



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

BANKRUPTCY CAUSE NO. 46 OF 2009

IN THE MATTER OF SHAH SAIJUL SOBHAGHAND - DEBTOR

IN THE MATTER OF BANKRUPTCY ACT CHAPTER 53 OF THE LAWS OF KENYA

RULING

1. By a notice motion dated 28th June 2011, the debtor herein prays for setting aside of the order of court of 6th May 2011 rescinding the receiving order issued against the estate of the debtor on 23rd July 2010. The debtor also prays for costs.
2. The motion is expressed to be brought under rule 15 and 16 of the Bankruptcy Rules under the Bankruptcy Act. It is supported by the affidavit of the debtor sworn on 28th June 2011 and the annexures. The debtor states that he or his advocates were not served with a hearing notice for the court's public examination hearing for 6th May 2011. Due to his absence on that day, the court entered an order rescinding the receiving order earlier granted on 23rd July 2010 thereby exposing the debtor's estate to execution by creditors. The debtor thus challenges the averments in the affidavit of service of David Muriuki sworn on 31st March 2011 upon which the court relied on to find that the debtor had absented himself from court despite service with the hearing notice. The debtor states that he only came to know of the adverse orders of court on 22nd June 2011 when his lawyers received a letter from the official receiver of 16 May 2011 by registered mail. He lastly avers that it is in the interests of justice to set aside the order of court of 6th May 2011 and, in effect, to reinstate the receiving order.
3. The application is contested by the Official Receiver and by the creditors. In a replying affidavit sworn by Judy Mugo on 22nd July 2011, it is stated that on 23rd September 2010, the 1st creditors meeting over this matter was held wherein the debtor gave a proposal to pay Kshs 25,000 per month to liquidate a total amount of Kshs 75,000,000 owed to his creditors. The meeting was adjourned to 25th October 2011 to consider the proposal but the debtor did not turn up. He was also to provide some documents which, again, were not rendered. In the meantime, the Official Receiver fixed the matter for public examination of the debtor by the High Court for 6th May 2011 and served the debtor and all creditors by registered mail to their last known addresses. In particular, the postal address in the notice to the debtor was the one he gave in his statement of affairs annexed "JW2" in the said affidavit. The notice dated 16th February 2011 was also served on the debtors advocates Nyaberi & Company. The debtor did not attend court on 6th May 2011 for his examination and in the circumstances, the court rescinded the receiving

order. Finally, it is averred that the notices to the debtor informing him of the rescission of the receiving order were sent to his lawyers at the same address and the debtor acknowledges receipt and hence his present application. To the official receiver then, the present application is an abuse of court process to frustrate the creditors and the same should be dismissed.

4. There are also 2 other fairly identical replying affidavits of the creditors Himanshu J. Dixit and Suryakant Shah both sworn on 6th July 2011. The two are directors of Technol Relief Services Ltd and Summer Limited respectively. Their key objections are that the application to set aside was made 8 weeks after the order, the debtor has not shown any good faith by meeting any part of the debt in excess of Kshs 71,000,000, has not offered any security for due performance or demonstrated what loss he would suffer if the order rescinding the receiving order is not set aside. The creditors assert that the debtor herein and one Shah Saijul Sobhaghand through a company known as Kaka Wholesalers Limited obtained sugar from the creditors company worth Kshs 3,045,864 but payment cheques were dishonoured. The debtors company Kaka Wholesalers Limited filed for voluntary winding up but no steps to determine the petition have been taken. To the creditors, the debtor is using court process to shield himself from payment yet he claims to own some properties. Accordingly, the debtor having been served with a hearing notice and having failed to attend court on 6th May 2011, was himself to blame and the present application should be dismissed.

5. I have heard all the parties. I take the following view of the matter. From the affidavit of service of David Muriuki sworn on 31st March 2011 paragraphs 2 and 3, it is clearly deponed that a hearing notice dated 16th February 2011 was received by him notifying the parties of a hearing session for public examination of the debtor scheduled for 6th May 2011. On 30th February 2011, he sent that notice by registered mail to the persons specified at paragraph 3 thereof. Two of the relevant persons are Saijul Sobhaghand (the debtor) of P. o. Box 3188 Nairobi and Nyamberi & Company Advocates (his lawyers) of P. o. Box 79246 Nairobi.

