



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 619 OF 1993

PAN AFRICAN CREDIT FINANCE LTD.....PLAINTIFF

VERSUS

HELLEN CHEBET KOECH.....DEFENDANT

RULING

On 25th May 1994 a money decree was issued herein against the Defendant. The first application for execution of decree was made on 13th of June 2008. It was not successful.

In the meantime the Plaintiff/Decree-Holder was placed under receivership about the year 1998. Also, a receiving order was made against the Defendant on 13th April 2006 under the **Bankruptcy Act, Cap 53** vide **Nairobi High Court Bankruptcy Cause No. 42 of 2006**. That receiving order has not been discharged, but there is as yet no formal stay of execution on account of the receiving order.

It appears that the Official Receiver (in whose possession the estate of the Defendant now is under the law) has on a number of occasions invited the liquidator of the Plaintiff to attend creditors' meetings and public hearings in court, but the liquidator has not done so.

On 15th June 2011 the Deputy Registrar of this court issued a warrant of arrest against the Defendant in execution of the decree herein after the Defendant failed to attend a notice to show cause. The Defendant then applied by **notice of motion dated 28th of June 2011** seeking the main order that there be stay of the said warrant of arrest pending hearing and determination of the bankruptcy cause. That application is the subject of this ruling.

Various provisions of the law have been cited, including **sections 9 and 11** of the Bankruptcy Act, **section 3A** of the **Civil Procedure Act, Cap 21**, and **Article 2(6)** of the **Constitution of Kenya**.

The grounds of the application appearing on the face thereof are: -

- 1) That the Defendant was unwell and unable to attend court for the notice to show cause.
- 2) That in view of the receiving order execution cannot issue against her.

The Plaintiff has opposed the application by replying affidavit sworn by one **DORIS M MUGAMBI**. She says she is the Liquidation Agent representing the **Deposit Protection Fund Board**, the Liquidator of the Plaintiff. Various grounds of objection have been raised including: -

- 1) That the order sought cannot be granted to any meaningful effect when no relief is sought for setting aside or vacating the order of 15th June 2011 for issuance of warrant of arrest.
- 2) That there is no nexus between satisfaction of decree herein and the proceedings in the bankruptcy cause.
- 3) That even if the application were properly before court, there is no basis upon which the orders sought can be granted.
- 4) That the receiving order is not in law a bar to the execution proceedings.
- 5) That this court does not have jurisdiction to grant stay of execution as it is not the court seized of the bankruptcy proceedings.
- 6) That in any event, the suit herein having been concluded and decree issued, there are no pending proceedings which this court can stay within the meaning of section 11 of Cap 53.
- 7) That the Defendant has by conduct acquiesced to the execution proceedings herein as previous warrants of arrest issued against her **after** the receiving order was already in place were never challenged.

I have considered the submissions of the learned counsels appearing, including the one case cited.

Section 9 of the Bankruptcy Act provides as follows: -

“9. (1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose.

(2) This section shall not affect the power of a secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.”

The Official Receiver is thus by law the receiver of the Defendant’s property, and the Defendant has no control over it. She would not have the power to pay the decretal sum, even if she was minded so to do.

Again by dint of sub-section (1) of section 9 aforesaid, except as directed by the Bankruptcy Act, no creditor (including a judgment-creditor) to whom a debtor is indebted in respect of any debt provable in bankruptcy, shall have any remedy against the property **or person** of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the (bankruptcy) court and on such terms as the court may impose. Court decrees are debts provable in bankruptcy. See **section 35** of the Bankruptcy Act.

So, as the receiving order against the Defendant was, and still is, in place, the Deputy Registrar herein did not have jurisdiction to order issuance of warrant of arrest against the Defendant in execution of the decree for money herein.

The issue has also been raised whether this court (not being the bankruptcy court in the bankruptcy proceedings against the Defendant) has jurisdiction to grant stay of execution. Section 11 of the Bankruptcy Act provides as follows: -

“11. (1) The court may, at any time after the presentation of a bankruptcy petition, stay an action, execution or other legal process against the property or person of the debtor, and any court in which proceedings are pending against the debtor may, on proof that a bankruptcy petition has been

presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.”

Stay of any action, execution or other legal process against the property or person of the debtor may be issued by the bankruptcy court at any time after presentation of a bankruptcy petition. Equally, **any court in which proceedings are pending against a debtor** may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

In the present case execution of decree proceedings are pending against the Defendant. This court thus has jurisdiction to issue the stay sought.

It is also to be noted that there are stringent legal conditionalities to be met by both a judgment-creditor and the executing court before the court will permit arrest and detention in prison of a judgment-debtor in execution of a money decree. Those conditionalities are to be found in the **proviso to section 38** of the Civil Procedure Act which states:-

“Provided that where the decree is for the payment of money, execution by detention in prison shall be not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied-

(a) That the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree –

- i. is likely to abscond or leave the local limits of the jurisdiction of the court; or**
- ii. has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or**

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or customer having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.”

There was absolutely no attempt by the Plaintiff/Decree-Holder herein to demonstrate or satisfy the Deputy Registrar of all the matters set out in the proviso, nor did the learned Deputy Registrar address her mind to these legal requirements.

For all the above reasons, I must allow the application by notice of motion dated 28th June 2011 as prayed in prayer (d). The warrant of arrest ordered to be issued against the Defendant on 15th June 2011 is hereby stayed pending disposal of Nairobi HC Bankruptcy Cause NO. 42 of 2006. Costs of this application will be in the cause.

It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2011.