



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
BANKRUPTCY NOTICE CAUSE NO 10 OF 2013
(CONSOLIDATED WITH BC NO 11 2013)

NAAZ HAROON

ISMAIL

HANIF KASSAMALI HIRJI
DEBTORS

AND

PBM NOMINEES LIMITED
.....CREDITOR

RULING

Causes consolidated: Composite Ruling

[1] This is a composite Ruling for Bankruptcy Case No 10 and 11 of 2013 which were consolidated by consent of the parties on 14.3.2014.

Applications to set aside Bankruptcy Notices

[2] These are Applications to set aside two Bankruptcy Notices which were issued upon the Debtors pursuant to a request made in that behalf to the court. On receipt of the Notice the 1st and 2nd debtors filed separate Affidavits sworn on 30th July, 2013 and 2nd August, 2013, respectively. By law, these affidavits constitute the application to set aside the Bankruptcy Notice. The relevant rule 101(1) of the Bankruptcy Rules is 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.

[3] The applications were contested by the parties herein; the arguments for and against the application are condensed in their respective written and oral submissions filed in and made before court, respectively. I have considered them but below I re-state the specific emphasis which was made by each party on the central points in issue.

[4] On 14.3.14 counsels for the parties made oral submissions before me. M/S Keitany, counsel for the Debtors, submitted that the Debtors have each filed a replying affidavit showing why they should not be adjudged bankrupt. The Debtors admit being indebted to the Creditor but there was an agreement that the sum due be liquidated in instalments of Kshs. 40,000/- per month. The Debtors paid as agreed until last year when they needed to resolve the amount of interest payable on the principal sum. A meeting was held between the parties but for some reason, the Creditor thought the Debtors would pay the entire sum at once.

[5] She continued to submit that Dairy World Ltd bought machinery from Ranchland Ltd. But on closure of business, Dairy World Ltd left its machinery at the demised premises. The assets/machinery was sold by the Creditor upon distress for rent. The assets/machinery was valued at Kshs. 4,500,000. The said value realized on distress for rent by the Creditor was not credited into the Debtors' accounts. Further, the Debtors have been paying as agreed. For those reasons, counsel is of the view that the Debtors should be allowed to pay the agreed monthly instalment of Kshs. 40,000/- rather than being declared bankrupt.

[6] Mr. Frazer argued the case for the Creditor. He referred the court to rule 100(2) and 101(1) of the Bankruptcy Rules, and submitted that an Affidavit filed to challenge a Bankruptcy Notice must show a counter-claim or cross action which equals or exceeds the debt, and which could not have been raised in the suit where the debt was ascertained. The affidavit filed herein does not satisfy that threshold. The debt is not also in dispute. Therefore, the claims for goodwill and distress for rent cannot hold any water. In fact, Mr Frazer submitted, there was no distress for rent at all. What there is in this matter is that the Bank of Baroda took away the goods Debtors as security offered to them. And the Debtors have not challenged that claim. There is also no entitlement to good will as alleged by the Debtor. Mr Frazer did not stop there. He argued that, in this kind of application, the Court cannot order payment by instalments; it can only determine whether the Bankruptcy Notice is good or not. In any event, no payments have been received for 1 year now. He was of the view that the applications have no merits and should be dismissed. And the Notices herein should be allowed to proceed to the next stage; allow the filing of a petition for Bankruptcy.

CCOURT'S RENDITION

The issue

[7] The main issue I should determine is:

a) *Whether the Bankruptcy Notices issued herein should be set aside.*

But to reach there, I see two other strands appurtenant to the main issue which I must also determine, namely;

1) *Whether the Bankruptcy Notices are proper in the sense of the law; and*

2) *Whether the Debtors have committed acts of bankruptcy.*

Propriety of Bankruptcy Notice herein

[8] The Creditor has emphasized that the Bankruptcy Notices are proper, as they 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.

Needless to state that the rules above 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.***

[9] The Creditor made a request for the issuance of the Bankruptcy Notices herein; lodged with the Registrar two copies of the Notice in the prescribed form and a copy of the decree on which the Notice is founded; the Notice was properly endorsed as by law required, specifically required the Debtor to pay the decretal sum and stated the consequences of non-compliance with the Notice. It was then served in accordance with the law required and an affidavit of service was duly filed. Accordingly, the Noticed complied with rule 99 and 100(2) of the Bankruptcy Rules. That issue closes. I move to the next issue.

