



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Bankruptcy Cause 143 of 2003**

**TONY JOHN K. KETTER.....PETITIONER**

**VERSUS**

**IN THE MATTER OF BANKRUPTCY ACT**

**R U L I N G**

On 16/3/04, the applicant herein, Italian Exclusives (K) Ltd, a Creditor applied for the following orders:

1. Rescission of the receiving order made by this court on 11/11/03;
2. That the court do rescind the order made on 11/11/03 staying execution of all civil legal process against the debtor's property or person in any court.
3. That the Court do dismiss the petition for Bankruptcy, filed by Tony John K. Ketter.
4. That the petitioner do pay the costs of this application.

The application, brought under Rules 7(2), 15 and 147(1) of the Bankruptcy Rules, as read together with Sections 100, 16, 24 and 138(1) (a), (d), and (f) of the Bankruptcy Act, Cap. 53, Laws of Kenya, is on the grounds that:

- (a) The petitioner-debtor is guilty of failure to provide full discovery of his assets in his statement of affairs filed herein;
- (b) The petitioner-debtor has sufficient assets to meet and settle his liabilities.
- (c) The petition has been filed with the sole intention of frustrating creditors, including the applicant herein, from enforcing recovery of their just and lawful debts from him and it amounts to an abuse of the court process.
- (d) The Petitioner-debtor by failing to provide full discovery of his property to this court has committed an offence under Section 138(1) of the Bankruptcy Act.

The application is supported by an affidavit by Frank Ndubi, dated 17/3/04. There is also another Supporting Affidavit, of Mavji S. Patel, of Eldoret, and the first Creditor named in the statement declared

by the Petitioner, under oath, on 10/11/03.

I have closely read and analysed the pleadings, and the submissions of the learned Counsels herein.

It is important to remind ourselves of the implications of Bankruptcy and the impact of Receiving Orders. Receiving orders, apart from other implications, keep at bay creditors of the debtor who innocently, and in good faith, supplied the debtor with either goods and/or services, at a price. For such persons to be ordered by the court to keep off from such a debtor, nothing should be kept away from the Court's knowledge. Total disclosure in the debtor's statement of affairs is absolutely essential.

I have perused the application herein, the grounds and the Supporting Affidavits by Mavji S. Patel and the other one by Mr. Frank Ndubi, and the annexures thereto, and compared the same with the Respondent/Debtor's Statement of affairs and his Replying Affidavits, one filed on 29/4/04, and the Further Replying Affidavit filed on 30/7/04.

From the above documents, I have reached the following findings and conclusions: the Respondent/Debtor did not make full disclosure of his assets in his statement of affairs, and to fully expound on this I need to immediately add that the debtor is a person who is very economical with the truth.

From the pleadings, there are many assets, which the Respondent/debtor failed to disclose in his statement of affairs prior to the grant of the Receiving Order, by this court, on 11/11/03. Top on the long list is L.R. No. 7741/149, at Kitisuru, Nairobi, charged to Barclays Bank, for K.Shs.365,000,000/- as on 14/12/1995.

This is followed by 250 acres of land at Kitale, mortgaged to Co-operative Bank of Kenya.

Even where the debtor purported to disclose his assets, the disclosure is shrouded in half-truths. For example, to say that he has tea bushes, without stating how many, is half-truth which falsifies the entire statement. To aver, on oath, that he has land, which is mortgaged to whatever financial institutions, without disclosing the value of the land involved and for how much money it is held as security, is far from the truth.

Finally, there is a clear effort by the Debtor/Respondent to project an image that mortgaged land is no longer his. That is not the truth.

Money deposited in court still belongs to the depositor until otherwise ordered or decided by the Court. The impression projected by the Respondent, in his Replying Affidavit, is that such deposit is no longer part of his assets.

Then there are companies in which the Debtor has interest, which he failed to disclose in his statement of affairs. These include Alora Flowers Limited.

All in all, I find, and hold, that the Respondent/Debtor failed to fully disclose his assets in his Statement of Affairs. This, I can state categorically, influenced the decision of this court in the grant of the Receiving Orders.

With the above finding of fact, that the Debtor failed to disclose his assets in his statement of affairs, I now turn to the very important question of what this court can do.

Counsel for the Debtor/Respondent strongly submitted that non-disclosure is a criminal act/offence and this court has no jurisdiction to entertain it. The matter should be referred to the state law office to prefer criminal charges. He further submitted that once bankruptcy has been issued, the work of this court is **functus officio**. In other words, the Learned Counsel for the Debtor/Respondent submitted that this court has no jurisdiction to rescind the Receiving Order. When he was referred to Rule 147 (1) of the Bankruptcy Rules, *vis-à-vis* section 138 (1) of Cap. 53, **the Bankruptcy Act, the Learned Counsel contended that "the Rule (147) and the Section (138 (1) ) are at variance."** He however cited no

authority in support of such a submission. I believe that no such authority exists for the submission is as rare and ridiculous as it is fallacious.

Thereafter, Learned Counsel, Mr. Nyaberi, embarked on frivolous submissions, including the submission that Italian Exclusive (K) Ltd. has no **locus standi** in the petition, and this application.

I find that strange because this applicant is No. 3 in the list of creditors filed, and disclose, by the Debtor in his petition, prior to the Receiving Order being issued by this court.

I now revert back to the substantive contention by Learned Counsel for the Debtor/Respondent. That is that this Court has no jurisdiction to rescind the Receiving Order, for non-disclosure, since that is a criminal act, and only the Attorney General can take such an action. Such a submission is either naïve or arrogant or an expression of total failure to grasp the provisions of Bankruptcy Act, Cap. 53, Laws of Kenya.

Section 97 of the Act states clearly that “**the court having jurisdiction in bankruptcy shall be the High Court.**” And Section 103(1) of the same Statute provides as under: “**the court may at any time review, rescind or vary any order by it.**”

The Learned Counsel’s submissions on jurisdiction of this court to rescind a Receiving Order, issued by it, is clearly out of step with any known law on the point. It would be strange that this court has power to issue a Receiving Order, but after that, the court has no jurisdiction to rescind such an order, even where the Receiving Order was issued without full discovery of the statement of affairs by the debtor.

I have no doubt in my mind that the Receiving Order, issued by this court was so issued because of the non-disclosure of the full and correct Statement of the Affairs, by the Debtor herein.

All in all therefore, and for the above reasons, I grant the Notice of Motion herein, and order as follows:

- 1. I rescind the Receiving Orders made by this court on 11/11/2003.**
- 2. I further rescind the order made herein, on 11/11/03, staying execution of all civil legal process against the debtor’s property or person in any court.**
- 3. Accordingly, the petition by the Debtor herein is hereby dismissed.**
- 4. The Petitioner/Debtor/Respondent to pay the costs of the applicants in this application.**

DATED and delivered in Nairobi this 18<sup>th</sup> Day of July, 2006.

O.K. MUTUNGI

JUDGE