6. It is important that annexures to the affidavit of Judy Mugo, state counsel, aforementioned has annexed a certificate of posting as well as the hearing notice itself.

7. Firstly, I am satisfied that the Bankruptcy Act at section 132 allows the Official Receiver to send such notices by registered mail. Upon perusal of the statement of affairs supplied to the official receiver by the debtor himself (annexture "JW2") I am also satisfied that he gave his address as P.o. Box 3188-00100 Nairobi. His lawyers also do not deny that their own address is as set out in the notices. Also relevant is the fact that the debtor, does not deny receipt of the notice for the hearing of 6th May 2011. He only avers that his lawyers did not receive the notice but he admits receiving the subsequent notice rescinding the receiving order. This he says he received on 22nd June 2011 through his lawyers who got it from the same address.

8. I must also point out that at a public examination hearing, the debtor, who is to be examined must attend. So that the attendance of his counsel was not that critical. In deed, at section 17 of the Bankruptcy Act, even when the debtor's counsel attends a public examination, he has no right of audience to address the court. The debtor's affidavit in support is completely silent on whether he himself, as one of the addressees of the hearing notice received it.

9. I am afraid I have not seen sufficient evidence from the debtor challenging service. Considering the conduct of the debtor, particularly at the 1st creditors meeting when he gave proposals to pay which he never fulfilled, his failure to attend the next creditors meeting, the substantial debt owed to the creditors herein and his company's dishonoured cheques to the creditors, I find it hard to believe that he or his

lawyers did not receive hearing notices. My belief is fortified by his lawyer's admission that they received the latter notice through the same postal address notifying them of the adverse orders of 6th May 2011. And also the fact that the debtor is completely silent in his affidavit on whether he, as one of the addressees received the notice. If he ignored the first notice, then the latter notice galvanized him into action. And hence this application.

10. The only redeeming aspect of the debtor's application is that on receipt of the notice rescinding the order on 22nd June 2011, he, 6 days later on 28th June 2011 filed the present application. But that is not enough. The debtor has not offered any sufficient security for due performance. *In Re Tony John K. Keter* Bankruptcy cause No 143 of 2003 [2006] e KLR, Azangalala J, was of the view that without such security, the court should not exercise its security to set aside the rescission order.

11. But it is important to keep in mind that setting aside the order rescinding the receiving order is a matter of discretion. A court of law will be reluctant to exercise its discretion in favour of a debtor whose conduct is aimed at obstructing justice or causing delay of the just determination of the cause. I have already highlighted that on 23rd September 2010 the debtor attended a 1st creditors meeting which was adjourned to the 25th October 2010 to consider his proposal to pay Kshs 25,000 per month. The entire debt was in excess of 75,000,000. He failed to attend the meeting of 25th October 2010 on grounds that his car had broken down. No payment, even minimal sums under the proposal have been paid. The affidavits by the creditors herein aforementioned have again demonstrated the poor conduct of the debtor in getting credit under the umbrella of his company Kaka Wholesalers Limited that issued bouncing cheques bearing his signatures and then filing a voluntary winding up cause that has not been determined. The debtor gave an address to which notices to him and his lawyers were to be served. He admits his lawyers received the last such notice on 22nd June 2011 informing him of the adverse orders of court made on 6th May 2011. Yet he claims his lawyers did not receive the material notice sent earlier on 30th February 2011 to present himself for public examination in the bankruptcy cause on 6th May 2011. And he is himself completely silent as to whether, as one of the addresses, he received the hearing notice for 6th May 2011.

12. That to me is not conduct that persuades the court to exercise its discretion to set aside the order rescinding the receiving order.

13. For all the above reasons, I find that the debtor's notice of motion dated 28th June 2011 lacks in merit. I proceed to dismiss it with costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 3rd day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Oluga for Nyamberi for the Debtor.

Mr. Sala for the Official Receiver.

No appearance for the Creditors.