



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Bankruptcy Cause 12 of 2002**

**KIPKALIA KIPRONO KONES.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT**

**RULING**

**[On the Preliminary Objection by the Debtor]**

The Creditors, Diamond Trust Bank Kenya Limited, filed a Creditor's Petition on 13/2/02, against the Debtor, Kipkalia Kiprono Kones, the same having been drawn on 5/2/02.

The basis for the petition, under the Bankruptcy Act, and Rules thereof, is that the Debtor is indebted to the petitioner in the aggregate sum of K.Shs.4,755,189/55 as the final judgment or order obtained by the Petitioner in HCCC No. 655 of 1999. The debtor, avers the Petitioner, has, within 3 months before the date of presentation of this petition committed the following act of bankruptcy: namely the Bankruptcy Notice having been served on him on 23/10/01, the debtor has failed and/or is unable to pay, liquidate and/or discharge his indebtedness to the Petitioners to the sum of K.Shs.4,755,189/55, within the stipulated period of 7 days or at all.

On the hearing date of the petition, 4/11/04, the debtor raised the following preliminary objection on the petition, notice of which had been given on 3/11/04.

1. That the Bankruptcy Notice was not served upon the Respondent (debtor)
2. The act of bankruptcy relied on by the creditor is invalid.

The grounds in support of the Preliminary objection are, that under Section 6(1) ( c ) of the Bankruptcy Act, Cap. 53, laws of Kenya, the act of bankruptcy on which the petition is grounded must have occurred within 3 months before the presentation of the petition.

It is the debtor's case that the above provisions have not been complied with, and consequently, the petition is invalid, for having been filed out of time. Having been served on the debtor on 23/10/01, seven days within which the Debtor was to liquidate the debt was on 30/10/01. That is when the act of bankruptcy was committed, and the petition should have been filed by the very latest, 30/1/02. The petition is dated 5/2/02, and filed on 13/2/02. Thus, by the provisions of Section 6 (1) ( c ) of the Bankruptcy Act, the petition was filed 13 days after the time fixed by the law.

It is on the above basis that the Preliminary Objection is raised – that the petition is invalid, and the only way out is for the petitioners to re-issue the Bankruptcy Notice.

Put differently, the petitioner had no right – entitlement – to present a bankruptcy petition against the debtor since the act of bankruptcy occurred outside the statutory period of three months before the presentation of the petition.

In opposition to the Preliminary Objection, the Petitioner's learned counsel, Mr. Luseno, submitted that if the debtor intended to show cause against the petition, he should have done so in accordance with Rule 128 of the Bankruptcy Rules. He had not done so. Further, submitted the Learned Counsel, the matter has appeared in the court at least three or four times, and the issues of the Notice not having been served on the debtor or that the petition was invalid had never been raised. Furthermore, the court had, on three times, acted on the representation that the debtor required time to clear the decretal amount. Hence, any irregularities must be deemed to have been waived, as there was no prejudice to the debtor.

I have considered the submissions of both learned counsels on the Preliminary Objection. I have difficulty in acceding to the submissions of the learned counsel for the petitioners.

First, a Preliminary Objection is a point of law and any party is entitled to raise the same at any point during the proceedings prior to the close of those proceedings. And proceedings are not closed until or unless there is an interlocutory judgment or final judgment.

Accordingly, the fact that the debtor had not raised the issues raised in the Preliminary Objections does not, and could, not be read to mean that he was barred, or to use the petitioners words, estopped.

From the submissions, this is the first time the matter came up for formal hearing. Besides, there can be no estoppel against an operation of law. In my humble view, the opposition mounted by the petitioner against the Preliminary objection is of little or no weight at all. The same goes for the submission that if there were any irregularities in the service of the Notice of Bankruptcy and or the filing of the petition **vis-à-vis**, the act of bankruptcy, such irregularities are deemed to have been waived.

I need to add the following, for emphasis: Rules are made pursuant to statutory provisions, and the rules cannot supercede the enabling statutory provision under which they are made. This should suffice in reconciling any conflict, if any, between Section 6 (1) (c) of the Act and Rule 128 of the Bankruptcy Rules.

It is an interesting point of law, that parties can claim to waive the law! The only time that parties can dream of altering what is binding on them is in the terms of a contract. Not in areas specifically stipulated by statutory provisions. Only the legislature can change such provisions, not the parties to litigation as herein.

Accordingly, and for reasons above, I uphold the Preliminary Objection and hold that the act of bankruptcy relied upon in the petition is invalid for non-compliance with Section 6 (1) (c) of the Bankruptcy Act, Cap. 53, Laws of Kenya.

Dated and delivered in Nairobi this 6th day of June, 2006.

**O.K. MUTUNGI**

**JUDGE**