



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
BANKRUPTCY CAUSE NO. 12 OF 2007

(LESIT, J.)

KENNETH MAINA KARITE.....PLAINTIFF

VERSUS

JANE NJERI.....DEFENDANT

R U L I N G

There are two Preliminary Objections raised against the application dated 23rd August, 2007 which application was brought by the Official Receiver under various sections of the Bankruptcy Act.

The preliminary objection brought by the Petitioner's Advocate is dated 15th November 2007 and it raises the following five grounds.

1. THAT the conduct of the said State Counsel Mark Gakuru offends the provisions of Rule 9 of the Advocates practice rules.
2. THAT the application drawn by the said State Counsel relying on an Affidavit sworn by himself is perjured and tainted with malice and ill motive.
3. THAT the Application is oppressive and intended to exert pressure on the debtor to accede to the said Counsel's wrongful and illegal demands.
4. THAT it is a gross aberration of justice and an abuse of the due process of law.
5. THAT the application should be stricken off and the State Counsel Mark Gakuru be disqualified forthwith from further conduct of these proceedings.

The second preliminary objection was raised by the interested party, **DUNCAN KARITE**, in which the following four grounds are cited.

1. That the application dated 23.08.07 is null and defective in law.
2. That the orders sought against Duncan Karite are premature and cannot be issue din the premises.

3. That the supporting affidavit thereon is defective for want of material disclosures and sworn by incompetent person without authority source of information and knowledge and cannot be acted upon.
4. That the 2nd prayer sought cannot issue without leave to enjoin the party thereon.

In order to understand the preliminary objection raised herein, it is necessary to show what the application by the Official Receiver is seeking. The application has been brought under sections **100, 24, 28, 103(1), 138(1) A, B, D, E and F and 145** of the **Bankruptcy Act** and **rule 15** of the **Bankruptcy Rules** and all other enabling provisions of law. It seeks the following prayers:

1. THAT this Honourable court do rescind the Receiving Order dated 14th February 2007 made against the estate of the debtor KENNETH MAINA KARITE.
2. THAT this Honourable court be pleased to order that the debtors' father DUNCAN KARITE be summoned and examined.
3. THAT this Honourable court be pleased to order that the debtor be prosecuted for committing offences under the Bankruptcy Act.
4. THAT this Honourable court do grant any order or further orders or relief as it deems fit and just to grant in the circumstances.
5. THAT the debtor herein does pay the costs of this application.

The application is based on the following grounds.

1. THAT the debtor is taking advantage of the Receiving Order to evade his responsibilities.
2. THAT the debtor fraudulently removed and transferred part of his properties to defeat justice.
3. THAT the debtor is guilty of omission and failure to provided full discovery of his assets in the statement of affairs filed herein.
4. THAT the debtor has failed to conduct his affairs and dealings as is required by Law.

Before considering the grounds raised in both preliminary objections, it is necessary to set out what, in law, constitutes a preliminary objection. I will quote from the celebrated case of **Mukisa Biscuits vs. West End Distributors [1969] EA, 696 at page 701** where the then President of the Court of Appeal for Eastern African made the following observation.

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

Mr. Gatheru acts for the Petitioner in this petition and in the instant application, Counsel submitted that the preliminary objection was based on the ruling in High Court **Misc. Application No. 446 of 1995, Jared Benson Kangwana vs. Attorney General**. Counsel did not however refer to any particular page in the ruling, which is 130 pages in length.

Mr. Gatheru's complaint was that the instant petition was prepared through the assistance of **Mr. Mark Gakuru** but that no sooner had the Receiving Order been issued, the Petitioner received a notice of a meeting and a summons requiring him to proceed to the office of **Mr. Mark Gakuru** for the First

Creditors meeting. **Mr. Mark Gakuru** is a State Counsel in the Official Receiver's office of the Attorney General's Chambers. **Mr. Gatheru** urged the court to find that under **rule 9** of the **Advocate's Practice Rules**, having had knowledge of the matter, it was unprofessional for **Mr. Gakuru** to act as the Official Receiver in the matter and that he ought to disqualify himself.

Mr. Gatheru proceeded to challenge certain paragraphs of **Mr. Gakuru's** affidavit, sworn in support of the instant application, on the basis that they offended **Order XVIII rule 3(1)** of the **Civil Procedure Rules**. **Mr. Gatheru** ended by saying that **Mr. Gakuru** was acting both as witness and prosecutor in the matter.

There was response from **Ms. Ruto**, State Counsel, for the Official Receiver, in which the learned State Counsel submitted that **Mr. Gakuru** had acted within his duties as spelt out under **sections 75** and **76** of the **Bankruptcy Act** and that nothing has been placed before the court to prove that counsel acted outside his mandate.

Mr. Githinji who represented the creditors in this application submitted that the Preliminary objection raised herein were defective as they required to be supported by evidence.

I have already set out the definition of preliminary objection in the **Mukisa Biscuits** case, supra. Does the preliminary objection by the Petitioner qualify as same? First of all, for a preliminary objection to qualify as same, it should be a point of law which requires no evidence to support it. Secondly the point of law should be capable of determining the application and indeed the suit.

