



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

Bankruptcy Cause 143 of 2003

TONY JOHN K. KETTER.....PETITIONER

VERSUS

IN THE MATTER OF BANKRUPTCY ACT

RULING

On 11.11.2003 the applicant lodged a petition to this Court, seeking two primary orders of the court as follows:-

- 1) That a Receiving Order be made in respect of his estate.**
- 2) That pursuant to Section 11 of the Bankruptcy Act Cap.53 Laws of Kenya an order of stay of all execution be granted.**

On the same day my Learned brother Mutungi J made an order that a Receiving Order be issued against the applicant's estate. On 5.3.2004 Mawji Patel (hereinafter called "*the 1st creditor*") by Notice of Motion dated 6.3.2004 applied that the said receiving order be rescinded and the order of stay of any action, execution or other civil legal process against the applicant's property and or person issued pursuant to the said receiving order be reviewed and or set aside.

On 17.3.2004, M/s Italian Exclusives (K) Limited (hereinafter called the 2nd Creditor) filed another Notice of Motion seeking prayers similar to those sought by the motion of the 1st Creditor save that the 2nd creditor also sought dismissal of the applicant's petition. The two applications were heard together by Mutungi J who on 18.7.2006 made the following orders:

- 1) "I rescind the Receiving Orders made by this court on 11.11.2003.**
- 2) I further rescind the order made herein on 11.11.2003, 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 applicant in this application."**

Execution of those orders is now sought to be stayed pending hearing and determination of an intended appeal by the applicant. The stay is being sought by way of Chamber Summons dated and filed on 10.8.2006. I heard the application on 11.9.2006. The gist of the application is that as the applicant has

filed a Notice of Appeal and intends to file an Appeal immediately upon receipt of certified copies stay of execution of the said orders of Mutungi J should be granted otherwise the applicant will be open to attachment from several creditors – some of whom will misout as they are not parties to these proceedings. It is also contended that the intended appeal has high chances of success which will be rendered nugatory unless stay is ordered.

On behalf of the creditors, it is submitted that a case for stay of execution has not been made out at all. In their view the principles to be followed in considering the application for stay of execution are similar to the principles set out in Order 41 Rule 4 of the Civil Procedure Rules and the applicant has failed to establish the same. Besides according to the creditors, there was nothing to stay as in their view the Orders of Mutungi J are not capable of being stayed. For this proposition reliance was placed upon the Court of Appeal decision in **Nairobi Civil Application No. Nai 136 of 2004 Yagnesh Devani & 4 others – vs – Joseph Ngindah & 3 others (UR)** – in which an application for stay of execution was refused on the basis that the order appealed against was not capable of being stayed. In that application the High Court had dismissed an application for judicial review with the result that a stay that had been granted when leave to make the application for the review was granted automatically lost effect. The Court of Appeal held that to allow the application for stay would in effect revive the dismissed application which could only be done after hearing the appeal. The creditors in this application are of the view that a similar situation arises here because, allowing the application will in effect revive the receiving order that Mutungi J rescinded.

I have considered the application the affidavits filed and the submissions made to me by counsel. I have also considered the cases cited. Having done so, I take the following view of the matter. I will first determine the principles that should guide me in considering the application. The applicant has invoked the inherent jurisdiction of the court and in his view the discretion to grant the stay sought is not fettered by the conditions prescribed in Order 41 Rule 4 of the Civil Procedure Rules. This argument is interesting because, the applicant was protected by the order of stay of execution granted when a receiving order was issued in respect of his estate. That order was given by Mutungi J. The same learned Judge not only rescinded that order but dismissed the applicant's petition. The effect of that order was to blow away the cover the receiving order was giving the applicant. Indeed the dismissal of the applicant's petition exposed the applicant to the process that he now seeks to stay. The applicant in effect is by this application asking me to reinstate the receiving order. The observations that the Court of Appeal made in **Magnesh Devani & Others – vs – Joseph Ngindari & Others (Supra)** would appear to apply to the application at hand. The Order dismissing the applicant's petition was not a positive order capable of being stayed. The petition was the foundation of the receiving order. To revive the same would in my view have to await the decision of the Court of Appeal on the intended appeal by the applicant. This finding in effect means that the applicant's application for stay of execution is like any other application for stay pending appeal and therefore my discretion is fettered by the conditions set out in Order 41 Rule 4 of the Civil Procedure Rules. Sub rule (2) reads:-

“4(2) No order for stay of execution shall be made under subrule (1) unless

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

The order of Mutungi J was made on 18.7.2006 and this application was lodged on 10.8.2006. The delay involved is of about three (3) weeks. In my view the applicant is not guilty of inordinate delay. This is the only redeeming feature of this application. There was no attempt to demonstrate substantial loss and the applicant expressly stated that **“there is no security needed.”** There is therefore no way my discretion can be exercised in favour of the applicant. This application is dismissed with costs to the creditors.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 2ND day of OCTOBER, 2006.

F. AZANGALALA

JUDGE

2/10/2006

Read in the presence of: