



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (COMMERCIAL DIVISION –MILIMANI)

BANKRUPTCY CAUSE 43 OF 2001

AJAY INDRAVAN SHAH

IN THE MATTER OF THE BANKRUPTCY ACT

RULING

The Petitioner Ajay Indaravadan Shah by his Petition dated 10th August, 2001 Petitioned the Court for a receiving order in respect of his estate on the ground that he was unable to pay his debts. He wanted to be adjudged bankrupt. Together with the Petition, the Petitioner filed a statement of affairs in which he listed his unsecured creditors as being owed Kshs 251,817,500/= and contingent and other liabilities were given as Kshs 1,809,573,527.37.

On 24th August, 2001 the Opposing Creditor, The Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) filed this Notice of Motion seeking the following orders:-

1. That the bankruptcy cause or the petition be struck out for being an abuse of the process of the Court.
2. Alternatively, that the bankruptcy proceedings be stayed altogether.
3. That Petitioner be arrested and brought before the Court to provide a complete and accurate list of all his assets held locally and overseas and in default thereof the Petitioner be committed to civil jail for concealing his assets from creditors in his statement of affairs.
4. Costs. The Application was based on the following grounds:-
 - a) That the Petitioner or the bankruptcy proceedings filed is or are based on false misleading and perjured evidence.
 - b) That the Petitioner is using the bankruptcy Law or the proceedings herein to assist him in his frauds on his creditors.
 - c) The present proceedings have been filed with the sole object of rendering a nullity the order requiring the Petitioner to deposit in Court US\$ 2,693,538 by 16/8/01 and in default thereof the Petitioner to be committed to civil jail.
 - d) That the Petitioner has concealed his property from the creditors and thereby committed a bankruptcy offence under the provisions of the Bankruptcy Act.
 - e) That the debts relied upon in support of the Petition are not presently due and payable.

f) That if the said debts are due and payable then the Petitioner has received all the money now claimed from him through embezzlement of the bank and he has failed to account for the whereabouts of this money in his statement of affairs.

g) That the debtor is capable of paying the debts due.

The Application was supported by an affidavit sworn by Kasaine S. Oloiptip the Liquidation Agent of the Liquidator. The Petitioner did not file any response to the Application. The Application was heard by Onyango Otieno J. as he then was and in a reserved ruling ordered as follows:-

“First, that prayer 2 is granted as prayed. The Bankruptcy proceedings in this cause be and are stayed till the Petitioner will provide a complete and accurate list of all his assets held locally and overseas. Secondly, that prayer 3 is granted. The Petitioner is to be arrested and brought to this Court to provide the same complete and accurate list of all his assets held locally and overseas. This matter will be mentioned on 19.12.01 for further orders.”

On 19th December, 2001 the Petitioner sought leave to appeal against the ruling of Onyango Otieno J. and further applied for stay of the order of arrest. The Learned Judge granted the leave to appeal and stayed the arrest order for 14 days to enable the Petitioner to file and serve an affidavit showing the Petitioner’s Assets. The affidavit was filed on the same day and an order was recorded by consent that “Mr. Ajay Shah the Petitioner to present himself to the Court on 22.1.2002 for the purpose of being examined as to his assets.

For one reason or another the examination of the Petitioner could not take place until the 2nd March 2004 when the Petitioner was partly examined and further examination took place on 29th June 2004 and 25th November, 2004. Mr. Oyatsi, Learned Counsel for the Creditor made oral submissions on 28th February, 2005 and Mr. Billing Learned Counsel for the Petitioner filed written submissions on 6th April, 2005 and on the same day Mr. Oyatsi replied to the said written submissions.

The examination has highlighted the following. That at the time of filing the Bankruptcy Cause, the Petitioner had the following:

1. Shares in Trust Bank.
2. Beneficial ownership of the following companies.
 - (a) Aspen Development Limited
 - (b) Airways Holdings Limited
 - (c) Roman Bronze Enterprises
 - (d) Bullock Investments Limited
 - (e) Whitehall Limited
 - (f) Fallmack Enterprises Limited
 - (g) Samvir Trustees Limited.
- (3) Shares in Moez Investments Limited
- (4) Shares in Trust Capital Services.

