



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

**Bankruptcy Cause 12 of 2007**

**KENNETH MAINA KARITE.....DEBTOR**

**R U L I N G**

These are two applications argued together. The first one is by the Official Receiver dated 23<sup>rd</sup> August, 2007 in which the following four orders are sought.

- 1. THAT this Honourable court do rescind the Receiving Order dated 14<sup>th</sup> 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 go grant in the circumstances.**

The grounds for the application are four namely:

- 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 provide 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.**

The application is supported by Mark Gakuru's Affidavit of even date with annexures thereto. There is an affidavit sworn by the Creditor to this petition also supporting the Official Receiver's application and the prayers sought there under.

The second application is by the Debtor and is dated 12<sup>th</sup> September, 2008. The application initially sought six prayers. However at the time of hearing, the Applicant abandoned all the other prayers except prayers 4 and 6 where he prays for orders:

**4. THAT the Receiving Order made against the Debtor Kenneth Maina Karite be lifted unconditionally forthwith.**

**6. THAT this Honourable Court do refer the conduct of the State Counsel, Mark Gakuru complained of by the Debtor in this matter for investigation by the Kenya Anti Corruption Authority and a report be filed to this Honourable Court within 60-90 days for further orders.**

The grounds for the application are five and are namely:

**i) The Debtor had clearly stated in his statement of affairs that the Receiving Order sought and obtained from this court was intended to last for duration of 12 months.**

**ii) THAT the petition for Bankruptcy herein was occasioned by serious financial hardship resultant from poor health by the Debtor.**

**iii) The Debtor has substantively recovered from the effects of ill health and financial predicament resultant there-from and has been making regular payments pursuant to the consent court order recorded between the Debtor and his Creditors in High Court Civil Appeal No. 59 of 2006 Kenneth Maina versus Jane Njeri Maina (Nairobi) reducing the amount of monthly maintenance from kshs.20,000/- to Kshs.7,000/- and the Debtor has been making regular monthly payment of this agreed amount without failure.**

**iv) The office of the Official Receiver has been unlawfully, wrongfully and unjustly undermining the efforts of the Debtor following disagreement with a State Counsel by the name of Mark Gakuru who has been seized of this matter from the inception and the said officer has conducted and continues with impunity to conduct himself in a manner that is patently illegal, unethical, unjust, unfair and grossly prejudicial to the Debtor.**

**v) It is in the interest of justice that the orders sought be granted to avoid further miscarriage of justice.**

The application is supported by the affidavit of the Debtor and opposed by the Replying Affidavit of Rhoda Rutto State Counsel.

The prayers in both applications by the Debtor and the Official Receiver have one prayer in common, which is, that the Receiving Order granted herein be rescinded. The difference is that the Debtor wishes to have the order rescinded unconditionally while the Official Receiver seeks to have the Debtor prosecuted for committing offences under the Bankruptcy Act. There are other prayers in each application which I will consider in this ruling.

This court has power under Section 103 of the Bankruptcy Act (hereinafter referred to as the Act) to rescind any order made under the Act, including that of rescinding a Receiving Order. The two parties are not contesting the rescission of the Receiving Order made by this court on 13<sup>th</sup> February, 2007. I will therefore oblige and rescind the Receiving Order as prayed by both parties. Considering the Official Receivers application dated 23<sup>rd</sup> August, 2007, first the Official Receiver also seeks four other prayers. These are stated at the beginning of this ruling.

In regard to hearing the father of the Debtor, DUNCAN KARITE under section 28 of the Act the court may order any person to be summoned and examined. I do not find it desirable to summon the Debtor's father to be examined since the proceedings have by reason of the order rescinding the Receiving Order herein effectively been concluded.

The other prayer the Official Receiver seeks is to have the Debtor prosecuted for committing offences under the Act.

Mr. Gakuru for the Official Receiver has shown that the Debtor transferred a property L.R. No.