Mr. Gatheru has complained of **Mr. Gakuru's** role in the matter. The role allegedly played by the said State Counsel in preparing the petition and having the Receiving Order herein issued needed to be proved by evidence. No evidence was adduced, and in any event, none would be allowed in support of the preliminary objection. For that reason alone, the preliminary objection raised does not qualify as same.

The other complaint that certain paragraphs of **Mr. Gakuru's** affidavit contravenes **rule 9** of the **Advocate Practice Rules** and the ruling in **Jared B. Kangwana's** case, supra. First of all the **Kangwana** case does not apply in this case. It should be noted that the instant case is a Bankruptcy Petition, which was filed by the Petitioner now complaining against the instant application. It is a Petition filed by the Petitioner himself. Having filed it, by application of **Section 76** of the Act, the Petitioner is subject to investigation by the Official Receiver, of whom **Mr. Gakuru** is one. **Mr. Gakuru** was not only duty bound and obligated to make the report he now makes to court through swearing the application he has sworn in support of the application. In addition to investigating and reporting, the Petitioner, the State Counsel as Official Receiver had power to participate in the prosecution of the Petitioner in case of fraud.

As opposed to the **Kangwana's** case which was concerned with abuse of office and of the due process due to engagement of both civil and criminal process against the Applicant (Kangwana), the instant matter is a Petition under the Bankruptcy Act brought by the party raising this objection. The cited case clearly does not apply nor does it fit the facts or circumstances of this petition.

Mr. Gakuru's affidavit is subject to the **Bankruptcy Act** and is sworn in furtherance of **Section 76** of the Act. **Mr. Gakuru** has not sworn the affidavit as a Practicing Advocate representing a client. **Mr. Gakuru** represented the Official Receiver and his role in this Petition was solely in that capacity. The affidavit in question is proper and cannot be faulted.

On the whole, having regard to the grounds raised in the Petitioner's preliminary objection, I am satisfied that it has no merit, does not qualify as a preliminary objection and should be dismissed with costs to the Official Receiver and the creditors.

Mr. Nyende represents the interested party, **Duncan Karite** who raised the second preliminary objection. **Mr. Nyende** submitted that there was no provision under the Bankruptcy Act under which a third party can be summoned before the Receiving Order is set aside. Counsel submitted that it was

necessary to obtain leave under **Section 9** of the Act before commencing the application.

Just like **Mr. Gatheru**, **Mr. Nyende** also raised issue with the supporting affidavit sworn by **Mr. Mark Gakuru**, particularly paragraphs 5 to 8 of the same. **Mr. Nyende** relied on the case of **Simon Ngui vs. Overseas Courier Services (K) Ltd. HCCC No. 1632 of 1997.**

Ms. Ruto, in response to **Mr. Nyende's** submission relied on **Section 28** of the **Bankruptcy Act** and urged the court to find that the court had jurisdiction to summon any person known or suspected to have in his possession any of the estate or effects belonging to the debtor

Section 28 of the Act stipulates:

“28(1) The court may on the application of the official receiver or trustee, at any time, after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor or his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor or his dealings or property.”

Prayer 2 of the Notice of Motion application dated 23rd August, 2007 is set out in full herein above. As indicated, the Applicant invokes **section 28** of the **Bankruptcy Act** among other provisions of the Act in support of this application.

As noted in regard to the preliminary objection raised by the Petitioner, a preliminary objection which requires evidence to support the ground raised does not qualify to be one. The preliminary objection by the third party contends that the application is defective in law and null, is premature and cannot be issued. In the submission by **Mr. Nyende**, nowhere has he shown on what basis the application in question is defective, null or premature. The only complaint raised is that the prayer sought was not provided for under the Act. Section 28 of the Act is very clear that the court may summon before it any person known or suspected to have in his possession any of the estate or effects belonging to the debtor. The application has been brought by the Official Receiver. It is based on the affidavit by a State Counsel in which the basis for the suspicion is set out.

Mr. Nyende's submission that the court lacked jurisdiction to grant the orders sought is misconceived, based on an understanding and misconstruction of the law and especially Section 28 of the Act, and is without merit. The case relied upon by **Mr. Nyende** has no application to this case. The State Counsel in the Official Receiver's office of the Attorney General Chambers had not only the power, but a duty and a mandate under **Section 76** of the Act to investigate the conduct of the debtor and to report to court and could go as far as prosecuting the debtor in a criminal court.

Mr. Gakuru's affidavit is a report to court disclosing the Petitioner's conduct and stating how the conduct, in relation to the interested party is suspected to be fraudulent. I see no defect in the various paragraphs complained of in the affidavit of **Mr. Mark Gakuru**. The defects complained of even if proved, would not qualify to be raised as preliminary objection as they cannot lead to the termination of the application or of the petition.

For these reasons, I dismiss the preliminary objection by the interested party with costs to the official receiver and the creditor.

Dated at Nairobi this 16th day of May, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Nyende for the Interested party

Mr. Gatheru for the Petitioner

Mr. Githinji for the Creditor

Ms. Ruto, State Counsel for Official Receiver

LESIIT, J.

JUDGE

Court: The application dated 23rd August, 2007 now set for hearing on 19th June 2008 by consent of parties.

LESIIT, J.

JUDGE