



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Bankruptcy Cause 1 of 2009

ANTONY MUIRURI GACHOKA DEBTOR

VERSUS

EX PARTE: HARENDRA PAL CREDITOR

RULING

Vinod Kumar Ramdattma Pal, pursuant to a power of Attorney issued to him by Harendra Pal the creditor herein, issued a bankruptcy notice upon the debtor on 19th January 2009, requiring the debtor to pay a sum of Ksh.5,714.419.70/- being the decretal sum as per the certificate of costs in Hccc No. 2752 of 1995 within 10 days. The debt was not paid so this was followed by a petition for a receiving order against the estate of the debtor for failure to pay the same debt. The debt emanates from a decree of the court, the execution of the decree or the judgment of the court giving rise to the debt have not been set aside or stayed.

The petitioner further states that the creditor does not hold any security regarding the debt to secure the payment. It is also stated that the debtor has within 3 months or thereabout before the presentation of the petition committed the following acts of bankruptcy, namely;

- (a) Failed to pay the said decretal sum
- (b) Failed, before the 16th February 2009 to comply with the requirements of a Bankruptcy Notice (issued on behalf of the creditor) and duly served upon him on the 3rd February 2009.

The petition is supported by the affidavit of the petitioner; he has given details of how **HCCC NO.2752 OF 1995** was filed against the debtor. He has also annexed a copy of the plaint that was filed on 31st August 1995 seeking for a liquidated claim with costs and interests. According to the petitioner, the debtor did not enter appearance and default judgment was entered in favor of the petitioner. He has also annexed a decree issued on 18th January 1996, which the petitioner tried to execute by attachment of the debtors assets, but an objection was raised by **Priscilla Chari Njagi** the wife of the debtor.

Since the entry of judgment, the debtor has not made any attempts to settle the decretal sum owing to the petitioner. Directions were given that the petition be served upon the debtor. The debtor filed a replying affidavit in opposition of the petition. Counsel for the debtor also argued that the petition is bad in law because the petitioner is not the creditor but a holder of a power of attorney. The creditor in HCCC NO. 2752 OF 1995 is Harendra Pal who has purportedly issued a power of Attorney to the petitioner. The validity of the power of attorney cannot be established because the debtor does not know whether the

creditor is dead or alive and that affects the power of Attorney which cannot be issued by a dead donor.

On the debt owing, counsel submitted that the suit that gave rise to this decree was wrongly filed against him as he was merely a director of Prestige Developers Limited who entered into a contract with the creditor. Other parties who had entered into a similar contract filed a case against the Prestige developers Limited – and not the debtor. Counsel urged the court to dismiss the petition because the decree was obtained *ex parte* by way of default judgment. Which is also suspicious?

Under the provisions of the Bankruptcy Act a debtor commits an act of bankruptcy in each of the following cases. Section 3(1)

“(a) . . .

(g) If a creditor has obtained a final decree or final order against him for any amount, and, execution thereon not having been stayed, has served on him in Kenya, or, by leave of the court, elsewhere, a bankruptcy notice under this act, and he does not within seven days after service of the notice, in case the service is effected in Kenya, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he as a counter-claim, set off or cross-demand which equals or exceeds the amount of the decree or sum ordered to be paid, and which he could not set up in the action in which the decree was obtained, or the proceedings in which the order was obtained, and for the purpose of this paragraph and of section, 4, any person who is, for the time being, entitled to enforce a final decree or final order shall be deemed to be a creditor who has obtained final order shall be deemed to be a creditor who has obtained a final decree or final order.”

The debtor was duly served with the bankruptcy notice giving him ten (10) days to pay the decretal sum. The service of the ten days bankruptcy notice is confirmed by the affidavit of service which is on record, in any event service is not denied by the debtor. The debtor did not pay the decretal sum, thus the petitioner proceeded to file a petition seeking for a receiving order against the estate of the debtor. The debtor opposed the petition on three principle grounds that;

Firstly, the debtor contends that he changed his name from **Antony Muiruru Gachoka** to **Tonny Gachoka**. The debtor however is not denying that he is the same person who was previously known as Anthony Muiruri Gachoka and now known as Tony Gachoka. Nothing turns on this submission since the names refer to the same person. Secondly, the debtor claims that the petition was taken out by the petitioner who is not the creditor under HCCC NO. 2752 OF 1995. The petitioner claims to be holding a power of Attorney which is challenged by the debtor on account that it was given 10 years ago, and there is no evidence to show that the donor is still alive because a power of attorney donated by a dead person is of no legal consequences.

The debtor however did not produce any evidence to support the allegation that the decree holder is dead or that he did not sign the power of attorney. The petitioner is holding the power of attorney duly executed by the creditor. It was up to the debtor to produce evidence to show the power of attorney was in valid.

Lastly, the debtor contends that judgment entered against him in HCCC NO.2752 OF 1995 was a default judgment. The suit ought to have been filed against Prestige Developers Limited. That may very well be so but the forum for the debtor to advance that kind of argument should have been in HCCC NO. 2752 OF 1995 where judgment and decree was entered.

At this point in a bankruptcy proceeding, the courts duty is to ensure that the petition is properly filed and served upon the debtor. The petitioner has also been able to prove the existence of a debt owing to the creditor arising from a decree which has not been satisfied which constitutes an act of bankruptcy. That decree in HCCC 2752 OF 1995 has not been set aside or stayed or settled by the debtor. The debtor was duly given notice and the debtor has not complied by payment, the debtor has also not denied owing the debt save for the argument that the suit should have been instituted against a company which matters he

ought to have contested in HCCC No 2752 of 1995.

Accordingly I find the petitioner is entitled to a receiving order pursuant to the petition the estate of the debtor shall be administered by the official receiver. The petitioner is allowed with costs to the petition.

RULING READ AND SIGNED ON 9TH OCTOBER 2009 AT NAIROBI

M.K. KOOME

JUDGE