (2) of the Bankruptcy Rules. It is only once such composition or scheme is rejected by the creditors (rule 182) or where the debtor himself makes an application, or the receiver satisfies the Court that he has absconded among others that the debtor is adjudged bankrupt and once that is done there are consequences. Again there is no evidence that that was done and there is no order on the Court record adjudging the debtor in this case bankrupt.

Whereas under Section 103 of the Act this Court may review, rescind or vary any order made by it, I am not persuaded that it would be just to grant the order sought in the application. Accordingly this application is struck out so that the official receiver may move the Court appropriately. Costs be in the cause. It is so ordered.

Signed, dated and delivered at Kisumu this 22nd day of October, 2015

E. N. MAINA

JUDGE

In presence of:-

N/A for the debtor

Mr. Mayaka for the Official Receiver

Mr. Nyanga for Kalya for Respondent

CA: Felix Maguta