



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

Bankruptcy Cause 7 of 2009

**IN THE MATTER OF THE BANKRUPT ACT CHAPTER 53 OF
THE LAWS OF KENYA
AND
IN THE MATTER OF SMUEL GITAU NJENGA**

EX-PARTE ANTONY MWONDU MAUA

RULING

1. The Petitioner applied for a receiving order in respect of his estate and also for an order of stay of execution of all civil matters pursuant to **Section 11 of Bankruptcy Act**. By an order made on 8th April 2009 by **Lesiit J** the following orders were made:-

1. **That receiving order be and it is hereby issued over the estate of the debtor/petitioner**
2. **That there be a stay of any further proceedings in HCCC No. 1150 of 2001 until further orders of this court.**
3. **That cost be in the cause.**

2. This is what prompted the application by the creditor by way of Notice of Motion which is brought under the provisions of **Rule 15** of the **Bankruptcy Rules** together with **Sections 33, 103 and 140** of the **Bankruptcy Act**. The Creditor by the name **Anthony Mwoundu Maua** seeks for an order to rescind the receiving order made on 8th April 2009. The application is premised on the grounds that the debtor failed to disclose that he is still in gainful employment at NEC Nairobi Liaison Office. The Petitioner has sufficient assets to meet and settle his liability and finally this petition was filed with a sole intention of frustrating the applicant from enforcing recovery of their just and lawful debts.

3. This application is supported by the applicant's affidavit sworn on 16th July 2009 in which the applicant has given further details of how he had sued the petitioner in **Nairobi HCCC No. 1150 of 2001** and judgment was entered against the petitioner on 13th September 2006 for a sum Kshs. 1,517,670.00 with costs and interests. Execution commenced on 6th August 2008 and movable properties of the Petitioner were proclaimed. Although an objection was filed by the petitioner's wife, the application was never prosecuted. An application for Notice to show cause why the petitioner should not be committed to civil jail was suppose to be heard on 30th September 2008 but counsel for the petitioner applied for an adjournment. The application was finally heard on 5th November 2008 and a warrant of arrest was issued.

4. After that, the Petitioner made offers to settle the outstanding amount but made excuses that his contract with NEC Liaison Office was not renewed. However the applicant carried out investigations through Bosco Nyamanyi Mati a process server, who swore an affidavit that he found the Petitioner working for NEC Corporation. According to the Applicant, the petition is an abuse of the court process and should be dismissed for failure to make material disclosure.

5. This application was opposed by the Petitioner. Firstly, on the grounds that the application contravenes the provisions of **Section 9** of the **Bankruptcy Act**. The Applicant should have sought leave of the court before instituting any proceedings against the official receiver. Moreover there is no reason why the receiving order should be rescinded because the Petitioner disclosed that he was not in gainful employment. There is a letter annexed to the application showing that his contract with NEC was not renewed. The applicant has not shown any assets which belongs to the petitioner. Counsel urged the court to allow the petition to go through the process to determine whether the Petitioner should be adjudged bankrupt.

6. Under the bankruptcy Act, the power to rescind a receiving order is discretionary, and as in all discretionary powers that power must be exercised judiciously on the basis of legal principals and on evidence to support the fact that the Petitioner had failed to disclose to court material information prior to the issuance of the receiving order. It is also trite law that in order for the Petitioner to be shielded through a receiving order, a petition must be made in good faith and there should be no material nondisclosure. (See the case of **Ngei vs. Official**

Receiver { 1999} KLR) In that decision, the Court of Appeal cited with approval an English decision in the case of **re Taylor ex parte Taylor (1901) 1QBD744** especially the following words of **Wright J**;

“This debtor admittedly was guilty of two of the worst crimes which a bankrupt can commit – the crime of falsifying his statement, and the crime of substantial concealment of assets”.

7. The issues to be addressed in this application are whether the Petitioner failed to make material disclosure on his financial status and employment. It was particularly alleged by the Applicant that the Petitioner failed to disclose that he is employed by NEC Liaison office in Nairobi. The allegation is only supported by an affidavit of a process server who claims that he visited the offices of NEC Corporation and was led to an office occupied by the Petitioner thus he made the conclusion that the petitioner is employed there. This allegation is not supported by any document for example a letter from NEC Nairobi Liaison Office.

8. The only letter attached to the application dated 4th February 2009 shows that the Petitioner’s contract expired at the end February 2009 and was not renewed. For the aforesaid reason I am not satisfied that the applicant has been able to show that the petition is an abuse of the court process as provided for **under section 33, 103(1), 138 and 140** of the **Bankruptcy Act**. This petition should proceed to its full course as provided for under the **Bankruptcy Act** to enable the court make a determination on whether to adjudge the Petitioner bankrupt or not. Due to the nature of the proceedings I will not make an order for costs.

RULING READ AND SIGNED ON 16TH APRIL 2010 AT NAIROBI.

M. K. KOOME

JUDGE