



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Bankruptcy Cause 25 of 2009**

**PURITY GATHONI GITHAE..... DEBTOR**

**VERSUS**

**OCEANFREIGHT TRANSPORT COMPANY LIMITED.....PETITIONER**

**RULING**

1. This ruling will apply to Bankruptcy Cause No. 24 of 2009 which was consolidated during the hearing. Both causes raise the same issues of law and fact. The genesis of this protracted matter is to do with a decree issued in **HCCC NO.3958 OF 1991 Ocean Freight Transport Company Limited vs. Purity Gathoni Githae and S.K. Macharia**. Judgment was entered for the petitioner against the debtors for a sum of Ksh.500,000/- with interest at 19% per annum, compounded monthly from 6<sup>th</sup> day of December 1986 until payment in full.
2. The petitioner filed Bankruptcy notices on 10<sup>th</sup> July 2008 for failure by the debtors to pay the debt which as at 1<sup>st</sup> June 2009 stood at Ksh.34,746,510 and continues to accrue interest at 19% per annum compounded monthly until full payment. When the Bankruptcy notices were served upon the debtors, they applied to set them aside on the grounds that they had a counterclaim. That application was heard by **Kimaru J** and in his ruling of 27<sup>th</sup> May the application by the debtor to set aside the bankruptcy notice was dismissed. The debtors filed a second application seeking for stay of proceedings which was similarly dismissed.
3. Being dissatisfied with the rulings of **Kimaru J**, the debtors appealed. In addition to the appeal, the debtors sought an interim order from the Court of Appeal for stay of proceedings

pending the hearing and determination of the appeal. The Court of Appeal declined to allow the application for stay of proceedings. On 12<sup>th</sup> June 2009, the creditors filed a petition seeking for orders that the debtors be deemed to have committed acts of Bankruptcy for failure to satisfy the decree and to comply with the bankruptcy notice. The debtors filed their notices of intention to oppose the petition and supporting affidavits. The debtors also filed a notice of motion seeking for an order to stay further proceedings in this matter. Counsel for the petitioners filed a Preliminary Objection which was argued before me and is the subject of this ruling.

4. According to the petitioners, the notice of motion seeking for a stay of proceedings raises the same issues that were the subject matter of the ruling by **Kimaru J** and the Court of Appeal. The same issues raised in this motion have been considered and a similar application was dismissed thus the issue is res-judicata and an abuse of the court process. In view of the rulings both by the High Court and the Court of Appeal, dismissing the application for stay of proceedings, this court cannot entertain a similar matter which is tantamount to an abuse of the court process. The issue of whether the Bankruptcy proceedings should be stayed pending the appeal was conclusively determined.
5. Counsel urged the court to strike out the notice of motion and to proceed with the hearing of the petition. The petition was properly filed as provided for under Part 111 of the Bankruptcy Proceedings Rules. The petitioner issued a notice to the debtors which were duly served. The debtors opposed the notices based on the provisions of rule 100 of the Bankruptcy Rules and the court ruled against them. The creditors filed the petition which should proceed to hearing. Both the High Court and the Court of Appeal have observed that the decree on which the Bankruptcy Proceedings are founded has not been appealed against and it has not been settled since 23.10.2001.
6. Formidable opposition was put forth by Dr. Kamau Kuria counsel for the debtor. He submitted that the Preliminary Objection raised by the petitioner offend the principles set out in the oft' cited case of **Mukhisa Biscuits v West End 1969** which case give guidelines on when a Preliminary Objection can be raised in a matter

7. Counsel for the petitioners was also faulted for importing the provisions of order 6 rule 13 of the Civil Procedure Rules into bankruptcy proceedings. Bankruptcy Rules are self governing and they specifically forbid the application of the Civil Procedure Rules. Moreover, the debtor disputes the debt and the Court of appeal made a finding that the appeal in which the debtor challenged the debt and set up a counterclaim or set off raised triable issues. Dr. Kuria further submitted that the bankruptcy court has discretion to allow an order of stay of the petition until the appeal is heard and determined. This is for reasons that, should the appeal succeed the debtors will have been dwelt with as per the petition and the appeal will be rendered nugatory.

8. On the issue of *res judicata*, he submitted that the previous proceedings related to the bankruptcy notices as no petition had been filed. Furthermore the petitioners cannot rely on the provisions of order 6 rule 13 of the Civil Procedure Rules to seek to strike the notice of motion because the Bankruptcy Act and Rules, in particular rule 317 prohibits the application of Civil procedure rules in bankruptcy proceedings. The debtors should be given an opportunity of pursuing the appeal to determine the issue of counter claim and set off.

9. The issues raised in the preliminary objection basically urged this court to find the order sought in the notice of motion dated 1<sup>st</sup> December 2009 is a repetition of what was decided by **Kimaru J** and the Court of Appeal when their Lordships refused to allow an application by the debtors seeking for an order of stay of proceedings. What therefore follows is for me to determine whether the notice of motion raises similar issues which have been adjudicated upon. It is trite law that no court should try a matter or an issue which previously been tried and adjudicated upon. Under section 7 of the Civil Procedure Act, it provides as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

10. I have considered the arguments by Dr. Kuria with an anxious mind especially the argument that there is an appeal which raises triable issues on the defence of counter claim and

set off as provided for under rule 100 of the Bankruptcy Rules. According to Dr. Kuria the Bankruptcy Court has a wide discretion to allow a stay of proceedings until the appeal is heard and determined. With respect I disagree with this submission because the same issues of whether the debtors have a defence of counter claim and set off have been determined by this court. An application for stay of proceedings was dismissed by this court and the Court of Appeal. A determination of the same issues is a regurgitation of the same issues that were ruled on by **Kimaru J** and the Court of Appeal. Asking this court to revisit the same issues is an abuse of the process.

11. It is evidently clear that the petitions were filed in the second stage of the proceedings after the objection of the bankruptcy notices was dwelt with, this is a progression from the bankruptcy notices and not a new matter as urged by learned counsel for the debtors. The same issues that were raised to oppose the bankruptcy notice and to block their progress to hearing are being raised to block the petitions.

12. For the forgoing reasons I uphold the preliminary objection and strike the notice of motion by the debtors dated 1<sup>st</sup> December 2009 with costs to the petitioners.

RULING READ AND SIGNED ON 5<sup>TH</sup> FEBRUARY 2010 AT NAIROBI.

**M.K. KOOME**  
**JUDGE**

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