KWALE/UKUNDA/3383 in 29<sup>th</sup> November, 2005 to his father DUNCAN KARITE just before filing the Bankruptcy Cause on 13<sup>th</sup> February, 2007. That offends section 138(1) (d) of the Act. The Debtor has admitted that he transferred the said property. The other offence committed, Mr. Gakuru submitted, was contravention of section 138(1) (a) and section 138 (1) (b) of the Act. In that, the Debtor did not disclose a property in his name L.R. NO. LOC 14/KAMUNE/1829. That submission is supported by the Statement of Affairs filed in court in support of the bankruptcy. The property is included in the statement. Mr. Gakuru's attempt to give evidence that the same was missing in his copy when he first saw the document is untenable. The other offences alleged are failure to disclose that he owns a lorry Reg. No. KAR 493V, which as per annexure 'MGI' dated 15<sup>th</sup> November, 2006, the lorry was registered in the Debtor's name.

Regarding the motor vehicle, the Debtor has deposed that he bought it in an auction on behalf of someone else. I am not convinced by that explanation. The Debtor has not explained why it was necessary to register the vehicle, bought for another in his name. There is a good ground to believe that the Debtor is guilty of failure to deliver property to the Official Receiver and failure to disclose property.

In regard to the Debtor's application, he seeks his conditional discharge of the Receiving Order which for reasons given in this ruling I decline to give.

The Debtor also seeks to have Mr. Mark Gakuru, State Counsel, be investigated by Kenya Anti-corruption Authority and a report filed in this court within 60 – 90 days. First of all, the jurisdiction of the court to order such investigation has not been invoked. Secondly, Mr. Nyende for Duncan Karite, the Debtor's father filed a Notice of Preliminary Objection which was considered by this court in the ruling dated 16<sup>th</sup> May, 2008 together with the notice of Preliminary Objection raised by the Debtor. The issues raised in both Preliminary Objections are similar to prayer 6 of the Debtor's application. The ruling speaks for itself. There was a specific finding that Mark Gakuru conducted himself as required under the Act, as officer dealing with the Bankruptcy on behalf of the Official Receiver. The Preliminary Objection had no substance. If anything the Debtor, by insisting on pursuing this prayer after I made a ruling touching on issues raised herein is evidence of lack of bona fide, is in bad faith and intended to intimidate a Senior Government Official from doing his rightful duties. The Debtor may not agree with Mr. Gakuru. However, Mr. Gakuru conducted himself exceptionally well. I believe that the fact the Debtor seeks to have the Receiving Order rescinded sanctifies Mr. Gakuru's findings regarding this bankruptcy cause. It is also foul proof that the Debtor acted in bad faith from the very beginning.

I must conclude by stating that it is quite disheartening and the Debtor should feel remorse or in the very least embarrassment that he could go to the extent of concealing his property, transferring others to third parties and then could file this cause just to escape his responsibility as a husband and father. This is not only an abuse of the court process but also impunity against ones own which should be frowned on by the court and the society.

In conclusion, the application dated 23<sup>rd</sup> August, 2007 and 12<sup>th</sup> September, 2008 are allowed in the following terms:

- 1. Prayer 1 of the Official Receiver's application dated 23<sup>rd</sup> August, 2007 be and is hereby allowed. The Receiving Order issued by this court on the 13<sup>th</sup> day of February, 2007 be and is hereby rescinded.**
- 2. Prayer 3 of the application dated 23<sup>rd</sup> August, 2007 is allowed. The court recommends to the Attorney General that the Petitioner/Debtor herein be charged with offences under Section 138 (1) (a), (b) and (d) of the Bankruptcy Act for failing to provide full discovery of his property and for transferring part of his assets to defeat justice.**
- 3. The Debtors application dated 12<sup>th</sup> September, 2008 be and is hereby dismissed in its entirety.**
- 4. The Debtor do meet the costs of the two applications to the creditors and official receiver.**

**Dated at Nairobi this 31<sup>st</sup> day of October, 2008.**

**LESIIT, J.**

**JUDGE**

***Read, signed and delivered in presence of:-***

Mr. Gatheru for the Debtor

Mr. Nyende for Interested Party

Mr. Opija holding brief Mr. Gakuru for the Official Receiver

Mr. Mogere holding brief Mr. Githinji for Creditor

**LESIIT, J.**

**JUDGE**