

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

Bankruptcy Cause 121 of 2005

RE: MBURU WAMBUGI - DEBTOR

RULING

On 17th July 2009, this court rescinded the receiving order earlier issued on 15th October 2005, on application by the debtor. The court rescinded the receiving order after it was satisfied that the debtor had failed to attend court on the day the petition was listed for public examination. This was despite the debtor being served with the hearing notice to attend court by the official receiver. On 19th August 2009, the debtor sought to have the order rescinding the receiving order set aside on the grounds that he had received the said notice to attend court three (3) days after the scheduled hearing date had passed. In his affidavit in support of the application, the debtor stated that he has always been ready and willing to attend court for public examination. He was of the view that he would suffer prejudice if the said rescinding order is not set aside.

The official receiver was opposed to the application. Rhoda Rutto – Koech, a state counsel, swore a replying affidavit in opposition to the application. She deponed that the debtor was served with the hearing notice two (2) months prior to the date that was fixed for public examination. She did not buy the excuse offered by the debtor that he had received the registered letter notifying him of the date fixed for public examination after the scheduled date. She swore that since the receiving order was issued in 2005, the debtor had failed to come up with a suitable proposal despite several creditor meetings. She was of the view that the receiving order should not be reinstated.

I have carefully considered the rival arguments made by Miss Ouko for the debtor and by Mr. Mogere for the official receiver. Has the debtor established a case as to persuade this court exercise discretion in his favour and set aside the receiving order? I do not think so. The debtor's failure to attend court on 17th July 2009 was the last straw that broke the camel's back. I was not persuaded by the reason advanced by the debtor for his failure to attend court. It was improbable that he would have received the letter sent by registered post on 29th May 2009 on 20th July 2009. He must have received the said letter on an earlier date. The debtor's failure to attend court appears to have been deliberate. As long as the debtor was enjoying the protection from creditors that was afforded to him by the receiving order, he was not prepared or willing to either cooperate with the official receiver by giving a suitable proposal or attend court during the date that was fixed for public examination. It is a legal requirement under **Section 24 and 25** of the **Bankruptcy Act** for the debtor to cooperate with the official receiver in regard to the just determination of the bankruptcy cause.

In the present application, it was evident that the debtor held the mistaken view that once the receiving order was issued, he was free to disregard what was required of him by the law. It is for the above reasons that this court is not prepared to exercise its discretion in favour of the debtor. The debtor's application dated 19th August 2009 is hereby dismissed with costs to the official receiver.

It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2009.

L. KIMARU

JUDGE