



**IN THE MATTER OF THE BANKRUPTCY ACT, CAP. 53 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF DIANA WALKER KIVUVANI**

**EXPARTE: AGRI HARDWARES (E.A.) LIMITED -A CREDITOR**

**RULING**

By a notice of motion made under **Sections 24, 138 (1) (a), (d), (f)** of the **Bankruptcy Act** and **Rules 7 (2), 15 and 147** of the **Bankruptcy Rules**, the creditor, Agri Hardwares (EA) sought an order of this court to rescind the receiving order made on the 18<sup>th</sup> July, 2006 staying execution of all civil legal process against the debtor's property or person in any court. The creditor further prayed for the petition to be dismissed and the debtor ordered to pay the costs of the application. The grounds in support of the application are stated on the face of the application. The creditor contended that the debtor was guilty of failure to provide full discovery of her assets in her statement of affairs filed in court. The creditor stated that the debtor has sufficient means and is capable of meeting and settling the amount outstanding to the creditor. The creditor was of the view that the petition herein was filed with the sole intention of frustrating the creditor from enforcing the recovery of its just and lawful debts from the debtor and as such the petition filed amounted to an abuse of the due process of court. The creditor contended that it would serve the interest of justice if the court were to rescind the receiving order issued. The application is supported by the annexed affidavit of Sudhir K. Shah.

The debtor and the official receiver were served with the application. Neither the official receiver nor the debtor filed any papers in opposition to the application. The creditor served the debtor and the official receiver with a hearing notice of the date when the application was scheduled to be heard. The debtor did not make an appearance in court on that date. This court was satisfied that the debtor was duly served and ordered the creditor to proceed with the application, the absence of the debtor notwithstanding. At the hearing of the application, I heard the submission made by Miss Mungai for the creditor and by Miss Rutto for the Official Receiver. Miss Rutto did not oppose the application by the creditor.

The issue for determination by this court therefore is whether the creditor made a case to entitle this court to grant it the orders sought in its application. The creditor claimed that the debtor failed to give a full disclosure of her assets in accordance with the provisions of **Section 138 (1)** of the **Bankruptcy Act**. A debtor who petitions the Bankruptcy court must make a full and honest disclosure of his or her assets and liabilities when making a statement of affairs at the time of filing the petition for the receiving order to be granted. The purpose for making full disclosure of such assets and liabilities is to enable the Official Receiver to apportion the assets which may be realized to the creditors who would have presented their claims to the Official Receiver.

I have perused the petition which was filed by the debtor in this case. The debtor did not disclose that she had any assets. After being served with the receiving order, the creditor instructed an investigator to conduct investigations if the debtor had any property other than that which she had disclosed in her petition. The investigator filed a report. The said report is annexed to the creditor's application as annexure "SKS 8". I have read the said report. It discloses that apart from the debtor being a director of a company called Dikiv Enterprises Co. Ltd., the debtor also had an interest in a parcel of land known as LR No.1870/11/311. At the time the creditor filed the present application, the debtor was in the process of disposing off the said parcel of land. It is therefore clear to this court that the debtor did not make full disclosure of her assets at the time she petitioned this court for a receiving order to be granted. **Section 138 (1)** of the **Bankruptcy Act** grants this court jurisdiction to punish such a debtor by sentencing him or her to serve a term in prison. This court can also invoke its jurisdiction under **Section 100** of the **Bankruptcy Act**.

In the present application, the creditor sought to invoke the jurisdiction of this court to rescind the

receiving order issued by this court on 18<sup>th</sup> July, 2006. I am satisfied that the debtor failed to make a full disclosure of her assets. I am further satisfied that the debtor does not deserve to benefit from the receiving order issued by this court. I therefore exercise jurisdiction granted by the **Bankruptcy Act** and the **rules** made thereunder and hereby rescind the said receiving order staying the execution of all civil legal processes against the debtor's property or person. The creditor shall be at liberty to execute for the balance of the decretal sum due in the civil suit.

The creditor shall have costs of the application.

**DATED at NAIROBI this 20<sup>th</sup> day of FEBRUARY, 2008.**

**L. KIMARU**

**JUDGE**