



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Bankruptcy Cause 107 of 2004

BENEDICT MUTIA MWOVA:.....DEBTOR

IN THE MATTER OF BANKRUPTCY ACT

R U L I N G:

The applicant herein Associated Motors Limited a Creditor of the Respondent herein moves the court by a Notice of Motion stated to be brought under Sections 33 and 100 of the Bankruptcy Act cap 53 of the Laws of Kenya and Rules 15 and 147 of the said Act. It prays that the court be pleased to rule and/or declare that the Receiving Order issued herein on 25th August 2004 stands revoked, vacated and/or set aside and the court do permit the creditor to execute the Decree issued in Milimani CM .CC.No.2159 of 2002 against the debtor and that the costs in these entire proceedings be borne by the Respondent Debtor. It is brought on the grounds that:-

- a) Pursuant to the Debtor's sworn petition dated 10th August 2004 this Honourable court on 25th August 2004 granted a Receiving Order in favour of the Debtor.
- b) By the consent Order recorded in court on 27th November 2007 the Debtor agreed to begin settling the Decretal sum due in Milimani CM.CC. No.2159 of 2002 by monthly installments as from 30th January 2008.
- c) By the said consent order it was expressly agreed that should the Debtor default in any one installment **the creditor would be at liberty to withdraw or rescind the consent and in which event the Receiving Order issued herein on 25th August 2004 would stand automatically revoked.**
- d) **Despite the said terms of the consent the Debtor has defaulted in settling his said monthly installments. As a result thereof the creditor has accordingly now withdrawn the said consent.**
- e) **The Debtor's general conduct in these proceedings amounts to an abuse of the process of this court.**
- f) **In line with the said terms of the consent the said Receiving Order should be declared to now stand automatically revoked and set aside.**

The Application is supported by the filed Affidavit of Ramzan Jamal described as the Executive Director of M/S Associated Motors Limited a creditor owed money by the Respondent debtor. This affidavit details the activities that led to the receiving order being issued. These are that the creditor obtained judgement against the debtor in **Milimani CM.CC.No.2159 of 2002** for the decretal sum of 721,466/=

plus costs and interest. In a bid to avoid paying the debtor rushed to court and obtained a Receiving Order. The debtor then avoided attending creditors meetings. Later the creditor and the debtor agreed to reduce the amount of the judgment to kshs.500, 000/= and the debtor undertook to make monthly installments starting on 30th January 2008 but the debtor has never made even a single installment. These facts are not contraverted by the debtor.

The creditor now applies to court to rescind, revoke, vacate and set aside the Receiving Order and the court do allow the Creditor to execute the decree passed in the lower court.

The debtor filed grounds of opposition that the application lacks merit and it is an abuse of the court process. At the hearing he did not urge those grounds and merely requested for more time to enable him commence payments. He did not endeavour to explain why he had not honoured the consent order recorded in court. The Official Receiver attended court and left the matter for the courts determination.

I have given due consideration to the application herein. As already stated the debtor does not deny that he obtained the Receiving Order so as to avoid execution of the decree obtained in the Chief Magistrate's court. He similarly does not deny that he has not made a single payment contrary to the agreement entered between him and the creditor. The judgment creditor is being kept away from enjoying the fruits of its judgment by a debtor who would obtain a Receiving Order enter into a consent order and promise to liquidate the decretal sum by installments then pay nothing. Nothing is shown to stop me from exercising my powers under Rule 147 of the Bankruptcy Rules to rescind the Receiving Order herein. Accordingly I order the Receiving order dated 25th August 2004 rescinded revoked, vacated and set aside. The creditor is at liberty to execute its Decree in Milimani CM.CC.NO. 2159 OF 2002. The costs of the application shall be borne by the debtor.

Orders accordingly.

DATED AT ELDORET THIS 11TH DAY OF MAY, 2009.

P. M. MWILU

JUDGE

DATED AT NAIROBI THIS 15TH DAY OF MAY,2009.

J. W. LESIIT

JUDGE

IN THE PRESENCE OF:-

.....Court clerk

.....Advocate for the Creditor

.....Official Receiver Debtor.