



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

Bankruptcy Cause 54 of 2008

PETER MIROBI KIBOI PLAINTIFF

VERSUS

IN THE MATTER OF BANKRUPTCY ACT DEFENDANT

RULING

On the petition of the debtor himself filed on 26th September, 2008, a receiving order was made against his estate on 5th December, 2008. By the same order, the Official Receiver was constituted receiver of the estate. Upon application by Counsel for the Official Receiver, the public examination of the debtor was ordered to be at Nairobi High Court on 12th February, 2010 at 9.00 a.m. On the appointed day, the debtor did not attend court, consequent whereupon the court rescinded the receiving order.

By this application, the debtor seeks two substantive orders that:-

1. *This Honourable Court do reinstate the receiving order made against the estate of the debtor on 5th December, 2008; and*
2. *That this Honourable Court do review the orders issued on 12th February, 2010 rescinding the receiving order.*

The application is made under **Sections 100, 103 (1) and 104** of the **Bankruptcy Act**, and **Rule 15** of the **Bankruptcy Rules**, and is supported by the annexed affidavit of the applicant himself. It is based on the grounds that the applicant did not receive any hearing notice, and that he did not willfully fail to attend court for his public examination.

Opposing the application, the Official Receiver filed a replying affidavit through Mrs. Wainaina, State Counsel, by which the deponent deposes that the debtor as well as all the creditors were served with hearing notices indicating that the public examination of the applicant was slated for 12th February, 2010. All the hearing notices were sent by registered post, and all the creditors attended court. If the debtor had not received his notice, the same would have been sent back to sender, but it was never sent.

At the hearing of the application, Mr. Kimathi for the applicant argued that service of notification of the meeting should be effected on the person but in this instance it was sent by registered post. He submitted that service by substituted means without leave of the court was non effective, and that legally and technically there was no service.

Opposing the application, Mrs. Wainaina for the Official Receiver argued that the notice was sent by registered post as required, and that in bankruptcy matters they had been sending all notices by registered post. She urged the court to dismiss the application.

In his reply, Mr. Kimathi maintained that service by registered post had not been controverted, and the possibility of an error, or the

letter still being on the way, could not be ruled out. He submitted that under **Order V** of the **Civil Procedure Rules** service should be on the person; otherwise the Official Receiver should have obtained leave of the court to serve by registered post. He asked the court to make a summary order reinstating the Receiving Order.

After considering the application and the submissions of Counsel, it is common ground that the notice for the public examination of the debtor was sent by registered post. The only issue to be determined is whether this mode of serving the debtor was effective, or whether personal service should have been effected on him. Counsel for the debtor referred the court to **Order V** of the **Civil Procedure Rules** which requires that service of summons be effected on the person. A few observations arise from this contention. Firstly, **Order V** regulates service of summons on defendants. And whereas the general rule is that service be effected on a defendant personally, even that personal service may sometimes be dispensed with. That dispensation arises from situations in which a defendant has an agent empowered to receive service, or has an advocate who has instructions to accept service and enter an appearance to the summons.

But service of summons is not the same as service of a hearing notice. Whereas it is in the plaintiff's best interest to ensure that the defendant attends court to answer charges levelled against him by the plaintiff, the relationship between the Official Receiver and the debtor is not the same as that between a plaintiff and a defendant. For a start, neither is the Official Receiver a plaintiff, nor is the debtor a defendant. Indeed, as in this case, it is the debtor who petitions the court for a declaration that he is unable to pay his debts; that a receiving order be made in respect of his estate; and that he may be adjudged bankrupt. That is exactly what the applicant/debtor in this case did vide his petition filed in court on 28th September, 2008. And for that reason, he is the one who should be most keen to ensure that the petition is finalized at the earliest possible time. The Official Receiver is to the debtor like a next friend who comes to help and assist the debtor through the motions so that he can stand on his own feet again. It is the debtor who needs the Official Receiver more than the Official Receiver needs him. The debtor should therefore give the Official Receiver utmost co-operation while the petition pends in court. I find it untenable to suggest that the Official Receiver should be going out of his way to look for the debtor in order to serve him personally with a hearing notice. Such a practice would more likely than not lead the Official Receiver into spending large sums of money which he does not have, especially where the debtor decides to play truant. Yet there is no acrimony between the two. It is the debtor who should be seeking the Official Receiver, and not the other way round. The debtor is indeed the person who should be driving the whole process, and not the Official Receiver.

Secondly, the Preliminary Examination of the debtor shows that he is required to give his postal address and state the name of the P.O. Box renter. He is also required to furnish a phone number and exchange where he can be contacted on telephone. The wording of this Form suggests that he can even be informed of the hearing date on telephone! But that was not what the Official Receiver did. The Official Receiver caused a hearing notice to be sent to the debtor by registered post, informing him of the date for his public examination. That notice was posted on 13th January, 2010, and the public examination was scheduled for 12th February, 2010, which was a month down the road.

A letter sent by registered post is always returned to the sender in the event that it is not claimed by the addressee. And where the sender does not receive it back within a reasonable time, it is presumed that it was received by the addressee. In the instant case, the debtor, as well as the creditors, were all served by registered post and their letters were all posted at the same time and place. Yet, whereas all the creditors received their notices, and they all attended court on the appointed day, I find it strange that only the debtor purports not to have received the notice. And this after a whole month since the notices were posted! I seriously doubt the debtor's credibility on this matter.

Since the **Bankruptcy Act** does not specifically require personal service, and instead suggests that a debtor can be given information on telephone, I find that service of the notice by registered post was appropriate, and since the letter was not returned to the Official Receiver

as having been unclaimed, one can only conclude that it was actually received by the addressee. Having so found, I further find that the debtor was served with the date of Public Examination, and that he has not adduced any reasonable excuse for not attending court on the appointed date. His application must therefore fail.

For the above reasons, the debtor's application by Notice of Motion dated 19th February, 2010 is hereby dismissed.

Costs in the cause.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of April, 2010.

L. NJAGI
JUDGE