

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

BANKRUPTCY NO.5 OF 2003

IN THE MATTER OF STANFORD MITARU

AND

IN THE MATTER OF THE BANKRUPTCY ACT CAP.53, LAWS OF KENYA

JANE NYAMBURA

.....

APPLICANT

~VRS~

STANFORD MITARU

.....

RESPONDENT/PETITIONER

RULING

On 25/2/2003 the Respondent filed this petition and with it a notice of motion under sections 5, 8, 10, 11 and 16 of the Bankruptcy Act Cap.53 and Rule 15 of the Bankruptcy Rules seeking that receiving and stay orders be issued against him on the basis that he was unable to meet his debts and liabilities. The application came under certificate of urgency and he was on the same day granted the orders on ex-parte basis. Since then no action has been taken on the orders. He was a Defendant in Kitale CM CC No.596 of 2002 in which the Applicant was the Plaintiff in the running down matter. Following the stay order, the Chief Magistrate of Kitale stayed the proceedings in the case.

The Applicant seeks under section 103 (1) of the Bankruptcy Act and Rule 15 of the Bankruptcy Rules to have the receiving and stay orders set aside on the grounds that they were obtained fraudulently, no gazettelement of the orders has been made, an official receiver has never been appointed, a trustee has not been appointed and that the meeting of creditors has not been convened. The Applicant contends that the failure to comply with these requirements has rendered the notice a nullity. He states that the Respondent merely intended to stall the proceedings in Kitale.

The Respondent opposed the application on the basis that it was directed at him and not the official receiver who had not even been served with the same. His counsel Mr. Sichangi submitted that the application was incompetent. Mr. Situma for the Applicant did not think so. He asked the court to discharge the orders in the petition since the Respondent had not even filed a replying affidavit to challenge the averments in the supporting affidavit.

There is no evidence on record to show that after the receiving order was issued the same was served on the official receiver by the Deputy Registrar, or at all, as is required by section 139 of the Act. It is upon the receipt of such an order that the official receiver was required by section 145 to advertise the same by gazettelement.

Once a receiving order is made the official receiver is *ipso facto* constituted the receiver of the property of the debtor and no suit can be filed against the debtor or his property except with the leave of the court. **(National Bank of Kenya Ltd v Paul Kibugi Muite High Court (Milimani) Civil Case No.1446/2000)**. Under section 147, an application to rescind the receiving order, to stay proceedings there-under or to annul the order, has to be served on the official receiver.

In short, the present application is incompetent in so far as it seeks to side-step the official receiver who took charge of the property of the Respondent. It is struck out with costs.

Dated and delivered at Bungoma this 8TH day of NOVEMBER 2011

in the presence of Mr. Situma for the Applicant and Mr.Sichangi for the Respondent and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE