JACKSON MUCHIRI WANYEKI………...……..…….DEBTOR/PETITIONER

IN THE MATTER OF BANKRUPTCY ACT

RULING

Before me is a Notice of Motion application made under Order 12 Rule 7 of the Civil Procedure Rules 2010, Sections 3A of the Civil Procedure Act 2010 and section 8 of the Bankruptcy Act Cap 53 Laws of Kenya. The same seeks an order to set aside the order of 27th February, 2012 that lifted the receiving order made against the applicant on 2nd February, 2007 and consequently to reinstate the said order. The same is supported by the Affidavit of Jackson Muchiri Wanyeki, the debtor.

It was contended by the applicant that on 27th February, 2012 he attended court for the hearing of an application by one Dishon Gicheru, the creditor, that he intended to present his position to the court but he did not hear when the matter was called out, that the matter proceeded and the receiving order made on 2nd February, 2007 against him was lifted, that as a result he is now exposed to harassment by his creditors, that he did raise the issue with the court but was advised to make the present application. He pleaded that the receiving order be reinstated.

Mr. Kabaiku, learned Counsel for the applicant/debtor rehearsed his client's position as contained in the Supporting Affidavit and submitted that, the applicant still intended to present his side of the story to court, that the applicant had visited the offices of the creditor's Advocates to explain his position severally, that The debts arose from an accident whereby the insurer went under and that he had lodged his claim with the statutory manager, that the applicant stands to suffer prejudice if the application is not allowed, that the evidence of lodgment of the claim with the statutory manager was with the Official Receiver. Counsel urged the court to allow the application.

On his part, the Creditor filed a Replying Affidavit which was sworn on 8th March, 2012 by his Advocate Francis Mwangi Njuguna. The Creditor contended that the debtor's application was a gross abuse of the process of the court, that the receiving order was made on 2nd February, 2007 but for a period of 5 years the applicant had failed to take any steps to prosecute his application to prosecute this matter which had prompted the creditor to file his application to lift the said order on 2nd February, 2011, that the debtor had been served with the application but he had not attended court on 27th February, 2012, that his assertions in the Affidavit that he was in Court on 27/2/12 were a deliberate lie, that the Official Receiver who was in court on that day did not oppose the Creditor's application.

Mr. Mwangi, learned Counsel for the Creditor submitted that the receiving order by the debtor had been obtained in order to avoid settling just debts, that no good grounds had been set out in the Affidavit in Support to justify the granting of the orders sought, that the debtors visit to Counsel's offices did not amount to settling the debt, that the creditor will stand to suffer grave prejudice if the orders sought were granted.

The Official Receiver did file a Replying Affidavit sworn by state Counsel Jared Saha on 8th March, 2012. The Official Receiver contended that the debtor's application to set aside was an abuse of court process, that there were good reasons for the court to have rescinded the receiving order of 27th February,

2012 as the applicant had failed to attend court, that after the receiving order was issued on 1st February, 2007, the debtor went missing and for five (5) years he had ignored to attend the Official Receiver despite notices to do so, that the receiving order had not been gazetted because of the missing original receiving order, that it is a mockery of court process for the debtor to state that he was now willing to present a full statement of affairs five years after obtaining the receiving order, that the applicant's application was a time buying tactic.

Mr. Saha, learned Counsel for the Official Receiver submitted that the Applicant had failed to conduct his affairs to the satisfaction of the Official Receiver, that his dealings for the last five (5) years were unknown to the Official Receiver, that he had failed to present the Official Receiver with the original order for Gazettement or to attend the Official Receiver for the preparation of his statement of affairs that the reasons advanced were unmerited. Counsel urged the court to dismiss the application.

I have considered the Affidavits on record and the submissions of Counsel. The present order 12 Rule 7 of the Civil Procedure Rules, 2010 under which the present application is made is akin to Order 1XB Rule 8 of the former Civil Procedure Rules. The principles applicable when considering an application under Order 12 Rule 7 of the Civil Procedure Rules were set out in the case of **Njagi Kanyunguti alias Karingi Kanyunguti & 4 others –vs- David Njeru Njogu CA No. 1818 of 1994 (UR)** wherein the Court of Appeal stated at page 4 that:-

"In an application brought either under OIXA Rule 10 or O.IXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina –vs- Thuku Mugiria (Civil Appeal No. 27 of 1982) (unreported), Patel V.E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.

