



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS, NAIROBI**

**BANKRUPTCY CAUSE Nos.25 and 26 of 2009**

**PURITY GATHONI GITHAE .....1<sup>ST</sup> DEBTOR**  
**SAMUEL KAMAU MACHARIA .....2<sup>ND</sup> DEBTOR**

**AND**

**OCEANFREIGHT TRANSPORT COMPANY LIMITED .....PETITIONER**

**JUDGMENT**

1. The two bankruptcy causes Nos. 25 and 26 of 2009 were consolidated with the consent of the parties and were heard together. They are filed by Ocean freight Transporters Company Limited (hereinafter referred to as the petitioner) against Purity Gathoni Githae and Mr. S.K. Macharia (herein after referred to as the 1<sup>st</sup> and 2<sup>nd</sup> debtors respectively). Both debtors are husband and wife. They are also acclaimed media moguls who are associated with one of the largest media houses in Kenya. The petitioner sought for receiving orders against the debtors who are claimed to be justly and truly indebted to the petitioner in the aggregate sum of Ksh.34,854,510/= as at 31<sup>st</sup> May 2009, together with interest at the rate of 19% per annum compounded monthly from the 1<sup>st</sup> day of June 2009.

2. This amount is in respect of the decretal amount and costs due on a judgment obtained by the petitioner in **HCCC NO. 3958 OF 1991**. It is claimed that the debtors have failed to settle the claim and to comply with bankruptcy notices that were issued by this court on 10<sup>th</sup> July 2008, and served upon both debtors on 4<sup>th</sup> August 2008. The debtor's application to set aside the bankruptcy notices was heard and dismissed by this court on 27<sup>th</sup> May 2009. The debtors filed notices of objection on 30<sup>th</sup> November 2009; by those notices the debtors denied that they owe the petitioner the sum of Ksh.34,854,510.00/-. They also claimed that they have a counter claim, set off or cross demand which exceeds the amount of the judgment creditor as set out in a case they have filled against the petitioner being; **Nairobi ELC 406 OF 2008 Purity Gathoni Githae and S.K. Macharia versus Excell Structures Limited and Ocean Freight transport Company Limited**.

3. It was also indicated that the debtors have appealed in the Court of Appeal against the ruling of this court delivered in **Milimani High court Bankruptcy Notice No. 4 of 2008** which was delivered on 27<sup>th</sup> May 2009. The Court of Appeal despite refusing to grant an order of stay of proceedings did hold that the appeal raises an arguable point. The notice of objection was subsequently amended on 13<sup>th</sup> April 2010, and further grounds were added to wit; the decree in Nairobi HCCC No. 3958 of 1991 on which the petition is founded, is not final and more importantly the debtors indicated that they intended to seek an inquiry into that ruling of the court as they claimed the court was misled by the petitioner to arrive at its judgment.

4. Although on the face of it, this would appear like any other petition for bankruptcy, which is a daily fare in commercial courts, the hearing of this petition however was highly protracted. Trial took a considerable amount of time as tempers flared in court and emotions ran high among counsel for the parties. Counter interlocutory application was filed by counsel for the debtors and this was perceived (either rightly or wrongly) by counsel for petitioner as an attempt to scuttle the hearing and further prolong the determination of this petition. Eventually parties agreed on the way forward; that the two petitions be consolidated and be heard by way of viva voce evidence. By adducing oral evidence, the debtors were expected and indeed they led evidence that challenged the validity of the debt that forms the basis of the petitioner's claim.

5. The petitioner's case was supported by the evidence Mr. Livingstone Ndungu Waithaka, the Managing Director of the petitioner. He produced documents in support of the petitioner's claim. He explained that the petitions were founded on a judgment obtained by the petitioner in a ruling delivered by **Rawal, J** on 23<sup>rd</sup> October 2001 in **Nairobi HCCC NO. 3958 OF 1991**. By that ruling, judgment was granted to the petitioner and a decree was extracted. By that decree the debtors were ordered to pay a sum of ksh.500,000/-with interest thereon at 19% per annum compounded monthly from the 6<sup>th</sup> December 1986 until payment in full. The petitioner also obtained a certificate of taxation of costs assessed at Ksh.108,000/- all inclusive. The petitioner tabulated the interests payable and annexed a schedule. He also annexed the bankruptcy notices dated 2008 which were served upon the debtors. According to the petitioner, the debtors have not settled the claim as presented by the decree. They were served with the bankruptcy notices and persisted in their refusal to settle the claim thus the petitioner now seeks for a receiving orders against the debtors.

