

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT 180 OF 2007

ANN NYAMBURA MBURUPLAINTIFF

VERSUS

JOHN WAWERU KAMAU:.....DEFENDANT

R U L I N G

Before me is an application by way of Chamber Summons under sections 9 and 11 of the Bankruptcy Act cap.53 of the Laws of Kenya and Order 1 Rule 10(2) of the Civil Procedure rules and section 3A of the Civil Procedure Act. It prays for leave for the Plaintiff/Applicant to proceed with this suit and that the Official Receiver be substituted in place of the Defendant/Respondent and the suit do proceed against the Official Receiver. There is also a prayer for costs. The application is brought on the grounds that the Defendant petitioned for Bankruptcy and a Receiving Order against him was made on 01/12/2008 wherein the Official Receiver was designated the Receiver of the Defendants estate in Bankruptcy and leave of the court is required to proceed against a Bankrupt. The applicant has sworn the supporting affidavit.

Principal State Counsel Josephine Ogolla has sworn a Replying Affidavit stating that the right court for filing the instant application is either the High Court at Nairobi, Mombasa or Kisumu or that in any case there cannot be substitution of the official Receiver for the Defendant Bankrupt, the role of the official being merely to defend the Bankrupt. She adds that the Applicant lost her cause for divorce as the court found that there never was a marriage between the Applicant and the Respondent therein and as such she cannot claim against the Respondent. The Defendant on his part has filed Grounds of Opposition to the effect that Applicant's suit is frivolous and vexatious and as court has found that there was no marriage between the parties herein then the Applicant cannot succeed under S.17 of the Married Women Property Act, 1882 and that this application should have been brought under Kisumu HC. Bankruptcy cause No. 15 of 2008 as that is the court ceased of the requisite jurisdiction.

The issue for determination now is not whether the case herein filed can succeed on merit. That is for the trial court. The issue is whether this court has jurisdiction to grant leave to the Plaintiff to proceed with her case and to substitute the Official Receiver in place of the Defendant. Section 9 of the Bankruptcy Act relates to commencement of legal proceedings once a receiving order has been commenced. That section does not therefore aid the Applicant herein as her case was commenced long before the Receiving Order was made. That section also provides that the debt must be provable in Bankruptcy and hence the Applicant must of necessity enjoin herself to the Bankruptcy cause and prove her claim there. In this case the right cause of action is to join herself in Bankruptcy case No.15 of 2009 in Kisumu High Court. That also being the court ceased of the Bankruptcy case is the right court for the Applicant herein to prove her claim against the debtor. There is no provision that the Official Receiver must be substituted in place of the debtor as all the Official Receiver does is to represent the Bankrupt debtor. It therefore follows that the provisions of Section 11 of the Bankruptcy Act do empower any court before which any proceedings are pending against a debtor to do one of two things, either to stay the proceedings or allow them to continue on such terms as it may think just. The concurrence of the official Receiver to so continue with the proceedings is mandatory as proceeding without such concurrence of the Official Receiver constitutes an offence under the Bankruptcy Act. In this case the Official Receiver does not grant concurrence for the proceedings to continue and any leave that this court may grant would not aid the Applicant as against the Bankrupt. The court does not issue orders in vain. For these reasons the application dated 11th September 2009 is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF FEBRUARY, 2010.

P.M.MWILU
JUDGE
IN THE PRESENCE OF

Paul Ekitela - Court Clerk

Miss. Nasimiyu - Advocate for the Applicant

Miss. Mutai holding brief for Omboto Advocate for the Debtor

N/A for the Advocate for the Official Receiver.