



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

BANKRUPTCY CAUSE NO. 10 OF 2014

IN THE MATTER OF BANKRUPTCY ACT CAP 53 OF

THE LAWS OF KENYA

RE: GEORGE WAWERU WANJOHI

RULING

1. The Notice of Motion application before the court is dated **13th August 2014**. It is filed under Order 45 Rule (1), 2 (1) of the Civil Procedure Rules 2010, Section 11 of the Bankruptcy Act Cap 53 of the Laws of Kenya & Section 1A, 1B & 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya.

2. The Application seeks the following orders:-

1. *That the application be certified urgent and be heard ex-parte in the first instance.*
2. *That the Honourable Court be pleased to vary and/or review its order given on 2nd April 2014 in terms of Order number 3.*
3. *That the Honourable Court be pleased to order the release of the Petitioner/Judgement-Debtor from Civil jail and stay the execution of the decree issued in Nairobi CMCC No. 4030 of 2013.*
4. *That costs of this application be provided for.*

3. The application is premised on the grounds stated therein, and is supported by affidavit of **George Waweru Wanjohi** dated **13th August 2014** with anenxturess thereto. The said affidavit expands mainly the above said grounds.

4. The brief history of the application is that NIC Bank Limited obtained an *ex-parte* judgment on 31st October 2013 against the Petitioner in Nairobi CMCC No. 4030 of 2013 for a sum of Kshs.2,199,307.10 together with costs and interest. The Petitioner alleges that he was never served with summons to enter appearance and has already filed an application seeking to set aside the *ex-parte* judgement whose Ruling was scheduled for 18th September 2014. Pursuant to this Court's order given on 2nd April 2014, the Petitioner's estate was placed under receivership meaning that the Decree-holder could not commence recovery of the decretal sum from the Petitioner or attach his property except with the leave of the court on such terms as the court may impose. However, this court directed at Order number 3 of the Order given on 2nd April 2014 that the Receiving Order shall not operate as a stay of any proceedings in any court in Kenya and in particularly shall not stay the Notice to Show Cause in Milimani CMCC No. 4030 of 2013. Upon being served with

the Receiving Order given on 2nd April 2014, both the Presiding Magistrate in CMCC No. 4030 of 2013 and the Decree-Holder interpreted Order number 3 of the Receiving Order to mean that the same did not bar the court from arresting and/or committing the Petitioner to civil jail for failing to settle the decree. An arrest warrant was therefore issued against the Petitioner on 4th April 2014 after the Receiving Order had been issued and served upon the Decree-holder and the Presiding court in CMCC No. 4030 of 2013. The Petitioner was subsequently arrested on 15th July 2014 and committed to civil jail for six (6) months for failing to settle the decretal and is currently serving his sentence. The Applicant says that it is imperative that this court makes a clarification and/or interpretation and/or vary Order number 3 of the Order given on 2nd April 2014 as to whether the same meant that the Decree-holder could proceed and execute against the Petitioner or his estate after a Receiving order had been issued.

5. The application is opposed vide a replying affidavit of **Kelvin Mbaabu** dated **12th September 2014** and filed in court on 22nd September 2014.
6. With leave of the court parties filed written submission to the application. The Petitioner did that on 3rd October 2014 while the Respondent/Creditor filed theirs on 1st October 2014.
7. I have carefully considered the application and the opposition to it. I am called upon to review and or clarify my order herein on 2nd April 2014. That order was as follows:-

“3. For avoidance of doubt this Receiving Order shall not operate as a stay of any proceedings in any court in Kenya, and in particular shall not stay the Notice to Show Cause in Milimani CMCC

No. 4030 of 2013 which is alleged to be scheduled for hearing on 4th April 2014.”

8. That order was and is still, clear enough. This court made that order while alive to the fact that there was a Notice to Show Cause that was coming up on 4th April 2014 in CMCC NO. 4030 of 2013. The said Receiving Order clearly stated that the same did not bar the Creditor from proceeding with the Notice to show Cause. The court was also aware of instances where a Petitioner petitioned the court for a Receiving order with the sole purpose of frustrating the hearing of a Notice to Show Cause. In any event a Notice to show Cause is not one way in the execution process. As the title suggest, the Debtor is merely required to appear in court to show cause why he should not be jailed for failure to pay the debt. It would be one of the way of showing cause when the Debtor appears in court and states that he already had a Receiving Order in his estate, and submit that he intends to pay the debt under the rules of bankruptcy. A litigant would not be allowed the luxury of using the Receivership process solely to defeat a lawful process. In any event, there is no conflict of interest between an estate in Receivership and a Notice to Show Cause as I have shown above. Both can co-exists, with a Notice to Show Cause eventually giving way to the payment under Receivership and bankruptcy rules. The said order 3 therefore merely required the Petitioner to attend to the Notice to Show Cause, and to explain to the court the Petitioner’s newly acquired status. A Receiving Order, therefore, cannot have the effect of defeating the process of a Notice to Show Cause, but the Notice to Show Cause, once fully heard by the relevant court, would eventually give way to allow the Official Receiver to proceed with his or her responsibility.
9. Now that the Petitioner has attended to the said Notice to Show Cause, and has indeed been released from jail upon payment of Kshs.300,000/=, the Petitioner is now released from the effect of the said prayer 3 and is free to attend to the Official Receiver to the Receiving Orders of this court issued on 2nd April 2014.
10. In the upshot, it is my view that this application was unnecessary. It is dismissed with costs, herein assessed at Kshs.10,000/= to the Creditor/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 31ST DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Owang for the Plaintiff

No appearance for the Defendant

Irene – Court Clerk