6. On the part of the debtors, they relied on the evidence by **Mr. S.K. Macharia, the 2<sup>nd</sup> debtor (DW1)**. He testified that as regards NAIROBI HCCC NO. 3958 OF 1991 his wife (the 1<sup>st</sup> debtor) was issued with a letter of allotment by the Commissioner of Lands in respect of an industrial Plot off Enterprise Road. **Mr. Waithaka PW1** who was well known to the debtors as a long time friend and business colleague, offered to purchase the letter of allotment. After negotiations, DW1 said he gave Mr. Waithaka the letter of allotment, and he was later shown the plot by the 1<sup>st</sup> debtor and Grace Mumbi (DW3). They agreed on the terms of the payment although the 2<sup>nd</sup> debtor said that he could not recall whether the purchase price that was agreed upon was two or three million.

7. According to the debtors, Mr. Waithaka was supposed to go to the Lands office and pay the total sum of Ksh.636,970/- being the stand premium and other charges and have the title issued in his name. The debtors were paid Ksh.500,000/- and the balance was to be paid after Mr. Waithaka was issued with a title. According to the 2<sup>nd</sup> debtor, he did not follow the matter any further as he had given the original letter of allotment and Mr. Waithaka who in his understanding was supposed to process the title in his favor and then pay the balance. He testified that a company called Excello Structures Limited is registered as propriety of LR NO.209/9827. It was denied that the debtors were selling a plot that did not exist. The 2<sup>nd</sup> debtor was emphatic in his evidence that the plot existed and the petitioner was given the original letter of allotment to process the title which he must have used to have the title issued to another entity.

8. Regarding the proceedings in **HCCC NO.3958 OF 1991**, the debtors contended that the summary judgment which was given to the petitioner to be paid 500,000/- was irregularly granted. This is because an application was made on 28<sup>th</sup> February 2002, seeking for a clarification of the ruling but nothing seems to have happened to that application. It is the debtors case that Mr. Waithaka has been keeping the letter of allotment and they have been keeping the sum of Ksh.500,000/-. The debtors did not pursue the matter even after they were notified of the judgment because they have been waiting for their lawyers to file an appeal.

9. The evidence of the 2<sup>nd</sup> debtor was reiterated by Mrs Purity Gathoni Githae DW2. It was denied that an agreement was entered into and there in any event no such arrangement to enter into a written agreement because the understanding was that the petitioner would process the title for himself. DW2 claimed that the allegation that they were selling a none existing plot was most preposterous because it was Mr. Waithaka who originated the number LR209/727 and the debtors have no idea where it came from because they were selling a plot that was un surveyed and unregistered without a title. DW2 told the court that they were surprised when they were taken to court and all along they did not think the matter was serious until they were served with bankruptcy notices two years later.

10. DW4 Grace Mumbi testified that she and the 1<sup>st</sup> debtor were allotted industrial plots by the Commissioner of lands which were adjacent to each other within the Industrial area Nairobi. She recalled having accompanied the 1<sup>st</sup> debtor to show Mr. Waithaka the subject plot at Industrial area. She was surprised when she read in the newspapers that the debtors were facing a bankruptcy cause for selling a plot which did not exist. She carried out a search at the Lands office and established that the plot that had been allotted to the 1<sup>st</sup> debtor was now in the name of **Excello Structures Limited**. She confirmed that she pointed out to Mr. Waithaka Plot No.28 which did not have an Land Registration Number.

11. Charles Ngetich an Advocate working as a Senior Lands Registration Officer at the Lands Office Nairobi testified as DW3. He produced documents in respect of Land Reference No.209/9827 which is now in the name of **Excello Structures Limited**. He referred to a letter of allotment dated 13<sup>th</sup> September 1982 in respect of un surveyed plot No.28 which was issued to Gathoni Githae (1<sup>st</sup> debtor). It had special conditions whereby the allot tee is supposed to pay all the fees mentioned in the letter. He also referred to several letters that were written to Gathoni Githae in which she was reminded to meet the conditions set out in the letter. Eventually some other parties applied to be allotted the same plot and it was allotted to those applicants who executed an informal transfer to **Excello Structures Limited**.

