



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

Bankruptcy Cause 25 of 2008

GIDEON MWITI IREA.....DEBTOR

R U L I N G

The application is a Notice of Motion dated 24th June, 2008 brought under Rule 147(1) of the Bankruptcy Rules. It seeks to have the Receiving order dated 28th April 2008 annulled or set aside. The application also seeks that the debtor Gideon Mwiti be cited for perjury.

The grounds of the application are that the Receiving order was obtained by the Debtor on the basis of falsehood and non disclosure of material facts. The second ground is that the Debtor failed to disclose to the court that he had previously obtained a similar order which is still subsisting, in Bankruptcy cause No. 132 of 2003. The other grounds are that the petition was an abuse of the court process and was intended to defeat execution against the Debtor in **HCCC NO. 271 of 2007**.

In support of the application, Dave, the Deputy General Manager of Oriental Commercial Bank Limited has sworn an affidavit dated 24th June, 2008. In the affidavit, he annexes a guarantee and indemnity instrument executed by the debtor in favour of the Creditor/Applicant on 3rd June, 2006. The guarantee is annexure 'AID1'. The deponent also annexes to the affidavit 'AID2' a copy of a plaint of a case HCCC No. 271 of 2007 in which the Applicant/Creditor has sued the debtor and others. The deponent also annexes a decree issued in that case on 1st October, 2007 upon entry of judgment against the Defendants in the suit. The decree is for Kshs.20,252,097.55. The deponent also annexes copies of the petition and other documents filed by the debtor in Bankruptcy cause No. 25 of 2008 as 'AID6'. The deponent also annexes 'AID7' a copy of a title deed No. Kajaiado/Kaputei-North/1668 in the Debtor's name. The Debtor has also annexed 'AID8' copies of proceedings on Bankruptcy Cause No. 132/03 in which a Receiving Order was made in the debtors favour.

The application was heard inter-parties. Mr. Bundotich for the Applicant relied on the replying affidavit of Mr. Dave. The learned counsel also relied on Rule 3(12) (1) of the Bankruptcy Rules for the submission that the rule required a debtor to make full disclosure of material facts. Counsel also relied on Section 138(1) of the Bankruptcy Act to state that it was an offence not to make a full disclosure under that section. Mr. Bundotich also relied on Section 139 of the Bankruptcy Act to submit that the Act bars a debtor from obtaining credit after a Receiving Order is issued. Counsel urged court to recommend that the debtor be charged with criminal offences and relied on the English case of **In Re: Betts Ex Parte Official Receiver [1901] CA 39**. The case simply emphasis that a court has the power to rescind a Receiving order made against a bankrupt (read debtor) even on his own application if sufficient grounds exists justifying the order to rescind.

Mr. Mwenda for the debtor in his submissions made far reaching statements which I will consider vis-à-vis the legal provisions he relied upon to back him.

Miss Ruto for the official receiver associated herself with the submissions made by the creditor. The learned state counsel relied upon the replying affidavit sworn by herself dated 27th of August, 2008. In that affidavit Miss. Rutto deposes that she is in support of the application. The learned counsel deposes further the Debtor was trying to use the Bankruptcy proceedings to defeat the creditors judgment and Decree and that the Debtor had committed offences under the Bankruptcy Act and should be penalized. Miss Rutto deposes further that the Debtor was untruthful and had concealed relevant information when he presented his petition by failing to disclose the facts that he had a receiving Order. Miss Rutto deposed finally that the Debtor had abused the process of the Court by failing to correctly disclose his statement of affairs and properties which is also an offence under the Bankruptcy Act.

The application was opposed. Mr. Mwenda relied on the replying affidavit sworn by the Debtor dated 16th of July, 2008. In that affidavit the Debtor deposes that if there are any omissions or misstatements in the statements of affairs he filed together with this petition then it should be attributable to an honest inadvertence on his part and is not intended to mislead and defraud. The Debtor deposes further that as his advocates on record advised him the debt in HCCC 271 OF 2007 did not attach to him in personal capacity but to a company which is a separate entity i.e Maendeleo Pharmacy 2006 (K) Ltd. The Debtor has deposed to matters of the Law which are also covered by the submissions of Mr. Mwenda his advocate in the submissions in response to the instant application. I will therefore deal with them as I consider the application.

Mr. Mwenda in his submissions stated that the application is mischievous and an abuse to the court process. He has answered all the issues raised by Mr. Bundotich in this applicant and I will deal with them seriatim.

Regarding the filing of the two Bankruptcy petitions the Debtors admitted that he has filed two petitions as alleged by the Creditor, the first one was the one issued in the Bankruptcy Cause No. 132 of 2003, the second one is the instant one. Mr. Mwenda for the Debtor has urged the Court to find, first, that the Creditor is a secured Creditor and as provided under Section 9(2) of the Bankruptcy Act, herein referred to as the Act, he need not have come to the court with the instant application. The second argument is that section 44 of the Act allows multiple receiving orders being made and that section 105 of the Act allows for consolidation of receiving orders. Mr. Mwenda has urged that the Court should not allow the application but should insist that the Official Receiver processing this petition as mandated under sections 17 and 28 of the Act. These sections provide for public examination of debtors.

