

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

Bankruptcy Cause 61 of 2008

RE: JAMES STEPHEN KIPRUTO ARAP NGOK

RULING

Pursuant to a petition by the debtor filed on 3rd December 2008, a receiving order was issued against his estate. Charles K. Kipngok one of the creditors filed a Notice of Motion on 27th January 2009, under the provisions of Section 33, 103(1), 138 and 140 of the Bankruptcy Act. The applicant seeks for an order to rescind the receiving order made in favour of the debtor on the 5th December 2008. This application was duly served upon the debtor and the official receiver.

The matter came to court for hearing on 24th February 2009, when parties were given leave to file further affidavits. The matter came up for hearing again on 26th June 2006, however it did not proceed. On 3rd July, 2009 when it came up for hearing, counsel for the debtor applied for an adjournment on the grounds that they needed time to file a replying affidavit and on the grounds that the son of the debtor, had written a letter proposing to pay the creditor by monthly installments of Kshs.20,000/= . This application for an adjournment was unsuccessful, and the matter proceeded to hearing.

Counsel for the creditor submitted that when the debtor filed a petition for the receiving order, he failed to make material disclosure. This was repeated even when the debtor filed his documents for preliminary examination, he failed to disclose all his assets. The creditor conducted a search on a property known as L.R. No. Kericho/Kipchimchim/701 and found that it is registered in the name of the debtor. That property was not included in the statement of affairs and the preliminary examination forms filed by the debtor under oath.

Further, the properties disclosed as Kericho/Kipchimchim/2248 and 2249 are valued at Kshs.4, 930,000/= which is sufficient to cover the debtors liabilities and creditors. The fact that the debtor withheld this vital information regarding parcel No.701 makes him guilty of an offence of falsifying the records in order to evade the duty of paying due debts to the creditors. This petition was particularly filed to frustrate and circumvent the execution in Nakuru HCCC No.132 of 2006.

It is also evident that the debtor mentioned (10) ten creditors for debts ranging from 1999 to 2000, although no evidence is attached to support the existence of the alleged debts. Counsel for the creditor faulted the inclusion of creditor No.3 that is one **Moses Juma Kiprono Ruto** who is the son of the debtor who purported to set aside the judgment using a power of attorney donated by the debtor. This is therefore not a genuine creditor because the court recommended his prosecution.

Regarding the replying affidavit, counsel for the creditor submitted that the contention by the debtor that he had subdivided parcel No.701 and given it to his sons is without basis because the search certificate clearly shows the land was never subdivided. Thus this property ought to have been disclosed and by dint of the provisions of Section 103 of the Bankruptcy Act, the court may review or vary the receiving order and the application may be made any time. The debtor purported to amend the statement of affairs in order to defeat this application further. This amendment was also made without the leave of the court as provided for under Section 104(3) of the Bankruptcy Act.

This application was opposed by M/s Koech on behalf of the official receiver. She relied on her replying affidavit sworn on 6th March, 2009. She relied on the provisions of Section 56 of the Bankruptcy Act, which spells out the duties of the official receiver as regards the debtor's conduct. The official receiver

was not given an opportunity to hold a meeting and to investigate the conduct of the debtor and make a report on whether the debtor has committed any acts which constitutes an offence.

Failure by the debtor to disclose parcel No.701 was not deliberate because the debtor filed an amended statement of affairs. This was a mere defect or irregularity which should not invalidate the proceedings herein. Secondly, there are about ten other creditors and two of them have filled prove of their debts. It is in the interest of justice that the estate of the debtor be administered by the official receiver so that it can be liquidated for the benefit of all the creditors.

Counsel for the official receiver urged the court to give a time frame within which the estate should be liquidated so that the other creditors can be given a chance to recover as well. Moreover the debtor has demonstrated willingness to settle this claim by a letter dated 1st July, 2009 by his son.

This application challenges the receiving order on the grounds that the debtor withheld material information in order to frustrate the creditors especially the applicants who are the judgment order in **Nakuru HCCC No.132 of 2006**. It is trite that in order for a debtor to be shielded through a receiving order, the petition must be made in good faith and there should be no material nondisclosure. (See the case of **Ngei versus Official Receiver 1999 KLR**) in that case, the Court of Appeal cited with approval the English decision in the case of **re Taylor ex parte Taylor (1901) 1 QBD744** 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”.

In this case, the debtor contends that parcel No.701 was not included because he had distributed it to his sons in accordance with customary law. However the certificate of official search shows that the land belonged to the debtor from 1972 and no subdivision has been done. The debtor revealed two parcels of land and left out parcel No.701.

The power to review or rescind a receiving order is discretionally and as in all discretionally powers, it must be exercised judiciously on the basis of legal principles and on the basis of the evidence. I am not persuaded that failure by the debtor to include parcel No.701 is a mere irregularity that does not go into the root of the matter. Furthermore the debtor is claiming that he had subdivided the land and given it to his sons which allegation is not supported by the evidence especially the certificate of official search. The debtor is obviously being less than candid, in his approach to this court. The debtor is not entitled to a receiving order which is meant to shield him from creditors. The debtor has a cardinal duty to make total disclosure of his entire affairs.

A letter written by the debtor’s son dated 1st July 2009, by the name Moses J. K. Ruto who undertakes to pay Kshs.20, 000/= on behalf of the debtor when at the same time he is said to be a creditor No.3 clearly shows this petition was not filed in good faith but in collusion of sorts to avoid paying the debts.

Accordingly I rescind the receiving order made on the 5th December against the estate of the debtor. The creditor shall be entitled to the cost of this application.

Ruling read and signed at **NAIROBI** on 21st August, 2009.

M. K. KOOME

JUDGE