



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J.)
BANKRUPTCY CAUSE NO. 4 OF 2010
RE: JAMALDIN ABDULKARIM VARVANI
***ex parte* THE DEBTOR**
IN THE MATTER OF: DIAMOND INDUSTRIES
LIMITED.....CREDITOR/APPLICANT

RULING

Jamaldin Abdulkarim Varvani's Debtor's Petition dated 25th May, 2010 and filed on 31st May, 2010 thus moved the Court:

“I, JAMALDIN ABDULKARIM VARVANI of Post Office Box Number 400, Kitui in the Republic of Kenya and having for the greater part of the six (6) months resided and carried out business at Kitui....., within the jurisdiction of this.....Court and being unable to pay my debts, hereby petition this Honourable Court that:

- (a) a Receiving Order be made in respect of my estate and may be judged bankrupt, and*
- (b) all civil proceedings and executions thereof be stayed.”*

The petitioner swore a three-paragraph affidavit in support of the petition, bearing the following content:

“1. THAT I am a male adult of sound mind residing and/or working for gain in Kitui District.....

“2. THAT I confirm that the information stated in the Petition is true according to my personal knowledge and belief.

“3. THAT what is stated hereinabove is true to the best of my knowledge, belief and information save where otherwise stated, in which event the source is disclosed.”

The Deputy Official Receiver then furnished a Certificate of Compliance dated 28th May, 2010 and filed in Court on 31st May, 2010 stating as follows:

“I certify that JAMALDIN ABDULKARIM VARVANI of P. O. Box 400 KITUI in the Republic of Kenya, the petitioner named in the petition filed herewith has completed and submitted to the Official Receiver the statement of affairs in duplicate and has paid the mandatory deposit of Kshs. 20,000 towards the Official Receiver’s expenses.”

On the basis of the above documentation, and on an *ex parte* basis, the Deputy Registrar proceeded to issue a Receiving Order dated **31st May, 2010** in the following terms:

“On the petition of the Debtor on his behalf by M/s. Omondi Waweru & Co. , Advocates filed on the 31st day of May, 2010 and numbered Bankruptcy Cause No. 4 of 2010 a Receiving Order is hereby made against JAMALDIN ABDULKARIM VARVANI of Post Office Box Number 400, KITUI ordinarily residing within KITUI District, and the Official Receiver of this Court is hereby constituted Receiver of the Estate of the said Debtor. And it is further ordered that all action and proceedings including execution against the person [of] the Debtor aforesaid be and are hereby stayed generally pending final determination of the bankruptcy proceedings”.

The Deputy Registrar ordered the Debtor, immediately after service of the Order upon him, to attend the Official Receiver of the Court.

The significance of the Receiving Order to the Debtor becomes quite clear, in the light of a letter (Ref. OW/W225/2010 dated **2nd June, 2010**) written by his Advocates to the Provincial Criminal Investigations Officer, Coast Province; the letter thus reads:

“We act for Mr. JAMALDIN ABDULKARIM VARVANI in respect of [whom] a complaint was lodged.....in your offices for issuance of bad cheques to Narodhco Kenya Limited.

“PLEASE TAKE NOTICE that our above-named client has had a receiving Order issued against him on 31st May, 2010.....

“Consequently, kindly advise the complainant, Norodhco Kenya Limited to register their claim with the Official Receiver, High Court of Kenya....for due consideration”.

It is obvious that the Debtor’s affairs, which were now touching on the sphere of the administration of **criminal justice**, were also affecting other parties, in relation to the **civil law**. For, at least two applications of a civil nature were filed: Narodhco (K) Ltd’s Notice of Motion of **12th October, 2010**; and Diamond Industries Limited’s Notice of Motion of **14th October, 2010**. The second application is the basis of the Ruling herein.

The Creditor/Applicant in the application of **14th October, 2010** moved the Court under Rules 15 and 147 of the Bankruptcy Rules, seeking Orders as follows:

- (i) THAT, the Receiving Order issued in favour of the Debtor and dated 31st May, 2010 be rescinded and/or discharged;***
- (ii) THAT, the entire Petition by the Debtor be dismissed;***
- (iii) THAT, further Orders, as ends of justice may require, be made;***
- (iv) THAT, the costs of this application be provided for.***

The application was founded on the following grounds:

- (i) ***the Petitioner has deliberately omitted the applicant from the list of unsecured creditors, in spite of having issued to the applicant cheques that were dishonoured upon presentation;***
- (ii) ***the Debtor has never attended any creditors' meeting called by the Official Receiver;***
- (iii) ***the Debtor owns several developed properties in Kitui and motor vehicles through proxies worth millions of Shillings, but he has made no disclosure;***
- (iv) ***the Petition is an abuse of Court process and of the process of Bankruptcy Law.***

Fanuel Chamwoma Wopwoko, the applicant's Credit Officer, swore a supporting affidavit on **14th October, 2010**, and depones that the Debtor had been in business with his brother and mother, under the name Taanzym Stores, at Kitui, and the Debtor, in **February, 2010** had changed the particulars of the said business, with the object of defrauding creditors. Thereafter the Debtor obtained goods worth over Kshs. 11,000,000/= from the applicant, for which he issued post-dated cheques that were later dishonoured. When the applicant embarked upon the process of securing payment for the goods already supplied to the Debtor, the applicant was served with the Receiving Order of **31st May, 2010**; and the said Order had excluded the debt owed to the applicant herein. The deponent was assigned the task of visiting Kitui, and establishing the existence of any assets in the name of the Debtor: he found that the Debtor owns several properties which he had not disclosed in his Petition; and he established that he Debtor owns several motor vehicles, "*some of which he has registered in the names of his houseboys and servants*". The deponent averred that the Debtor has withheld material information from the Court, and that the Receiving Order of **31st May, 2010** was "*obtained with the sole aim of defrauding creditors and abusing the bankruptcy process*".

On **29th October, 2010** this matter was mentioned before the Deputy Registrar, in the presence of learned counsel, **Mr. Kadima** (for the applicant in the Notice of Motion of **12th October, 2010**) and directions were given for service to be effected for a hearing on **1st November, 2010**. On the occasion of hearing, **Mr. Kadima** informed the Court that service had been duly effected, and indeed, the Official Receiver was present in Court in response to service even though the Debtor's Advocate was absent.

Was the hearing notice duly served upon the Debtor? **Fanuel Chamwoma Wopwoko**, the Credit officer of the applicant, swore an affidavit on **3rd February, 2011** deposing in the three relevant paragraphs as follows:

"3. THAT I assisted our Advocate's Clerk and Process Server in effecting service upon the Official Receiver and M/s. Odero Osiemo & Co., Advocates [for the Debtor] with the application dated 14th October, 2010....."

"5. THAT the Petitioner has been in hiding since he filed his petition for bankruptcy and I strongly believe that is why he did not present himself to the official Receiver as required....."

"6. THAT the Petitioner's Advocates [M/s. Odero Osiemo & Co., Advocates] have not annexed a copy of their diary to show that they had not diarized the matter on 1st November, 2010....."

In this Ruling, the whole context of the Debtor's actions and his securing of a Receiving Order in *ex parte* proceedings, is fully illuminated. From the evidence on record which this Court found credible, the Debtor and his advocates **did** know of the Deputy Registrar's directions given on **29th October, 2010**, for a hearing to take place on **1st November, 2010**; this was the basis for the conduct of the hearing on **1st November, 2010**.

On the basis of the evidence brought before the Court, and of the submissions of counsel, I must draw the conclusion that the Debtor has not invoked the law of bankruptcy in good faith; he has been reckless in

his business practices; he has not been forthright with his creditors; he has sought to impoverish his creditors while enriching himself; he has considerable assets which he conceals, but he invokes the Court's shield of receiving Orders to hold lawful claims at bay; he has failed to comply with Court Orders requiring him to attend regular process before the Official Receiver; he has given untruthful information to mislead the Court and to cause financial injury to his creditors; he has acted in bad faith; he is undeserving of the Court's protective shield, under the law of bankruptcy.

I will order as follows:

- (1) *The Receiving Order issued in favour of the Debtor on 31st May, 2010 is hereby rescinded and discharged.*
- (2) *The petition filed by the Debtor, is hereby dismissed.*
- (3) *The Debtor shall bear the costs of the other Parties in the several applications which have been filed in relation to the Petition.
Orders accordingly.*

SIGNED at MOMBASA

J. B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 1st day of July, 2011.

M. A. ODERO

JUDGE