



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

Bankruptcy Notices 3 & 4 of 2008

S. K. MACHARIA 1ST DEBTOR

PURITY GATHONI GITHAE 2ND DEBTOR

AND

EX-PARTE:

OCEANFREIGHT TRANSPORT CO. LTD CREDITOR

RULING

The creditor and the debtors have had a protracted dispute over the sale of a parcel of land within the city of Nairobi. The creditor filed suit against the debtors seeking a refund of the purchase consideration of Kshs.500,000/=. The suit is Nairobi HCCC No.3958 of 1991 Oceanfreight Transport Company Limited vs. Purity Gathoni Githae & S. K. Macharia. The creditor filed an application dated 24th May 2000 seeking summary judgment to be entered against the debtors for the said purchase consideration. The application was heard and on 23rd October 2001, Rawal, J allowed the application. Judgment was entered in favour of the creditor as against the debtors, jointly and severally, for the sum of Kshs.500,000/= together with interest thereon at the rate of 19% per annum compounded monthly from 6th December 1986 until payment in full. The debtors were ordered to pay costs of the suit to the creditor. The debtors' counterclaim was dismissed with costs. At page 11 of her ruling, Rawal, J had this to say in respect of the dispute between the debtors and the creditor:

“It is also pertinent to note that no sale agreement is executed between the parties. The correspondence, the pleadings and facts averred in both affidavits make that point very clear. In anticipation of such agreement, Oceanfreight gave deposit of Kshs.500,000/=:, the receipt whereof is acknowledged by Purity as well as Macharia in pleading by the former and in a letter by the latter. What they now state is that they are entitled to forfeit the same by failure on the part of Oceanfreight and that according to them is a triable issue. Is that so? In my humble opinion, it is not and cannot be. First of all Oceanfreight has always been willing and pursuing the completion agreement which was not put in writing. Now it is clearly placed before me that the parties were not ad idem on the property, parties as well as the purchase price.”

The debtors did not appeal against the said decision of the court. The creditor's attempt to execute the judgment has so far been unsuccessful.

On 1st July 2008, pursuant to Rule 99 of the Bankruptcy Rules, the creditor issued bankruptcy notices respectively to S. K. Macharia and Purity Gathoni Githae. In the said bankruptcy notices, the creditor demanded payment of the sum of Kshs.29,334,170/= together with interest at the rate of 19% per annum compounded monthly from 1st July 2008, being the amount claimed by the creditor as due on the final judgment obtained against the debtors in the above referred case. The creditor required the debtors to pay the said sum within seven (7) days to forestall bankruptcy proceedings being instituted against them. In response to the bankruptcy notices, the debtors, pursuant to Rule 101 of the Bankruptcy Rules filed affidavits seeking the setting aside of the said bankruptcy notices. In the said affidavits, the debtors averred that they had a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt and for which they could not have set up in the action which the judgment or order was obtained. The creditor filed replying affidavits in response to the debtors' application seeking to set aside the bankruptcy notices. In the said replying affidavits sworn by Livingstone Ndungu Waithaka, the managing director of the creditor, it was the creditor's case that the debtors had no counter-claim, set-off or cross demand capable of persuading this court to uphold the same and therefore resulting in the setting aside of the bankruptcy notices.

Prior to the hearing of the application to set aside the bankruptcy notices, counsel for the parties to these bankruptcy proceedings agreed to file written submissions in support of their respective clients' cases. They duly complied and filed the said submissions. I also heard oral submissions made by the respective counsel for the creditor and the debtors. The parties agreed to consolidate the two suits i.e. the bankruptcy proceedings against S. K. Macharia and that against Purity Gathoni Githae. The arguments presented in court were in respect of the two bankruptcy proceedings. I have carefully read the pleadings filed by the parties in support of their respective opposing positions. I have also evaluated the arguments presented before me, both in form of written submissions and oral submissions made in court. I have considered the authorities cited by both counsel in their submissions. I am indebted to learned counsel for their insight in the subject at hand. The issue for determination by this court is whether the debtors made a case to persuade this court that they have a counter-claim, set-off or cross demand that can be upheld and thereby result in the setting aside of the bankruptcy notices. To succeed in their bid to set aside the bankruptcy notices, the debtors must establish that they have a counter-claim, set-off or cross demand that can be upheld by a court of law applying its mind to such a claim.

Rule 100 (2) of the Bankruptcy Rules provides that:

“There shall be also endorsed on every bankruptcy notice an intimation to the debtor that if he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the registrar.”

Halsbury's Laws of England, 3rd edition Vol.2 para 525 gives the requisites of a counter-claim. It states:

“The counter-claim relied on must be mutual and due in the same right (m) and may be one which the debtor could, if had chosen, have taken steps to render available to him in the action (o). Where a set-off is relied on, it must be one which is effective at the time of the application, and not merely one which will become effective after bankruptcy; and the mere fact that the debt will be discharged by a set-off in the event of bankruptcy does not invalidate the notice.

526. Setting aside notice. On the hearing of the application the court will not go behind the judgment on which the notice is founded, but is confined to the consideration of the matters contained in the provisions as to set-off (q); an order setting aside a bankruptcy notice which the judgment-creditor was entitled to issue (r) cannot be made on any other grounds (s).”