Mr. Mwenda argued that it was the duty of the Official receiver to discover the properties owned by the Debtor and to take them over as provided for in the Act. Miss Rutto of the Official Receiver does not agree with the arguments of Mr. Mwenda. Miss Rutto submitted that the Debtor had not been candid but had willfully failed to disclose all the information on his estate as required by the Law. Further she referred the court to the statement of affairs where the Debtor had declared that he had not obtained any other receiving order, which she submitted was misstatement of facts.

In regard to multiple receiving orders section 44 of the Act should be read together with section 105 of the Act. While section 44 makes provision for a second Bankruptcy petition and therefore a second receiving order, section 105 provides for consolidation of such petitions. It is not correct to say that the Law allows one Debtor to petition as many receiving orders as they may desire. The Debtors right to bring petitions has to be exercised within the provisions of the Act. In the case of **RE AL-MOODAY**

(A DEBTOR) 1990 KLR 280 Githinji, J as he then was held that

“2. A debtor is entitled to use the Machinery of the Bankruptcy Act for his own purpose so as to shield himself from further liability to committal or other harassment.

3. There is a limit to a debtors immunity and if it appears as a fact that a debtor is on the habit of filing bankruptcy petitions to get right of his liabilities so as to defraud the creditor, he ought not to be protected by the Bankruptcy Act.”

The issue then before this court is not so much that the debtor has taken out two bankruptcy causes but, the manner in which this has been done, and whether in so doing he has given all the material information required to be given under the Act and the rules. It has been shown, and the Debtor and his Advocate admit that there was failure to disclose material information for instance the Debtor admits that he has filed two Bankruptcy petitions. He also admits that he did not declare that fact in the latter petition which is the instant one.

The debtor has given an excuse for this non-disclosure that it was due to inadvertence. He then excuses himself for not disclosing some of his properties and of his debt saying that the creditor in the instant application had a lien over the property in question.

I have looked at all the documents in of these proceedings. I note that the Debtor obtained a receiving order over his estate in 2003 in the Bankruptcy Cause No. 132 of 2003. Having obtained that Receiving Order, the Debtor was obligated to conduct his affairs thereafter in strict compliance with the Act. The Act disallows a Creditor from incurring any debt or liability or obtaining credit without disclosing his bankruptcy status.

It is very clear from the record that the Debtor obtained credit

or banking facilities or other financial accommodation from the Creditor in the sum of Kshs.20 millions shilling in 2006. This was after he had obtained the receiving order over his estate three years before, and which order was still subsisting at the time. When he now petitioned for a receiving order in the instant petition, not only did the Debtor fail to disclose that he already had a Receiving Order prior to the instant one. He failed to disclose all his properties in his statement of affairs. Contrary to Mr. Mwenda's submission, the debtor completed the statement of affairs with the assistance of his Advocate. It is also shown, and the Debtor also admitted that he did not disclose in his statement of affairs that he had secured creditors.

Mr. Mwenda's submission that it was the duty of Official

Receiver to investigate the Debtor and discover all his affairs and his properties is untenable. The debtor is obligated to make full disclosures in the statement of affairs filed in support of the petition and further, the Act requires him to co-operate with the Official Receiver in regard to all his property, his conduct and dealings. All this is provided for under sections 24 to 34 of the Act.

I am satisfied that the Debtor obtained two receiving orders, one in succession of the other, without making full disclosure of the existence of the first receiving order and without making a full disclosure of all the relevant information required to be made in the statement of affairs and the petition filed in the latter Bankruptcy Cause. So the Debtor has committed an offence under section 138 Sub-section 1(f) and (r). I would recommend that he should be charged with the offences under the said Section. I am also satisfied that the Debtor filed the instant Bankruptcy Petition in order to defraud the Creditor, and to avoid to meeting his liabilities and is therefore undeserving of the protection provided for under the Bankruptcy Act. I am also satisfied that the instant petition was for the reasons I have given in this ruling, improper and an abuse of the process of the court. Having come to this conclusion it is imperative upon this court to annul the receiving order given by this court on the 25th of April 2008.

Accordingly, I allow the Notice of Motion dated 24th of June, 2008 and annul the Receiving Order dated 28th of April 2008 with costs of the application being borne by the Debtor.

Dated at Nairobi this 9th day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Mwenda for the Debtor

Mr. Bundotich for the Applicant/Creditor

Mr. Gakuru holding brief for Ms. Ruto for the Official Receiver

LESIT, J.

JUDGE