



REPUBLIC OF KENYA
IN THE REPUBLIC OF KENYA AT NAIROBI
MILIMANI LAW COURTS
BANKRUPTCY CAUSE 16 OF 2007
GITOBU IMANYARA T/A GITOBU IMANYARA & COMPANY ADVOCATES
AND
IN THE MATTER OF BANKRUPTCY ACT
RULING

Gitobu Imanyara trading as Gitobu Imanyara & co. Advocates has come to this court by way of Chamber summons filed on 26th February, 2007 seeking orders that further proceedings towards prosecution of creditors petition in Bankruptcy Cause No. 16 of 2007 including the issuance of compliance certificate, receiving order and/or advertising the said petition by the official receiver in the Kenya Gazette, be stayed pending hearing and final determination of this chamber summons, and that the affidavit of Gitobu Imanyara sworn on the 29th January 2007, and filed on 30th January, 2007 be deemed to be duly filed. The Applicant further seeks to have Bankruptcy Notice dated 19th December, 2006 set aside, and such further orders given as will facilitate the interest of justice and fair hearing.

The application is based on the grounds that the applicant has complied with the Bankruptcy Notice dated 19th December, 2006 and served upon him on 24th January, 2007; That the filing of the creditors petition No.16 of 2007 is premature, in bad faith, and is premised on extreme malice; That the Bankruptcy Notice upon which the petition is based is fatally defective and a nullity.

In his supporting affidavit sworn on 26th February 2007, The Applicant depones that he duly filed a replying affidavit on 30th January, 2007 in response to the Bankruptcy Notice No. 14 of 2006 and that he has annexed documents to that affidavit showing that the proceedings in respect of which the Bankruptcy Notice has been issued have been stayed and that execution proceedings against him in respect of Kshs.5,425,000/= have proceeded against him by way of attachment of property way in excess of that amount and therefore the Bankruptcy proceedings were oppressive, vexatious and amounted to double jeopardy.

The Applicant deponed that the creditors petition and certificate of compliance signed by the official receiver, and the fixing of the hearing of the petition were done maliciously and in bad faith. He averred that if a receiving order is made pursuant to the Bankruptcy Notice he will suffer irreparable damage and his reputation as an advocate will be destroyed. His political career as an aspiring Member of Parliament will also be severely damaged.

Ms Sande who appeared for the applicant submitted that the applicant having complied with a Bankruptcy Notice and having sworn an affidavit showing that he has a counter claim to the petitioners claim these

issues ought to have been canvassed before any receiving orders are made. She therefore urged the Court to stay the proceedings and give the Applicant a chance to be heard.

Marienje Holdings Limited the Petitioner in the Bankruptcy cause hereinafter referred to as “Respondent”, filed a notice of preliminary objection contending that the application is incurably defective, incompetent and does not lie in law, and that the same is a grave abuse of the process of the Court purely meant to delay the cause of justice. It was contended that the court does not have the jurisdiction to grant the orders sought as there are no provisions in the Bankruptcy Act and Rules for an application of the sort filed by the Applicant. A replying affidavit sworn on 5th March, 2007 by Morris Peter Kinyanjui was also relied upon. In the replying affidavit it was deponed that there were no stay of proceedings in respect of Bankruptcy Notice No.14 of 2006. It was also deponed that the execution against the applicant is in respect of a court order made on 15th August 2006, in Miscellaneous Civil Application No. 6 of 2007 (OS) wherein the applicant was ordered to pay the sum of Kshs.5,425,000/= to the firm of Messrs Waweru Gatonye & Company Advocates or else to deposit the same in Court by way of Bankers cheques in default of which execution was to issue against the Applicant. To date no payment has been made by the Applicant.

It was the failure to pay this amount that lead to the creditor’s petition against the Applicant. It was maintained that the affidavit purported to have been filed by the Applicant in response to the Bankruptcy Notice did not qualify as an affidavit under the provisions of the Bankruptcy Rules. Mr. Machira who appeared for the Respondent submitted that the application before court was defective as it did not comply with Rule 15 and 17 (1) and (2) of the Bankruptcy Rules, the same having been brought by way of Chamber Summons without any leave or authority from the Court. Mr. Machira urged the court to strike out the application under Rule 19 of the Bankruptcy Rules as the Applicant did not properly serve his application and has taken unfair advantage of the situation to obtain ex-parte orders. It was maintained that the Applicant who is an advocate of the High Court has misled the Court that he complied with the Bankruptcy Rules by filing an affidavit which raises a counter claim or setoff, however the affidavit filed by the Applicant does not raise any claim and does not comply with Rule 100 and 101 of the Bankruptcy Rules. The affidavit was therefore insufficient to raise any setoff or counter claim. Mr. Machira relied on the cases of:

§ ***Kartar Singh Nanak Singh Ramagharia vs Naumann Gepp (East Africa) Limited (1960) E.A 442*** wherein it was held that an affidavit made in reply to a Bankruptcy Notice which does not allege a counter claim, setoff or cross-demand cannot operate as an application to set aside a Bankruptcy Notice.

§ ***Joginder Singh Nandhra and others vs Munshi Ram & Company Ltd(1965) E.A 753*** wherein it was held that an unsatisfied attachment of moneys in court does not operate as a stay of execution of a final judgment if the amount due is certain, and consequently a Bankruptcy Notice could not be barred.

Under Rule 15 of the Bankruptcy Rules, an application to the Court is required to be made by motion supported by affidavit unless otherwise provided by the rules of the court. The Applicant herein brought his application by way of Chamber Summons. No rule was cited to the Court providing for such a chamber summons nor has the court given any direction or leave for such a procedure to be adopted. The Summons before the court is therefore incompetent.

During the hearing of this application the file in respect of Bankruptcy Notice No.14 of 2006 was availed to the court. I have therefore had the opportunity to peruse the affidavit sworn by Gitobu Imanyara on 29th January, 2007 and filed on 30th January, 2007 in response to the Bankruptcy Notice. I do not find any paragraphs raising a setoff or counterclaim or cross-demand which equals or exceeds the amount which was being claimed by the Creditor. Moreover, the applicant has not denied that there is an order for payment of the amount of Kshs.5,425,000/=. He is merely claiming that the amount was not due because there is an order of stay of execution in force.

The copy of the order annexed to the affidavit is a stay order granted under order 21 Rule 54 of the Civil Procedure Rules. That is an order which only stays the attachment and sale of movables in respect of which an objection was lodged. It is not an order generally staying the execution in respect of the amount

claimed. Moreover, the decision in the case of *Joginder Singh Nandhara & Others vs Munshi Ram & Co. Limited (Supra)* is a clear authority that an unsatisfied attachment does not operate as a stay of execution of final judgment, and consequently a Bankruptcy Notice is in order. I am satisfied that the Applicant has failed to pay the amount due to the Creditor and has not satisfied this court that he has any setoff or counter claim or that there is any stay of execution of the order for payment. I am satisfied that the Bankruptcy Notice was in order and that there is no just or sufficient cause to set aside the Bankruptcy Notice or compliance certificate or stay further prosecutions of the Creditors petition.

Accordingly I find no merit in this application and do therefore dismiss it with costs to the Creditor/Respondent.

Dated Signed and delivered this 30th day of March 2007.

H. M. OKWENGU

JUDGE