REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 604 of 1998

JOSEPH GITAU WAWERU…….....…….PLAINTIFF/RESPONDENT

VERSUS

FRANCIS MUCHAI KARERA…….....…..... DEFENDANT/APPLICANT

RULING

A. Defendant's Application — Separate Claim by Petitioner in Pending Bankruptcy Proceedings

The defendant's application by Chamber Summons, dated 1st November, 2004 was brought under Orders IXA rule 10, L rule 12 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The application carries one substantive prayer:

"THAT judgement against the defendant/applicant be set aside and the defendant be granted leave to file a memorandum of appearance and defence, upon proper service by the plaintiff, out of time."

The application is premised on the grounds, firstly, that the defendant was served with summons and plaint on the wrong suit number – the summons bearing No. 604 of 1997 and the plaint bearing No. 564 of 1998. It is stated that the defendant subsequently forwarded those documents to his then insurers, Stallion Insurance Co. Ltd. (under receivership), who forwarded the plaint and summons to M/s. Kimani & Michuki Advocates – to act for the defendant. The said advocates acted on the basis that the instructions related to HCCC No. 564 of 1998, which was the particular given on the plaint as they received it. Neither the plaintiff nor his advocates rectified the errors of numbering on the documents as served upon the defendant by them. Subsequently, the ***Honourable Mr. Justice Mulwa*** took evidence from witnesses for the plaintiff and the defendant, following entry of interlocutory judgement, and wrote his judgement without taking into account the defence case. It is stated that the plaintiff's advocates never rectified the errors apparent on the face of the record, causing judgement to be entered irregularly against the defendant. It is stated also that the defendant's then - advocates, M/s. Kimani & Michuki Advocates, subsequently abandoned the defendant who now faces the threat of being declared bankrupt.

Evidence in support of the defendant's application is set out in a 23-paragraph affidavit of the defendant dated 1st November, 2004. To this there is an even longer, 31-paragrpah replying affidavit by the plaintiff dated 31st January, 2005.

B. Preliminary Objection based on Pending Bankruptcy Proceedings

There will, however, be no need at this stage to set out and consider the evidence carried in those depositions; because on 2nd February, 2005 the plaintiff filed a notice of preliminary objection. On the

occasion of hearing before me, on 8th February, 2005 learned counsel for the plaintiff, ***Mr. Machira***, applied to have the preliminary objection heard at the very beginning. As this application was opposed by ***Mr. Mutua,*** learned counsel for the defendant, I had to make a ruling as follows:

"**There is a preliminary objection being raised by the plaintiff/respondent. As this is on *points of law*, it is quite proper that it be heard right away, before further directions are given regarding the defendant's Chamber Summons dated 1st November, 2004."**

Mr. Machira for the plaintiff considered the merits of his preliminary objection to be self-evident. Bankruptcy proceedings are now pending against the defendant, at the High Court's Commercial Division at the Milimani Commercial Courts. The defendant himself had petitioned for a receiving order, which had been granted on 22nd April, 2002 and an official receiver appointed. From that moment, counsel submitted, the appointed receiver became a trustee for the estate in question; and consequently, only the Official Receiver had locus standi and not the defendant.

For this submission counsel sought reliance on ***Nirmal Singh s/o Uttam Singh v. Ram Singh s/o Saun Singh [1961] E.A.*** 168. The facts of that case had certain remarkable similarities to the instant one; and the following passage in the judgement of ***Crawshaw, J.A***. is pertinent(p.172):

"**In *Boaler v. Power and Others* [1910] 2 K.B. 229, the trustee in bankruptcy refused to proceed with an action commenced by Boaler prior to his bankruptcy. The action was thereupon struck out, and on appeal against this order by Boaler, *Farwell, J*, reading the judgment of the Court *dismissing the appeal*, and referring to one of the claims contained in the action, said -**

'**This is property which, if recovered, would belong to his trustee in bankruptcy for the benefit of his creditors; there is no question of after-locus standi in respect of this.'**

Boaler had not, so far as the report shows, obtained his discharge, but had he done so I cannot see that the position would have been different".

In the instant case, just as in the *Nirmal Singh*, the question is whether a party who has been declared a bankrupt, and in relation to whom receiving orders have been made, can maintain a suit in relation to rights which if they exist, would be due to the estate of the bankrupt. The following passage in the judgement of *Crawshaw, JA*, in the *Nirmal Singh* case is worth quoting (p.170):

"**Against this decision the appellant has appealed, but not so the Official Receiver. The respondent has taken a preliminary objection that the appellant never had any status in the suit, and is not competent to file this appeal, because the Official Receiver was at all material times the trustee of the appellant's estate, and any benefits from the suit would pass to him on behalf of the creditors."**

The learned Judge's decision, which had the concurrence of the two other Judges of Appeal (*Sir Kenneth O'Connor, P*. and *Gould, J.A.)*, was as follows (p. 174):

"**Being satisfied that the appellant in the instant case had no locus standi, and was improperly joined as a party, I would order that his name be struck out of the proceedings and that this appeal be dismissed with costs."**

***Mr. Machira* submitted that only the Official Receiver should, in the instant case, have been allowed to move the Court, and that the defect in the defendant's application was a fatal one. Bankruptcy proceedings, counsel submitted, bring about an automatic stay of suits by or against the bankrupt; before a receiving order is made, there is a transfer of property and the receiver becomes the custodian in the capacity of trustee. Counsel submitted that the bankruptcy proceedings were a shield and a protective cover for the defendant, and that once they were commenced, no suit could be instituted against the defendant; there could be no parallel proceedings.**

C. Applicant's Response: Right to Seek Justice in Matter arising before Commencement of

Bankruptcy Proceedings

Learned counsel, *Mr. Mutua* stated that the defendant had *not been* adjudicated bankrupt, and thus the authorities relied upon by the respondent were inapplicable. Counsel drew a distinction between, on the one hand, *taking out of bankruptcy proceedings*, and on the other hand, *declaration of bankruptcy status*. He admitted that the defendant did indeed take out bankruptcy proceedings, but that this should not preclude him from having set aside a *judgement irregularly obtained against him.* Counsel sought to buttress this proposition with the provision of section 11(1) of the Bankruptcy Act (Cap. 53). The relevant provision thus reads:

"**(1) The court may, at any time after the presentation of a bankruptcy petition, stay any action, execution or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."**

Counsel justified the defendant's application as follows: the applicant is seeking to set aside a judgement irregularly obtained against him, and he has shown how such a state of affairs was visited upon him. By section 11, *Mr. Mutua* urged, it was for the *Court before which bankruptcy proceedings had commenced,* to determine if other proceedings are to be stayed. In support of this contention, counsel cited the provision of s.11 (2) of the Bankruptcy Act (Cap. 53):

"**Where the Court makes an order staying any action or proceedings, or staying proceedings generally, the order may be served by sending a copy thereof, under the seal of the Court, by post to the address of service of the plaintiff or other party prosecuting the proceeding."**

Counsel submitted that this application was properly before the Court, as the *bankruptcy proceedings arose subsequent to the judgement sought to be set aside*; and furthermore, *no order at all, as against the defendant, had been made staying proceedings*. The matter was, therefore, open to the Court to consider on the merits.

***Mr. Mutua* submitted that the *Boaler* case [1910] 2 K.B. 229 relied upon by counsel for the plaintiff was not relevant, as it was concerned with one *already adjudicated to be bankrupt* – which was not the case in the instant matter. Similarly in the *Nirmal Singh case* [1961] E.A. 168, the appellant was *already an adjudicated bankrupt*; but such is not the case in the instant matter.**

***Mr. Mutua* submitted that it is precisely the *impugned judgement that gave rise to the bankruptcy proceedings* taken out by the defendant at the Milimani Commercial Courts. He doubted the propriety, especially in those circumstances, of giving an absolute status to the position of Official Receiver, just because bankruptcy proceedings were afoot. He submitted that even *during the pendency of such proceedings, ends of natural justice, equity and good conscience, dictated that the defendant be allowed to pursue his application* to a logical conclusion. Counsel maintained that "The plaintiff has not demonstrated how proceedings before a Bankruptcy Court can *stay,* or *halt,* or *justify the dismissal of* an application wherein the defendant seeks as a matter of right, to have judgement set aside." Counsel added that the plaintiff had not "shown an order from the Bankruptcy Court that prevents the [impugned] judgement from being set aside"; and restated the point that, so far, the defendant has not been adjudged bankrupt. He perceived this point as an issue of *natural justice*, and cited in that regard the Court of Appeal decision in *Prime Salt Works Ltd. v. Kenya Industrial Plastics Ltd*. [2001] 2 EA 528. The learned Judges (*Omolo, Lakha and Keiwua, JJ.A*) there remarked (p.530):**

"**Implicit in the concept of fair adjudication lie two cardinal principles, namely that no man shall be a judge in his own cause and that no man shall be condemned unheard. These two principles, the rules of natural justice, must be observed by the Courts save where their application is excluded expressly or by necessary implication. In the instant case it has not been suggested that the rule has been excluded."**

Counsel submitted that in the impugned judgement in the present case – the subject of the defendant's Chamber Summons of 1st November, 2004 – the defendant had been condemned unheard, in breach of the principles of natural justice.

D. Respondent's Rejoinder

In his response, for the plaintiff, *Mr. Machira* made submissions as follows. The bankruptcy proceedings are pending, and there is a public trustee in place; once bankruptcy proceedings commence, the Official Receiver becomes a trustee, and he is then the one who takes responsibility for suits vis-à-vis the relevant estate. After Court orders are made, counsel submitted, the right to proceed devolves upon the Official Receiver; and "so long as he exists, only he can proceed." Counsel doubted the relevance of natural justice in this matter, and contended that counsel for the applicant had not adequately responded to the principle in the *Nirmal Singh* case.

E. Analysis, Orders, Directions

A preliminary objection, such as the instant one, ought to be concerned with *points of law only*, and it must be *unnecessary to prove any matter of fact relevant to the proceedings* at the preliminary stage of which the objection is being raised. Unfortunately, the plaintiff/respondent did mention on-and-off that a receiving order had been granted upon the application of the defendant/applicant on 22nd April, 2002. Counsel did not produce that order, and I did not get the impression that he was prepared to be consistently in denial of the more reliable statement of counsel for the applicant, that although he, the applicant, had indeed taken out bankruptcy proceedings, this remained a *pending matter* as declaration of bankruptcy status has not yet taken place. I must take the defendant's position to be the valid and unquestioned premise of his Chamber Summons of 1st November, 2004, and also of the plaintiff's preliminary objection, because in my assessment from the documents on file, and from the submissions of counsel, any contrary position has no basis of validity.

From that foundation, I should state, in agreement with counsel for the defendant, that both the *Nirmal Singh case* [1961] E.A. 168 and the *Boaler* case [1910] 2. K.B. — decisions the basic principles of which cannot be faulted — are dealing with situations in which *receiving orders have been made*, and a party *formally declared bankrupt*. In such a situation, as the principle emerges from the two cases, *any legal proceedings whether commenced earlier than or subsequent to the bankruptcy proceedings, must be conducted only at the behest and under the directions of the Official Receiver.*

Such is not the position in the present matter, where the justiciable question raised, *predated the bankruptcy proceedings, and those proceedings are still pending*, as declaration of bankruptcy status has not yet taken place.

In that case, do those authorities, *Nirmal Singh* and *Boaler* apply to the situation here? I would have doubted it; but I will, for good measure, revert to the governing legislation in this country which I think qualifies the general state of the residual law as represented by the two authorities.

By s. 11(1) of the Bankruptcy Act (Cap. 53), the Bankruptcy Court may, at any time after the presentation of a bankruptcy petition, "*stay any action, execution or other legal process against the property or person of the debtor*." It has not been argued before me that any such order was made in relation to the defendant or to his property. This means that, in law, such proceedings as were pending at the time of commencement of the bankruptcy proceedings (still pending), *may continue.* Had any such order been made by the Bankruptcy Court, then under s. 53(2) of the Act, it would have been *served upon the plaintiff/respondent*, who has produced no such document and has not alluded to its existence.

Prima facie, therefore, a condition exists which bespeaks the need for and the propriety of leeway for the defendant to proceed with his Chamber Summons of 1st November, 2004. Final resolution

of the question now becomes an *equitable one*, in the discretion of the Court.

The defendant states as grounds to support his Chamber Summon application of 1st November, 2004 that a judgement had been entered against him *without proper service* and *without according him an opportunity for a hearing*. Although I am not at this stage dealing with evidence, I have been able to see the Court record shedding some light on the background to the defendant's complaint. The Honourable *Mr. Justice Kuloba* had on 23rd April, 2002 recorded as follows:

"**As it is said that the applicant was served with process relating to a different case and that, relying on what he was served with, the applicant acted in that case by entering appearance and filing a defence…while the plaintiff who wrongly served the defendant with papers bearing a different case number went ahead and obtained a default judgement on another case file, it appears at…present on what is before me now, that to allow the plaintiff to proceed and execute would be allowing him to reap benefits from his own wrong. For these reasons this matter is certified urgent, and execution is stopped for thirty days pending due service of this application and disposal at an *inter partes* hearing of the said application."**

The circumstances as they emerge from the foregoing analysis, and in the light of the record taken by *Mr. Justice Kuloba*, clearly give rise to a basis for this Court's discretion to ensure that the defendant is heard on his complaint. Since I have already held that the terms of the law of bankruptcy do not preclude an application such as the one filed by the defendant, I now find in his favour. Consequently I dismiss the plaintiff's preliminary objection with costs to the defendant.

Counsel shall appear before the Duty Judge on Thursday, *21st April, 2005* at 9.00 a.m. for mention and for allocation of an early date for hearing the defendant's Chamber Summons application of *1st November, 2004.*

Orders accordingly.

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendant/Applicant: Mr. Mutua, instructed by M/s. Nzioka Mutua & Associates Advocates

For the Plaintiff/Respondent: Mr. Machira Ngati, instructed by M/s. Njoroge Nyagah & Co. Advocates.