



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Bankruptcy Cause 19 of 2010
IN THE MATTER OF BANKRUPTCY ACT CHAPTER 53 OF THE LAWS OF KENYA

RE: ZIPPORAH WAMBUI MATHARA

R U L I N G

1. This Bankruptcy petition was instituted by Zipporah Wambui Mathara (hereinafter referred to as the debtor) the debtor sought for a receiving order which was made in respect of her estate on 21st May 2010. Upon the issuance of a receiving order the estate of the debtor vested upon the official receiver of the Republic of Kenya. The debtor has now filed an application under **Sections 9, 11 and 100** of the **Bankruptcy Act** seeking for an order of stay of execution of **Kangema SRMCC No. 19B of 2010 DAVID NDUNGO MAINA VS ZIPPORAH WAMBUI MATHARA** pending the hearing and determination of the Bankruptcy petition.
2. This application is based on the grounds that since the receiving order was issued against the debtor in this matter, the estate of the debtor vested upon the official receiver. Therefore the debtor has no capacity to pay the decretal amount. Secondly, the debtor is required to attend the official receiver in person, however she is incarcerated at the G. K. Muranga Prison where she is was committed to serve a jail term due to her failure to satisfy the decretal sum. This application is also supported by the affidavit of debtor sworn on 27th May 2010. She has elaborated in greater detail how she was committed to civil jail on 24th March 2010. She is being held at Murang'a G. K. Prison pursuant to a judgment in the above case in which she is supposed to pay the Respondent a sum of Kshs.339,855.00. However, she has now to appear before the Official Receiver to provide information on her estate for the proper administration of her estate by the official receiver.
3. Counsel for the debtor submitted that under the Constitution of Kenya 2010; Article 2(6) the supremacy of the Constitution provides the hierarchy and sources of the Kenyan Laws. Any Treaty or Convention ratified by Kenya shall form part of the laws of Kenya under the Constitution. This provision imports the Treaties and Conventions that Kenya ratified, especially the **United Nations International Covenant on Civil and Political Rights** which Kenya ratified on 1st May 1972. Under that Convention, particularly Article 11, it is provided that “**No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.**”
4. Mr. Kang'ata learned Counsel for the debtor argued that due to the hierarchy of the laws, the Constitution is supreme therefore the Civil Procedure Act that provides for committal to civil jail as a means of forcing a debtor to satisfy a contractual obligation is against the spirit of the Constitution and, International Human Rights Law that protects and promotes basic freedoms. Secondly, under **Section 9** of the **Bankruptcy Act** after the receiving order is made, the Official Receiver is supposed to take over the property of the debtor which cannot be attached except with the leave of the court.
5. This application was opposed by the Respondent who filed a replying affidavit sworn on the 7th June 2010. According to the Respondent, the debtor is deliberately refusing to pay the debt. She had promised to pay the debt by installments of Kshs. 50,000/= moreover she was paid a sum Kshs.635,556.00 as pension from the Ministry of Finance and she will continue earning a monthly sum of Kshs. 7,944.00

w.e.f. 1st May 2009. Due to the debtor's failure to pay execution was issued by way of committal to civil jail which is provided for under the Civil Procedure Act.

6. As regards the application of the International law, Mr. Kimani learned counsel for the Respondent urged the court to consider the provisions of the Civil Procedure Act which makes the provisions for recovery of money and execution by way of committal of the judgment debtor to civil jail is one of the means of enforcing a judgment. As regards the receiving order, this should not exempt the debtor from her legal obligation especially when the Respondent has been able to show the debtor is able to pay the debt.

7. This application is principally brought under **Section 9, 11 and 100** of the **Bankruptcy Act** which generally gives court the power to make orders to facilitate the bankruptcy proceedings in particular, Section 11 provides that:-

“(1) The court may, at any time after the presentation of a bankruptcy petition, stay any action, execution or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

(2) Where the court makes an order staying any action or proceeding, or staying proceedings generally, the order may be served by sending a copy thereof, under the seal of the court, by post to the address for service of the plaintiff or other party prosecuting the proceeding.

8. Under the Bankruptcy Act, as I understand it, this court is given discretion to issue an order of stay of execution in order to give the official receiver the opportunity to consolidate and administer the estate of the debtor. The argument by counsel for the Respondent that the debtor is refusing to pay the debt does not hold because this is not an application to set aside the receiving order. The receiving order was issued on 21st May 2010. It is common ground the debtor is incarcerated at Murang'a G.K. Prison where she is serving civil jail for failure to satisfy a debt. It is also conceded that she cannot be able to appear before the official receiver to provide information for the composition and setting up of creditors meeting. For that reason I would allow the application and grant the order of stay of execution until the determination of the bankruptcy petition.

9. The provisions of the Constitution of Kenya 2010 was also invoked, and this ruling would not be complete without a commentary on those submissions. Principally I agree with counsel for the Debtor that by virtue of the provisions of **Section 2(6)** of the **Constitution of Kenya 2010, International Treaties, and Conventions** that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the **International Covenant on Civil and Political Rights** which Kenya ratified on 1st May 1972 is part of the Kenyan law. This covenant makes provisions for the promotion and protection of human rights and recognizes that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed.

10. There are several methods of enforcing a civil debt such as attachment of property. The Respondent claims that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the International Covenant on civil and political rights that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development. For the above additional reasons I will allow the application, the costs of this application will however be awarded to the Respondent.

RULING READ AND SIGNED ON THE 24TH SEPTEMBER 2010.

M. K. KOOME
JUDGE