12. Both counsel for the petitioner and the debtors filed written submissions which were also highlighted in court. The debtors challenged this petition on the grounds that the decree which is the basis of this petition in HCCC NO. 3958 OF 1991 should be disregarded for reasons that it was obtained through fraud. Dr. Kuria learned counsel urged the court to be guided by the provisions of English Bankruptcy Act 1914 and Bankruptcy Amendment Act 1926 which is the source of the Kenya Bankruptcy Act Cap 53. This preposition was confirmed in the case of **Kassam and Karmali [1938] page18 1 KLR** where **Justice Lucies Smith** held that the Kenyan Bankruptcy Act is practically word for word the same as the English Bankruptcy Act. Thus under section 7 of the English Act, as it was interpreted in the case of **Re: Fraser [1982] 2, QB.633 at page 636** it was held that:-

**“If the court is not satisfied with the proof of the petitioning creditor’s debt, or the act of bankruptcy, or the service of the petition, or is satisfied by the debtor that he is able to pay his debts or that for such other sufficient cause, no order ought to be made, the court may dismiss the petition.”**

13. I think it is common ground that a bankruptcy court has the power to enquire into a judgment giving rise to a bankruptcy cause but the parameters of the inquiry is as regards whether the judgment on the face of it is laced with irregularities or if you like, illegalities or fraud. Some of the cases where an inquiry has been held and succeeded are cases where it was established that the order challenged, was obtained through fraud or collusion or where there was lack of genuine consideration for the judgment. (See *Haslburys Laws of England 3<sup>rd</sup> Edition paragraph 600*)

*“ . . . the court may, however, for the purpose of determining ... whether a receiving order should or should not be made, go behind the judgment or order and inquire into the consideration, and on finding that there was no valid or legal consideration, may refuse to make a receiving order ... the bankruptcy court may still go behind it and inquire into the liability on which it is founded but the court has no power on the hearing of a petition to go behind a judgment obtained in open court against a debtor represented there. . . but the court will not go behind a compromise where the debtor was represented by counsel and there is not a prima facie case for impeaching it ... but the court does not go behind the judgment simply on the suggestion of the debtor that the judgment debt is bad. There must be circumstances justifying an inquiry; there must be evidence that the judgment was obtained by fraud or collusion . . . it should not be used to go behind a judgment upon a nice balance of evidence, if the judgment was originally taken upon a real and genuine consideration of the facts.”*

14. This is because a bankruptcy court will not allow a person who is not a real creditor to obtain a receiving order. The court will also not allow bankruptcy proceeding to be recourse for enforcing fictitious claims even if they are in a form a judgment. In this case is the petitioner's claim arising out of a court judgment a fictitious one, one that lacks consideration or one that is fraudulent? These issues arise out of the allegations by the debtors that they were selling a letter of allotment and not a title and the petitioner fraudulently used the original letter of allotment and caused the title to be issued in the name of **Excello Structures Limited** and therefore benefited from its own fraud. The other issue is whether the interest's rate of 19% compounded monthly was also fraudulently awarded and lastly whether the debtors have a counter claim and set off against the petitioner?

15. There is a decree issued in HCCC 3958 OF 1991. That decree has not been appealed against and it has not been settled. The court enquired into that judgment and for reasons that will become clearer later in this judgment, the allegations made by the debtors regarding the credibility or legality of the judgment is without basis. Firstly it was not disputed by the debtors that by a letter dated 14<sup>th</sup> October 1986, addressed to the 1<sup>st</sup> debtor the petitioner confirmed its willingness to buy the debtor's plot for two million and enclosed the 1<sup>st</sup> cheque of Ksh.250,000/-. The ending of the letter described the plot being sold as **LR NO.209/727**.

16. On 16<sup>th</sup> October 1986 **Mr. Timan Njugi** (the debtor's advocate) acknowledged receipt of the cheque and confirmed that he would be acting for the debtors in the transaction. He also promised to forward a draft of the sale agreement and in his ending of the letter he referred to LR NO.209/727. The sale agreement was not forwarded as promised and two years later the debtors appointed Messrs Waruhiu & Muite as their lawyers. Messrs Murimi & Co. was appointed by the petitioner on 8<sup>th</sup> June 1989 when they wrote a letter requesting the debtor's advocates to forward copies of the title document to enable them prepare a formal sale agreement and to facilitate a search of title at the Lands office. After some silence there was a letter from the 2<sup>nd</sup> debtor addressed to their advocates Messrs Waruhiu & Muite with a copy to Murimi & Co. in which he confirmed having received a deposit of Ksh.500,000/-. He also promised to deliver the titles to his lawyers to transfer to the petitioner. The ending of the 2<sup>nd</sup> debtor's letter is also sale of LR NO.209/727.

17. Messrs Waruhiu & Muite also reconfirmed the debtor's instructions and promised to forward the draft agreement. In October 1989, after failing to get a draft agreement from the debtors, the petitioner's advocate carried out a search of the title and discovered that **LR NO. 209/727** was not the correct plot the petitioner was buying. This related to a different plot on Nairobi's Biashara Street. Murimi & Co. wrote to Waruhiu & Muite seeking clarification and seeking to be furnished with the copies of the title. Despite several reminders no documents were forwarded. The debtors also did not indicate that the petitioner was conducting a search and dealing with an incorrect land reference number after all the letters were ignored the petitioner filed HCCC No.3958 of 1991 in which judgment was entered for the petitioner after a full hearing of an application for summary judgment.

