



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
BANKRUPTCY NOTICE NO 8 OF 2013

SIMON NDEGEDEBTOR

Versus

TEAM CONSTRUCTION LIMITEDCREDITOR

RULING

Application to set it aside Bankruptcy Notice

[1] I have before me an Application to set aside a Bankruptcy Notice. By law an application to set aside a Bankruptcy Notice consists in an affidavit filed by the Debtor challenging the Notice. The Debtor filed a Replying Affidavit dated 30th July, 2013. See rule 101(1) of the Bankruptcy Rules cited below:

101(1) The filing of the affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and not less than three days before the day so fixed shall give notice thereof both to the debtor and to the creditor, and to their respective advocates, if known.

[2] The application is contested by the parties herein; the arguments for and against the application are condensed in their respective written submissions filed in court.

[3] According to the Debtor, he was not bound by the judgment and decree of the court in **NBI HCCC NO 163 OF 2011** for two reasons: 1) that the consent judgment in the case was purportedly entered on his behalf by his former associate Mr Stephen Mose Advocate; and 2) that he never had any direct dealing with the Creditor in the transactions which led to the debt herein; Mr Mose did and has retained the money until now; he is the real debtor. He insisted that, although a professional offence may have been committed when his firm was used by the said Mr Mose, it does not mean that he committed an act of bankruptcy in the sense of the law. He believes the Notice herein is maliciously issued to embarrass him as an advocate of the High Court of Kenya. The Notice ought to be set aside.

[4] The creditor has emphasized that the Bankruptcy Notice is proper. It is founded on a debt arising out of a decree of the court issued on 8.5.2013 in **NBI HCCC NO 163 OF 2011**. Neither has the decree been set aside nor execution thereof stayed by the court. Further, the debtor has not put forth a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment was obtained. Allegations that the consent was entered into without the knowledge of the Debtor are not only obvious afterthoughts, but also would not be a bar to the court's granting the application by the Creditor. The Debtor' application should be dismissed and the Creditor to be allowed to file Petition under rule 105 of the Bankruptcy Rules.

COURT'S RENDITION

Issues

[5] The ultimate decision I must make, is whether the Bankruptcy Notice herein should be set aside. But to reach there, I see two issues which I should determine, namely;

- 1) Whether the Bankruptcy Notice is proper in the sense of the law; and**
- 2) Whether the Debtor has committed acts of bankruptcy.**

Bankruptcy Notice: its propriety

[6] A proper Bankruptcy Notice is one which has complied with rule 99 and 100 of the Bankruptcy Rules. Rule 99 and 100 thereof are reproduced below:

99 A creditor desirous that a bankruptcy notice may be issued shall produce to the Registrar an office copy of the judgment or order on which the notice is founded and file the notice together with a request for issue; the creditor shall at the same time lodge with the Registrar two copies of the bankruptcy notice to be sealed and issued for service.

100

- 1. Every bankruptcy notice shall be endorsed with the name and place of business of the advocate actually suing, or, if no advocate is employed, with a memorandum that it is sued by the creditor in person.**

(2) There shall be also endorsed on every bankruptcy notice an intimation to the debtor that if he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the Registrar.

Those rules give effect to Section 4 of the Bankruptcy Act, Chapter 53 of the Laws of Kenya, which provides inter alia that;

- 1. A bankruptcy notice shall be in the prescribed form.**
- 2. shall require the Debtor to pay the decretal sum or to secure or compound for it to the satisfaction of the Creditor or the Court; and**
- 3. shall state the consequences of non-compliance with the notices; and**
- 4. Shall be served in the prescribed manner.**

[7] The Bankruptcy Notice issued herein is proper having complied with rule 99 and 100 of the Bankruptcy Rules; two copies of the Notice in the prescribed form and a copy of the decree on which the Notice is founded were lodged with the Registrar; the Notice was properly endorsed as

by law required and specifically required the Debtor to pay the decretal sum and stated the consequences of non-compliance with the notice. It was then served as by the law required and an affidavit of service was duly filed. That issue closes. I move to the second issue.

Acts of bankruptcy

[8] The Debtor contends that a professional offence may have been committed but it does not constitute an act of Bankruptcy as by law required. I presume the term professional offence is in reference to a possible professional misconduct committed by the Debtor's associate as an advocate. But I think the statement altogether portrays a total misconception of what constitutes an act of bankruptcy under the Bankruptcy Act. Section 3 of the said Act bails us out; it prescribes instances which constitute acts of bankruptcy. But the more specific and relevant provision to this case is section 3(1) (g) of the Act, which provides as follows:

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 counterclaim, 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 decree 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;

[9] In this case, the creditor; 1) has obtained a final decree against the Debtor for a specified amount, and, execution thereon has not been stayed; 2) has served on the Debtor in Kenya, a bankruptcy notice under the Act, and the Debtor has not within seven days after service of the notice, neither complied with the requirements of the notice nor satisfied the court that he has a counterclaim, 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 decree was obtained, or the proceedings in which the order was obtained. Further, the Creditor is, for the time being, entitled to enforce the final decree arising from **NBI HCCC NO 163 OF 20II**. Therefore, for all purposes under the Act, he is deemed to be a creditor who has obtained a final decree of the court.

[10] Accordingly, the Debtor has committed an act of Bankruptcy and is a proper subject of these proceedings. All the other arguments by the Debtor that the consent judgment in **NBI HCCC NO 163 OF 20II** was entered into without his knowledge or that the proper debtor should be Mr Mose Advocate are not useful in these proceedings. Perhaps, they might profit an application or suit to set aside the consent judgment. They do not constitute ***a counterclaim, 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 decree was obtained, or the proceedings in which the order was obtained.***

[11] The upshot is that the Debtor's application to set aside the Bankruptcy Notice herein is dismissed. The Bankruptcy Notice is not set aside, and the Creditor may commence proceedings in accordance with rule 105 of the Bankruptcy Rules. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 28th day of March, 2014

F. GIKONYO

JUDGE