The Petitioner’s shares in Trust Bank were held by Samvir Trustees Limited. The following companies

had plots in Karura Forest as their only assets: Aspen Development Limited, Roman Bronze Enterprises Limited, Bullock Investments Limited, Whitehall Limited and Fallmock Enterprises Limited. Airways Holdings Limited had land in Parklands area. All the said properties were charged to Trust Bank. It emerged from the examination that all the above companies had accounts at Trust Bank.

The manner in which the accounts for the above companies were opened and operated left a lot to be desired. The Petitioner had also a personal account with Trust Bank which account was credited with large sums from the bank. The Petitioner does not know whether or not he invested the said sums but he used some of it for personal things. A strange answer indeed. This type of response characterized the entire examination. The Petitioner expressed ignorance of various transactions involving the companies in which he had a beneficial interest. He could not recall the persons who sold properties to the said companies. He could not recall how the companies raised balance of purchase price to pay for the said properties. His characteristic answer was that the balance was raised from personal sources without elaborating. He could not remember huge money transfers from Trust Bank to the said companies and other beneficiaries. The inescapable conclusion was that the Petitioner was not being forthright and candid. The consequence of this would have been quiet different, if the Court was dealing with public Examination of Petitioner under Section 17 of the Bankruptcy Act. This examination is however limited as to the assets of the Petitioner. Unfortunately however the examination has not yielded any further assets held by the Petitioner locally or overseas. The companies in which the Petitioner has a beneficial interest own properties already charged to the Creditor i.e. Trust Bank. The companies are not trading and the Petitioner therefore does not earn anything from the same. These properties can hardly be described as assets. The Petitioner's shares in Trust Bank in my view are not also assets as they were of no value at the time the Bankruptcy cause was filed. The Petitioner's shares in Moez Investments Limited are charged and there is no evidence that the said shares have any value. This was the story in respect of the Petitioner's shares in Trust Capital Services Ltd which had a huge overdrawn account at Trust Bank. The Petitioner does not know where the huge sum went to. He testified that he did not operate the account. The relationship between the large withdrawals and the Petitioner is suspect but that does not convert the suspicion into an asset.

In respect of alleged foreign assets held by or on behalf of the Petitioner, none were disclosed by the examination of the Petitioner. In the end no additional assets have been disclosed since the Petitioner filed his Replying Affidavit sworn on 6th December, 2001.

Counsel for the Creditor/Applicant urged me to find that various Bankruptcy offences under the Companies Act had been committed by the Petitioner and further that the Petitioner was guilty of contempt of Court as he had not discharged his duty imposed upon him by the Order of Onyango Otieno J. aforesaid.

As regards offences allegedly committed under, Section 138 of the Bankruptcy Act, with respect in my view offences under this Section are predicated on a finding that a person has been adjudged bankrupt or a person in respect of whose estate a receiving order has been made. That is not the position here.

As regards offences allegedly committed under the Companies Act, I am afraid a finding either way is not possible in an enquiry limited to establishing the assets of a Petitioner in a bankruptcy cause.

As regards the contempt alleged, I am afraid this again has not been well taken. Onyango Otieno J.'s findings were made on the premises of an application in which the Creditors allegations were not challenged. The Learned Judge delivered himself as follows:

"First that prayer 2 is granted as prayed. The Bankruptcy proceedings commenced in this cause be and are stayed till the Petitioner will provide a complete and accurate list of all assets held locally and overseas. Secondly, that prayer 3 is granted. The Petitioner is to be arrested and brought to this Court to provide the same complete and accurate list of all assets held locally and overseas. A plain reading of the orders made by the Learned Judge shows that the two orders he granted were conditional or subject to the Petitioner failing to provide a complete and accurate list of all the assets held locally and overseas. Indeed when on 19th December 2001 the cause was mentioned before the Learned Judge, the Petitioner filed what he

considered his list of assets in compliance with the orders of the Learned Judge. It appears from the record of the Court that what remained was to establish whether or not the list furnished by the Petitioner had complied with the order of the Learned Judge. In my view that is why the parties consented to the examination of the Petitioner which is now through, having yielded no further assets in addition to the assets disclosed in the Replying Affidavit. The question of contempt of Court does not therefore arise.

In my view the conclusion of this aspect of the Creditor's application leaves the parties with the option to proceed with other stages in the Bankruptcy Cause or adjudication of the Petitioner's Application to withdraw this Cause. Directions Accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of :-