Both counsel in these proceedings, relied on the English case of Re A debtor (No.80 of 1957) Ex-parte The debtor vs. Wiseburg [1957] 2 All ER 551. The Court of Appeal of England defined what constitutes a counter-claim, set-off and cross-demand in bankruptcy proceedings. Sellers L J held at page 559 as follows:

“If a cross claim is set up in an action by a defendant to a claim it is set up by way of counter-claim or set-off. If the debtor’s claim against the creditor arises afterwards (and presumably before the bankruptcy notice) it would seem to be of necessity a claim which would have to be made by separate action or proceedings, but such a claim is referred to in the sub-section as a counter-claim, set-off or cross demand. Whatever the claim alleged here is, it is conceded that it would not have been set up in the action in which the judgment was obtained. Therefore, the first and vital question is whether it is in its nature a cross demand, to select the most favourable of the expressions used. It is not easy to find a fundamental distinction between cross demand and a cross or counter-claim, but the words are separated by the word “set-off”, which has a distinctive character, and may be taken to have a different meaning.”

In my humble view, for a debtor to be successful in his application to set aside a bankruptcy notice in bankruptcy proceedings, he must first establish that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt. Further, such counter-claim, set-off or cross demand must be of a nature which would not have been raised by the debtor in the proceedings that resulted in the judgment that is sought to be enforced by institution of bankruptcy proceedings against such debtor. Such counter-claim, set-off or cross demand must be of a nature that a court of law, can, when applying its mind on the facts of the case, reach a determination that such a counter-claim, set-off or cross demand is valid as to disentitle the creditor from instituting bankruptcy proceedings against the debtor.

In the present bankruptcy proceedings, certain facts are not in dispute. It is not disputed that the creditor obtained a valid judgment of this court entitling it to the payment of the sum of Kshs.29,334,170/= (as at the 1st July 2008). The debtors have not satisfied the decree to date. The debtors did not appeal against the said decision finding them liable to pay the said sum to the creditor. After the creditor had commenced these bankruptcy proceedings by issuing the requisite notices to the debtors, the debtors reacted by filing suit against the creditor and a company known as Excelo Structures Ltd vide Nairobi HCCC No.406 of 2008 Purity Gathoni Githae and S. K. Macharia vs. Excelo Structures Ltd and Oceanfreight Co. Ltd. In the said suit, the debtors are seeking a declaratory order of the court that the parcel of land known as L.R No.209/9827, whose title is held by Excelo Structures Ltd, was in actual fact parcel No. Un-surveyed Plot No.28, off Enterprise Road, Nairobi which had been allocated by the government to Purity Gathoni Githae, one of the debtors. If I understood the debtors correctly, it is their case that the said parcel of land, is the subject matter of the dispute between the creditor and the debtors, and was fraudulently and unlawfully registered in the name Excelo Structures Ltd. That could be the case.

However, in the circumstance of this case, this court was not persuaded by the debtors’ argument that there was connection between the creditor and Excelo Structures Ltd. Having perused the Memorandum and Articles of Association of Excelo Structures Ltd and the Annual Returns filed by the said company (*annexed to the debtors’ application for injunction in the above suit*), I did not see any connection between either the creditor or its directors to the said company. It is the view of this court that the debtors filed the said suit, for among other purposes, to set up a counter-claim, set-off or cross demand against the bankruptcy notices issued against them by the creditor. I was unable to find any validity in the claim by the debtors that somehow the creditor was involved in the alleged fraud by which the title to the parcel of land allocated to Purity Gathoni Githae was issued to Excelo Structures Ltd. In my considered opinion, the debtors failed to establish a nexus between the said Excelo Structures Ltd and the creditor. If such connection was indeed established, I would hold that the same is so tenuous that it cannot amount to a valid counter-claim, set-off or cross demand to a bankruptcy notice as envisaged under Rule 100(2) of the Bankruptcy Rules.

Have the debtors established a suitable case for the setting aside of the said bankruptcy notices? I do not think so. The debtors have not established a valid counter-claim, set-off or cross demand that would entitle this court to set aside the said bankruptcy notices. I find and hold that, the debtors, having failed in their counter-claim in the suit in which the decree that is sought to be enforced by the creditor in these bankruptcy proceedings arose from, they cannot resist the bankruptcy notices by lodging a claim against a company which has no connection whatsoever with the creditor. In any event, I agree with the submissions made by the counsel for the creditor that a claim pending in court cannot, in most cases, constitute a valid counter-claim, set-off or cross demand that can result in the setting aside of a

bankruptcy notice.

In the premises therefore, I hold that the debtors have failed to persuade this court that they have a counter-claim, set-off or cross demand that is capable of being enforced by this court. Their application to set aside the bankruptcy notices are hereby dismissed with costs to the creditor. The creditor shall be at liberty to proceed with the bankruptcy proceedings against the debtors.

It is so ordered.

DATED at **NAIROBI** this 27TH day of **MAY 2009**.

L. KIMARU

JUDGE