



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Bankruptcy Cause 2 of 2010

IN THE MATTER OF THE BANKRUPTCY ACT

(CAP.53 LAWS OF KENYA)

ZAAMFA LIMITED.....CREDITOR/PETITIONER

VERSUS

CHARLES WACHIRA NGUNDO.....DEBTOR/RESPONDENT

RULING

The petitioner, ZAAMFA LIMITED filed this petition on 1st February, 2010 praying for a receiving order to be made in respect of CHARLES WACHIRA NGUNDO (the DEBTOR) on the ground that he is indebted to the petitioner in the sum of Kshs. 1,200,000/= being the decretal amount due as per the decree issued by the High Court in Civil Appeal No. 43 of 2009 between CHARLES WACHIRA NGUNDO (Appellant) and ZAAMFA LIMITED (Respondent) dated 24th November, 2009. That, the Creditor does not hold any security on the Debtor's estate or any part thereof, for the payment of the said sum. That, the said Debtor has before the date of presentation of this petition committed the act of bankruptcy as he was served on 18th January, 2010 with Bankruptcy Notice Number 1 of 2010 issued by this Honourable Court on 14th January, 2010 requiring the Debtor to pay the petitioner (Creditor) the sum of Kshs. 1,200,000/= being the decretal amount due. That the debtor having been duly served has failed to make payment.

Mr. CHARLES WACHIRA NGUNDO (the Debtor herein) raised the following preliminary objection filed on the 26th May, 2010 that-

- a) **The bankruptcy notice was not served on the debtor personally in contravention of Rule 103 of the Bankruptcy rules;**
- b) **The request for issuance of the said notice is also non-compliant with the prescribed forms as set out under the Bankruptcy rules;**
- c) **The request for the issuance of notice and the petition have not been sealed by the Creditor in non-compliance with the requirements of the Companies Act (Cap 486) Laws of Kenya.**
- d) **All the aforesaid omissions render the instant petition fatally defective and a non-starter.**

In his written submissions, the debtor opposes this petition on the ground that he was not validly served

with the Bankruptcy notice founding the instant petition. He contends that **Bankruptcy Rules Nos. 114 and 115** prescribe that a creditor's petition shall be personally served on the creditor by an officer of the court. It is his submission that the Bankruptcy notice herein was not personally served upon him but on an employee of the firm of Advocates that happens to have handled his previous matters, and that no proof had been shown to court that he was avoiding service or any other legal process at the time of service. He further contends that no order for substituted service is on record granting leave for any other person to be served other than the debtor. Consequently, he submits that an act of bankruptcy cannot be said to have occurred so as to form the basis of the current petition.

The Debtor referred **Section 133(1)** of the Bankruptcy Act which provides that *“No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.”* Further, the debtor submitted that the non-service of the bankruptcy notice upon him was prejudicial and had caused substantial injustice to him as it did not give him the opportunity to secure or compound the amount in the decree to the satisfaction of the creditor or the court. It is the debtor's contention that he should be allowed to make proposals in compounding the outstanding amount which, if not satisfactory to the creditor could indeed be satisfactory to the court. Finally, the debtor maintains that he would oppose the instant petition on the preliminary objection dated 26th May, 2010 as this was the only opportunity afforded to him because he could not canvass the issues of non-service of the bankruptcy notice with the same being overtaken by the filing of the instant petition. He submitted that the instant petition should thus be struck out with costs being borne by the petitioner.

In its response, the creditor submitted that the act of Bankruptcy forming the basis of these proceedings is a Bankruptcy Notice issued by this court pursuant to non-payment of the a decree. The debtor having defaulted to satisfy the decree and having not sought and obtained any orders from this court to stay execution of the decree, the petitioner applied to this court for a Bankruptcy notice to issue against the debtor. That the Bankruptcy Notice was sought and obtained in Bankruptcy Notice Cause Number 1 of 2010.

The creditor further submitted that it is settled law that a Bankruptcy Notice is issued under a different cause from the petition. Further, if the debtor feels that the Notice was not properly served on him, the same should be challenged in the cause under which the Notice itself was issued and not in the petition. The creditor contended that these are two different causes and the procedure of challenging each of them is differently set out in the Bankruptcy Rules. If the debtor wants to challenge the petition on any grounds, including this particular one, then a Notice under Rule 128 of the Rules must be filed and served. It is the Creditor's case that without this Notice, the debtor has no audience in this court whatsoever. Matters relating to service of the Bankruptcy Notice require evidence and cannot be resolved by this court by way of a preliminary objection. The procedure for making an application by way of preliminary objection is not suitable where the facts are disputed. Finally, the Creditor submitted that the filing of this preliminary objection is clearly an afterthought and urged that the same be disallowed with costs.

The first issue to be determined in this matter is whether the creditor complied with the requirements of the Bankruptcy Act in respect of service of the Bankruptcy Notice. **Section 4** of the said Act stipulates a bankruptcy notice shall be in the prescribed form and shall require the debtor to pay the amount in the decree or sum ordered to be paid in accordance with the terms of the decree or order, or to secure or compound for it to the satisfaction of the creditor or the court, and shall state the consequences of non-compliance with the notice, and shall be served upon the debtor in the prescribed manner. **Rule 116** of the Bankruptcy Rules requires that service of the petition shall be proved by affidavit with a sealed copy of the petition attached, which shall be filed in court forthwith after the service. From the records, it is difficult to tell with certainty whether the procedures as provided for in **Rules 114 and 116** of the Act were complied with. There is no evidence of service as the creditor has not furnished the court with a copy of the affidavit of service.

The other issue to be considered is whether the debtor's preliminary objection is in order. In its

submission, the creditor opposed the preliminary objection, and relied on the provisions of **Rule 128** of the Bankruptcy Rules. That Rule is to the effect that a debtor who intends to show cause why a receiving order should not issue against him or to defend the cause must file the requisite notice with the registrar, at least three days before hearing. The form of notice is set out in Form 17 of the subsidiary legislation.

Having carefully considered the submissions of the parties, the provisions of the Bankruptcy Act, and the rules therein, I do not accept that the debtor has met the requirements as provided for in the Act and especially the one cited above by the creditor.

Attention must also be paid to the provisions of **Section 133(1)** of the Act which states that- ***“No proceedings in Bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.”***

This court takes the view that the provisions of Bankruptcy must be construed strictly due to its penal consequences. It is therefore my considered opinion that the failure by the creditor to follow the well laid down procedures of **Rule 114** concerning personal service, and Rule 116 providing for the filing of an affidavit of service amount to a formal defect and irregularity. Furthermore, the failure by the debtor to follow the right procedure to bring about his complaints against the petition as is stipulated in the Act amounts to a formal defect and irregularity. Be that as it may, by virtue of the provisions of **Section 133(1)** of the **Bankruptcy Act Cap.53**, I do not accept that substantial injustice has been caused to the debtor through the creditor’s failure to serve him, as there is a valid decree subsisting against him and he was aware of that decree.

For the above reasons and in the interests of justice, I order that the Debtor be served in the manner prescribed in **Rule 114** and the creditor to furnish this court with an affidavit of service as provided for in **Rule 116** in the next 14 days, and the debtor should file any denial or dispute with the Registrar as provided for in **Rule 128** within 7 days of service.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 31st day of July, 2012

L. NJAGI
JUDGE