



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Misc Application 1359 of 2006**

**IN THE MATTER OF SECTION 9 OF THE BANKRUPTCY ACT CHAPTER 53 LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF APPLICATION BY JAMES NDUNG’U WANDERI FOR LEAVE TO  
COMMENCE SUIT AGAINST JOSEPH MUIGAI WANENE**

**JAMES NDUNG’U WANDERI.....APPLICANT**

**V E R S U S**

**JOSEPH MUIGAI WANENE .....RESPONDENT**

**R U L I N G**

I have before me an application by notice of motion dated 28<sup>th</sup> November 2006. It seeks the main order that leave be granted to the Applicant to file suit against the Respondent, **JOSEPH MUNGAI WANENE**, in respect to land reference No. 12945/42. The cause of action is stated to arise out of a sale agreement dated 12<sup>th</sup> November, 2004. Leave of the court is sought because a receiving order had been made against the Respondent in High Court Bankruptcy Cause No. 54 of 2002, Milimani.

The application is made under section 9 of the Bankruptcy Act, Cap. 53 (the Act) and under rule 15 of the Bankruptcy Rules. Order 50, rule 7 of the Civil Procedure Rules and sections 63 and 3A of the Civil Procedure Act, Cap. 21 are also cited. There is a supporting affidavit sworn by the Applicant. It fully sets out the history of the matter and the circumstances giving rise to the cause of action. A previous suit filed by the Applicant against the Respondent (**HCCC No. 283 of 2005, Milimani**) had to be withdrawn for lack of the court’s leave to commence it.

The Respondent has opposed the application upon the following grounds (grounds of opposition dated 25<sup>th</sup> January 2007):-

1. That the application is misconceived, bad in law and an abuse of the process of the court.

2. That it is incurably defective and/or untenable in law.
3. That it is frivolous, vexatious and scandalous.
4. That it otherwise lacks merit.

There is no replying affidavit filed.

I have considered the submissions of the learned counsels appearing. No authority was cited.

Section 9(1) of the Bankruptcy Act aforesaid provides:-

**“9. (1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose.”**

The court clearly has the jurisdiction and discretion to grant the leave sought.

A receiving order was made against the Respondent on 11<sup>th</sup> June 2002 in the **Bankruptcy Cause No. 54 of 2002, Milimani**. That order has never been discharged. The Respondent entered into the transaction giving rise to the Applicant’s cause of action long after that receiving order had been made against; he did not disclose to the Applicant the receiving order, and the Applicant was not aware of it until his suit against the Applicant (HCCC No. 283 of 2005, Milimani) came up for hearing. From the material placed before the court, it appears that the Respondent has admitted his indebtedness to the Applicant and even paid part of the claim. No replying affidavit has been filed to dispute these facts.

Various technical objections to the application have been taken by the Respondent. I am satisfied that despite the typing error in the body of the application, the Respondent’s name is **JOSEPH MUIGAI WANENE**, and that a receiving order was indeed issued against him as already seen. That order has not yet been discharged.

Indeed the Respondent may have resorted to protection under the Bankruptcy Act, because he was desperate. But I see nothing unjust or oppressive to him to permit the Applicant to secure what is owed to him by the Respondent by way of legal proceedings. Whatever judgment he may obtain against the Respondent cannot be executed without leave of the court; so there will be no immediate danger to him.

The application has been properly brought under the Bankruptcy Act and Rules; quotation by the Applicant of provisions of the Civil Procedure Act and Rules is merely misinformed. It cannot defeat the application.

The application is meritorious, and I will allow it. The Applicant is hereby granted leave to commence action against the Respondent as set out in the application. But any resulting decree shall not be executed against the property or person of the Respondent using the leave granted herein; further leave of the court must be obtained. The costs of this application shall be in the action to be instituted. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF AUGUST, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 24<sup>th</sup> DAY OF AUGUST, 2007**