



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

Bankruptcy Cause 89 of 2006

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

IN THE MATTER OF DIANA WALKER KIVUVANI

EXPARTE: AGRI HARDWARES (E.A.) LIMITED – A CREDITOR

RULING

This is an application (by Notice of Motion dated 5.4.2007) by the Creditor seeking one primary order that the Official Receiver Bernice Gachegu (Ms) be compelled to release forthwith and unconditionally the sum of KShs.1,030,541.00 to the firm of Kipkorir Titoo & Kiara Advocates paid to and held by him (Sic) on behalf of the debtor. In default the creditor prays that the official Receiver be cited for contempt.

The grounds for the application are as follows:-

- (a) That on 18.7.2006, or thereabout the debtor herein obtained the Receiving Order aimed at stopping and/or stalling the execution of the decree in Nairobi CMCC No.5956 of 2005 (Milimani) by Agri Hardwares (E.A.) Limited her only creditor.
- (b) That on 8.9.2006, the Creditor/Applicant filed its proof of Debt form and the General Proxy form.
- (c) That between January 2007 and 22.3.2007 pursuant to the applicant's efforts the debtor has paid to the Official Receiver KShs.1,030,541.00 which sums have been acknowledged by the Official Receiver.
- (d) That despite the applicant's requests to have the said sums transmitted to it the Official Receiver has failed, refused and/or neglected to remit the same.
- (e) That the creditor/applicant continues to lose on the benefit of the said monies as well as interest payable on the same.

There is a supporting affidavit sworn by Donald B. Kipkorir counsel for the creditor/applicant.

The application is opposed upon the grounds set out in the Replying Affidavit sworn by Catherine Bunyassi Kahuria on 23.4.2007 among them being that in pursuance to Section 66 (4) of the Bankruptcy Act and Rule 224 of the Bankruptcy Rules, the Official Receiver shall cause her intention to declare a dividend to be gazetted in the prescribed manner, in this case the Kenya Gazette and after the requisite notice it is the Official Receiver's intention to pay out any monies held for the benefit of the creditors after deducting her statutory charges. In the view of the Official Receiver, the creditors include the creditor referred to in the debtors' statement of affairs who has proved its debt and those who have not.

I have perused the record. I have also considered the affidavits filed both in support and in opposition to the application. Finally I have given due consideration to the submissions of the Learned counsels appearing. Having done so, I take the following view of the matter. The only debt disclosed in the debtor's Statement of Affairs is the debt owed to the Creditor/Applicant of KShs.1,030,541.00 which is the amount awarded to the creditor in Nairobi CMCC No.5956 of 2005. It is the only debt which was proved against the debtor. The impression given by the Official Receiver in the affidavit in opposition to this application that there are other creditors who have proved their debts cannot be correct. The Official Receiver acknowledges receipt of KShs.1,085,541.75 and contends rightly in my view that before any payment can be made her intention to do so must be gazetted and it is only after the expiration of statutory notices that the creditor/applicant will be paid. The anxiety of the creditor to be paid is understandable as it obtained a judgment against the debtor who appears to have sought refuge in this bankruptcy cause when the judgment was passed against her. However, as the Bankruptcy proceedings have not been set aside the Official Receiver is obligated to perform her duties in accordance with the Law. She has sworn that she intends to comply with Section 66 (4) of the Bankruptcy Act and Rule 224 of the Bankruptcy Rules and will pay creditors after the expiry of a thirty-day notice. The payment to the creditor or creditors (should any other creditors show up during the period of the notice) will be less the Official Receiver's Statutory charges. In the premises, I see no reason why the creditor should not wait a little longer to enable the Official Receiver comply with the law before the payment sought. In the event, I make the following orders:-

- 1) The Official Receiver shall (if she has not already done so) within 14 days from the date hereof cause a notice of her intention to declare a dividend gazetted in the prescribed manner.
- 2) At the expiry of the said notice (or the notice if one has already issued) the Official Receiver should immediately comply with the provisions of Section 66 (5) of the Bankruptcy Act.
- 3) Costs shall be in the cause.
- 4) I give liberty to the creditor to apply.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kipkorir for the Creditor and Ruto Ms for the official Receiver.

F. AZANGALALA

JUDGE

26/6/07