

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

Bankruptcy Cause 129 of 2006

MOHAMED SULEIMAN.....APPLICANT/CREDITOR

VERSUS

MAQBUL AHMED BUTT.....RESPONDENT/DEBTOR

R U L I N G

On the 6th November 2007, this court made an order following an application made by the creditor, Mohamed Suleiman, rescinding the receiving order which had been made on the 7th December 2006, against the estate of the debtor Maqbul Ahmed Butt.

The debtor has now come to this court by way of a notice of motion dated 15th November 2007, seeking orders:

That the order dated the 9th November 2007, rescinding the receiving order made against the estate of the applicant be set aside and the receiving order be reinstated; that in the alternative the Honourable Court issue a personal bond to the applicant for his release from Civil Jail at Industrial Area Prisons in Nairobi pending the hearing and determination of the application.

The application is premised on the grounds that the applicant debtor was never served with the application dated 10th May 2007, nor the hearing notice dated 25th July 2007, as alleged by the process server; that the application dated 10th May 2007 misrepresented facts by alleging that the debtor had committed a bankruptcy offence prior to the receiving order, and that the rescission order was irregularly obtained.

In his supporting affidavit, the debtor reiterates that he was never served with the application dated 10th May 2007, nor the hearing notice. He stated that he was currently committed in Civil Jail pursuant to interlocutory judgment obtained by the creditor in Civil Case Number 13138 of 2005. He pleaded that he would suffer irreparable loss if the orders sought were not granted.

In a replying affidavit sworn on 22nd November 2007, the creditor maintains that the debtor was duly served by the process server as per the affidavit of service sworn by the process server. The creditor further contended that that the debtor committed acts of bankruptcy namely obtaining credit on pretence of carrying on business.

It is evident from the court record that the order rescinding the receiving order which the debtor wishes to set aside was actually made on the 6th November 2007, and not 9th November 2007, as indicated in the debtor's application. That anomaly notwithstanding, I have considered the application and do find that although the debtor denies having been duly served with the application, the process server has sworn an affidavit showing that he served the debtor on 23rd August 2007, at Sheria House where the debtor was attending a Creditor's meeting. The debtor has not denied attending the Creditor's meeting on that particular day. I am inclined to believe and accept the word of the process server as against that of the debtor.

Moreover, the debtor has not denied the fact that the creditor's debt arising from the Judgment in the

Civil Suit is apparently the only debt he appears to have. The conclusion arrived at by this court on 6th November 2007, that the creditor's petition is an abuse of the court process as it was only intended to assist the debtor in avoiding the execution of the decree in respect of the judgment in favour of the creditor has not therefore been dislodged. I find no just cause upon which I can set aside the order rescinding the receiving order or issue the alternative prayer sought.

I therefore find no merit in the notice of motion dated 15th November 2007 and dismiss the same with costs.

Dated and signed this 29th day of January 2008.

H. M. OKWENGU

JUDGE

Delivered this 30th day of January 2008 in the presence of: -

M. A. WARSAME

JUDGE