18. The evidence from DW3 confirmed that the 1<sup>st</sup> debtor was issued with a letter of allotment by the Commissioner of Lands. However the 1<sup>st</sup> debtor failed or neglected to comply with the conditions set out in the letter of allotment; the offer contained in that letter lapsed because no payments were made even after several reminders. According to DW3, on 21<sup>st</sup> February 1994 another application was made seeking an allocation of the same plot by an entity known as; **Maalaki and Somche Traders**. They were allotted the plot after it was investigated and found there was no other person who was in possession and claiming ownership. The letter of allotment that had been issued to the 1<sup>st</sup> debtor was withdrawn and another one was issued to **Maalaki and Somche Traders** who transferred it to **Excello Structures Limited** and they were issued with the title.

19. From the evidence by DW3 and the documents that were shown to court there is not an iota of evidence to show that the petitioner participated in the fraud to obtain the title in respect of LR NO.209/9877 in favor of **Excello Structures Ltd**. More importantly the debtors do not deny that they received a deposit of Ksh.500,000/-. The interest rate was awarded by the court, which has discretion to do so. If the debtors were dissatisfied by the order of interest rate that was awarded, they should have appealed in the court of Appeal. I do not see how the petitioner misled the trial court to award unconscionable interest rate, considering that the debtors kept the petitioner's deposit for the same amount of period.

20. Moreover if this was the reason that has prevented the debtors from settling this claim, they should have appealed or applied to review the matter. The record shows that the petitioners counsel went as far as sending the debtors advocates copies of the court proceedings. Instead of filling an appeal immediately the judgment was passed, they have used every opportunity to avoid paying by raising complicated legal technicalities which in my view is like using a sledgehammer to kill an ant. The matter only required payment of the petitioners deposit of Ksh 500,000/= when it was demanded after the debtors failed to proceed with the sale transaction of the plot, or when the order was made by the court.

21. The contention that the debtors were selling a letter of allotment and they handed to the petitioner the original letter of allotment to process for itself a title lacks credibility. Firstly, the petitioner wrote letters to the debtors and their advocates which were acknowledged. It is not at all indicated by the debtors that they were selling only a letter of allotment and they were not to be involved in the processing of the title. Surely if that was the case why did the debtors fail to inform the petitioner on the outset that they were selling a letter and he was to process his own title? Secondly, the letter of allotment was in the name of the 1<sup>st</sup> debtor, how could a transfer be effected without the signature of the allottee, how did they expect the petitioner to know that he was supposed to pay the stand premium and process the title as this was not indicated in any of the correspondences.

22. The debtors also received all those letters in which the petitioner relentlessly sought for the documents, and even pleaded with them just to refund the deposit paid instead of making the matter protracted. If indeed the petitioner had misdescribed the plot as LR NO. 209/727, the debtors too repeated the same reference no. The debtors should have pointed out that they were not selling a plot with a title

but merely a letter of allotment and if indeed they had passed it to the petitioner as alleged, they should have pointed it out in the correspondence that the letter was in possession of the petitioner. This same letter of allotment was later exhibited by the debtors in the proceedings which is an indication that it was in their possession all along and they could have even corrected any mis descriptions of the plot.

23. After considering the evidence adduced by the debtors and their witnesses and all the submissions by counsel, there is nothing to support the allegation that judgment giving rise to the decree in HCCC NO. 3958 OF 1991 was obtained fraudulently; the debtors were served with the summons. They filed a defence, they were represented by one of the best civil lawyers at the time, Messrs Waruhiu K'owade & Nganga Advocates in particular Mr. K'Owarde, the enquiry did not yield any results. The debtors have been refusing to pay this debt and the reasons given for their refusal to pay have no basis in law. They were paid the sum of ksh 500.000/= in 1986, they did not bother to transfer the plot or to refund the money to the petitioner.

23. As regards the petition, the petitioner was able to prove that the debt has not been paid, the debtors were served with the petition and as provided for under section 7 of the Bankruptcy Act, I find the petitioner has proved that the debt has not been paid. Accordingly I hereby issue a receiving order against the 1<sup>st</sup> and 2<sup>nd</sup> debtors as prayed in the petition. The estates of the two debtors shall henceforth be placed under the Official Receiver of the Republic of Kenya. The petitioner shall also have the costs of this petition.

JUDGMENT READ AND SIGNED ON 28<sup>th</sup> DAY OF JANUARY 2011 AT NAIROBI.

**M.K. KOOME**

**JUDGE**