

REPUBLIC OF KENYA

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

Bankruptcy Cause 108 of 2003

MULI NZIOKA.....APPLICANT/CREDITOR

VERSUS

ALEX NZIOKA MULEI.....RESPONDENT/DEBTOR

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness and hospitalization, and also by an oversight in that the file had been misplaced for some time and escaped my attention. The delay is regretted.

The Applicant/Creditor herein, **MULI NZIOKA**, has applied by notice of motion dated 22nd September, 2004 in effect for an order to rescind the receiving order made herein on 9th September, 2000 in respect to the estate of the Debtor, **ALEX NZIOKA MULEI**. The application is said to be brought under sections 33, 138 and 140 of the Bankruptcy Act, Cap. 53. It is also stated to be brought under rules 15 and 147 of the Bankruptcy Rules made under the Act. The main ground for the application appearing on the face thereof is essentially that the receiving order was obtained through fraud and misrepresentation on the part of the Debtor. There is a lengthy supporting affidavit sworn by the Creditor's learned advocate, ALPHONCE M. MBINDYO. It is not immediately clear why the Creditor himself could not swear the supporting affidavit. Learned counsel has deponed many potentially contentious matters in that affidavit, and has thus allowed himself to descend into the arena of the litigants, something that he should not do.

The application was duly served upon the Debtor as well as upon the Official Receiver. None of them has filed any papers in response. So, the application is unopposed. When the application came up for hearing on 8th July, 2005 there was appearance for the Debtor as well as for the Official Receiver. The application was stood over to 28th July, 2005 for hearing. On that date there was no appearance for either the Debtor or the Official Receiver, and there was no reason given for their absence. The Creditor therefore proceeded *ex parte*.

I have read the supporting affidavit. I have also perused the court record. Finally, I have given due consideration to the submissions of the learned counsel for the Creditor. It appears from what is deponed in the supporting affidavit that the Debtor may have committed a fraud upon the court to obtain the receiving order in order to escape from meeting his just debts. Without any replying affidavit I am bound to accept the accusations leveled against the Debtor in the supporting affidavit. I will therefore allow the application upon the terms that the receiving order made herein in respect to the estate of the Debtor on 9th September, 2003 be and is hereby rescinded. I will also set aside the order entered on 8th December, 2003 pursuant to the application by notice of motion of the same date. The Creditor shall have the costs of this application against the Debtor. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 26TH DAY OF MAY, 2006.