Existence of Counter-claim, set-off or cross-demand

[10] The Notices are founded on a debt arising out of a final judgment of the court which is in favour of the Creditor and against the 1st and 2nd Debtor in **NBI HCCC NO 574 OF 2010**. The Creditor is convinced that the Notice is in order because; neither the said judgment nor execution thereof has been set aside or stayed by the court. Further, it is the contention by the Creditor that the debtors have not put forth a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which they could not have set up in the action in which the judgment was obtained. Therefore, is the Debtors' claim of uncredited sum of Kshs. 4,500,000 herein 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?

[11] The law recognizes a combination of two matters; 1) a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt; and 2) the counter-claim, set-off or cross-demand could not have been set up in the case where the debt was ascertained. The former situation envisages the Debtor telling the Creditor that 'I have a valid claim which will completely settle your claim and so you cannot sustain any bankruptcy proceedings against me''. Where the claim being set up against the Debtor is lower than the liquidated claim, the provision in section 4 of the Bankruptcy Act and Rule 100(2) will not avail relief to such debtor unless he pays off the difference between the counter-claim, set-off or cross-demand, and the amount claimed in the Notice within the time specified in the Bankruptcy Notice. The amount being claimed to constitute a set-off herein is Kshs. 4,500,000 whereas the sum claimed by the Creditor is Kshs. 6,508,867/25 as at the date of issuing of the Notice. Even assuming the said amount is

proved, the debtors would still have committed acts of bankruptcy because they have not paid off the amount in the Notice less the amount of the alleged cross-demand or counter-claim or set-off as the case may be. One other important detail; from the Valuation Report on the machinery/assets being claimed as set-off, the said assets belong to Ranchland Meats Ltd. Counsel for the Debtors attempted to explain that the said machinery had been purchased by the Dairy World Ltd from Ranchland Meats Ltd but no proof was offered to support the claim. The Creditor also raises another twist to the matter; that the said machinery was not distressed upon for rent but was taken away by Bank of Baroda which had secured the machinery as security for a loan advance to the company. The Debtors also stake a claim on goodwill realized by re-renting of the premises by the Creditor. No evidence is laid before the court to show that; they were entitled to good will; or that the Creditor benefitted from goodwill to which the Debtors were lawfully entitled to; or even the amount of the alleged goodwill. There is absolutely no evidence towards that end, and in the circumstance, the less I talk about that issue the better. It simply has not been proved. Moreover, the Debtors have not provided evidence when these claims arose or whether they could not have been raised in the case from which the debt herein arises. In sum, the court is unable to assign the claims by the debtors the vitality of 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 under section 4 of the Bankruptcy Act and rule 100(2) of the Bankruptcy Rules.

Have any acts of bankruptcy been committed?

[12] Have the debtors, therefore, committed acts of bankruptcy for which the Bankruptcy Notice was issued? The law in Section 3 of the Bankruptcy Act 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;

[13] In this case, the Creditor; 1) has obtained a final decree against the Debtors for a specified amount, and, execution thereon has not been stayed; 2) has served on the Debtors in Kenya, a bankruptcy notice under the Act, and the Debtors have not within seven days after service of the notice, neither complied with the requirements of the notice nor satisfied the court that they have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the decree or sum ordered to be paid, and which they 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 574 OF 2010**. Therefore, for purposes of determining whether the Bankruptcy Notices should or should not be set aside under the Act, for as long as the Debtors have not paid the sum specified in the Notice, they have committed an act of Bankruptcy and are a proper subject of these proceedings. At this stage, the court should only determine whether the Notice should be set aside; and such arguments on

payment by instalments, are only possible in a bankruptcy proceeding initiated pursuant to section 7 and rule 105 of the Bankruptcy Act and Bankruptcy Rules, respectively. The argument of payment by instalment is not useful at the moment especially that it has been shown the Debtors did not liquidate the debt due as it had been earlier ordered by the court. The debtors are in default.

Setting aside of Bankruptcy Notice

[14] I hold that the Bankruptcy Notices herein are proper, valid and enforceable against the debtors by law. Accordingly, I will not set aside the said Notices. The upshot is, therefore, that the Debtors' applications to set aside the Bankruptcy Notice herein are dismissed. 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 20th day of May, 2014

F. GIKONYO

JUDGE