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However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice." (emphasis mine)

From the foregoing, it is clear that in considering the present application the court has a wide discretion which however has to be exercised on the basis of the evidence and sound legal principles. That this court has to exercise its discretion in order to avoid an injustice or hardship arising from an accident, inadvertence or excusable mistake or error.

The evidence before me is that the applicant did attend Court on the 27th February, 2012 but was outside Court when the matter was called. The applicant travelled all the way from Nakuru to come and attend Court. He swore that he did raise the issue with the court when he found that the creditor's application had been allowed in his absence but was directed to make an appropriate application, the Applicant therefore urged the Court to allow his application to enable him re-organize his financial affairs.

I have considered the objections raised against the application. It is true that the matter has been pending for long without any steps being taken. However, I will apply the principles set out in the **Njagi Kanyunguti case (supra)** to the facts of this case to see if the application has any merit.

The discretion under Order 12 Rule 7 is to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors. For the record, this court confirms that the applicant did come to court on 27th February, 2012 after the orders had been made and Counsels had left but when he attempted to make an oral application to be heard the Court advised him to go seek legal advice on the steps he needed to take since an order had already been made on the application that was before court on that day. To that extent therefore the averment that he was in court on 27th February, 2012

is not entirely untrue.

However, what this court is to consider is whether by attending court and sitting outside when court proceedings are going on is excusable. In my view, since the Applicant had travelled all the way from Nakuru to attend Court on 27th February, 2012, his failure to be inside court when the matter was called may be an excusable mistake. I do not believe that his non- attendance when the matter was called out was a deliberate act meant to evade or obstruct or delay the course of justice. I hold this view because as the Court of Appeal held in the **Njagi Kanyunguti case (supra)** the circumstances after the order was made shows that the Applicant was not bent to delay the process of justice. He travelled from Nakuru to attend court, he entered the court room before the court started its business for the day, he asked for his matter to be revisited and on being told that he could only make such an application formally, he filed the current application one (1) day after the order had been made. On the foregoing, I am satisfied that the Applicant's conduct is deserving the exercise of the Court's discretion.

The Respondent's counsel did raise the issue of the delay in prosecuting the Bankruptcy proceedings herein. This together with the other issues touching on the conduct of the Applicant I believe should be addressed when the creditor's application dated 9th February, 2011 is heard on merit.

One other thing that weighed heavily on the exercise of the discretion is the effect of the order of 27th February, 2012. On setting aside the order of 1st February, 2007, the Applicant says he is left exposed yet the debts which drove him to commence the present proceedings emanate from a road accident in respect of which his insurer, United Insurance Company Ltd was placed under statutory management. I am aware that after that company was put under statutory management on 15th July, 2007 under Section 67C 2 of the Insurance Act, a moratorium inter alia, on all claims touching on the said company was declared on the same date under Gazette Notice No. 6821. Whether the Moratorium has been lifted or expired this court cannot tell. The statutory management however is still in force and that management is due to expire within the next six (6) months within which time all claims should have been settled.

The foregoing being the case and if true the Applicant had lodged the claims with the statutory manager, it might not be just to let the Applicant be harassed and executed against when the Creditor's claim may well be on the way to be settled. I make this finding being guided by the principle that it is advisable to maintain the matters as they stand at this juncture rather than deny the Applicant an opportunity of being heard as it may be more injurious if he is executed against at this stage and it is later found that the claims against him were to be settled by the statutory manager of his insurer. Here, I reiterate the sentiments of Ojwang Ag. J, (as he then was) in the case of **Suleiman –vs- Amboseli Resort Limited (2004) 2 KLR 539** whilst considering an application for injunction wherein he stated at page 606 thus:-

"I am not, with respect, in agreement with counsel on that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffmann in the English case of Films rover International, made this point regarding the grant of injunctive relief (1986) 3 All ER 772, at page 780 -781:-

'A fundamental principle is …. that the Court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been 'wrong'…."

Accordingly, I allow the application dated 28th February, 2012 set aside the order of 27th February, 2012, reinstate the receiving order of 1st February, 2007. I direct that subject to the orders hereinafter made the creditors application dated 9th February, 2011 be listed for hearing on merit within 21 days of the date of this ruling.

The applicant shall pay the costs of the application assessed at Kshs.7,000/- to the Respondents within 7 days of the date hereof in default the orders herein shall lapse and the order of dismissal of 27/2/2012 shall take force.

Dated and delivered at Nairobi this 25th day of April, 2012

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A. MABEYA

JUDGE