



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

**Bankruptcy Cause 105 of 2002**

**JULIUS KAMANDE KAMAU.....PETITIONER**

**VERSUS**

**ELIUD MBUGUA MWANGI.....1ST RESPONDENT**

**ESTER WANJIRU NYOIKE.....2ND RESPONDENT**

**R U L I N G**

The Respondents, Eliud Mbugua Mwangi and Esther Wanjiru Nyoike, have moved this court by way of a Notice of Motion. The said application, dated 30th June 2004, seeks to **“set aside the receiving order dated 10th October 2002 and all other subsequent orders given thereunder.”**

In support of the application, the “Respondents” filed an affidavit of Eliud Mbugua Mwangi, in which it is disclosed that the Petitioner had persuaded the court to issue the Receiving Order through fraudulent misrepresentation. The Respondents had caused investigations to be carried out, and the same had revealed that the Petitioner owns several assets which can be disposed of to clear his debts.

When the application came up for hearing, the Official Receiver did not attend court, even though the date had been fixed with his concurrence.

However, notwithstanding the absence of the Official Receiver from court, I am still minded to give due consideration to the application. It is certainly not proper that the application be allowed simply because the Official Receiver did not attend court. In my considered opinion, if this application, or any other, was to be allowed, the court should only grant orders on the basis of merit, as opposed to the absence of opposition.

In this case, the Petition was filed by the debtor. He was entitled to do so, pursuant to the provisions of Section 8(1) of the Bankruptcy Act. The said section stipulates as follows:-

**“A debtor’s petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the court shall thereupon make a receiving order.”**

It is noteworthy that that statutory provision gives rise to a legal presumption; to wit that the debtor who alleges, in his petition, that he is unable to pay his debt shall be deemed to have committed an act of bankruptcy, from which a receiving order shall come forth. In the circumstances, I hold that the grant of

the receiving order was valid, insofar as it was in accordance with the provisions of the law.

By asking this court to rescind the receiving order, the Respondents are effectively asking me to declare that the receiving order was no longer valid. However, I am unable to understand the basis for the application. I say so because Section 8 (1) of the Bankruptcy Act does not require the Court to satisfy itself that the debtor had proved his inability to pay his debts. That legal provision stipulates that once the debtor alleges that he is unable to pay his debts, the presentation of a petition to that effect shall be deemed an act of bankruptcy.

Thereafter, pursuant to Section 5 of the Bankruptcy Act, the court may make a receiving order, for the protection of the estate.

To my mind, the fact that the investigative efforts of the Respondents have revealed that the Petitioner **“owns several motor-vehicles and other attachable properties”**, does not deviate from the validity of the receiving order which was made on the basis of the statements made by the Petitioner.

On the other hand, if the Petitioner did conceal some of his properties, at the material time, and by so doing misled the court into granting the receiving order, the said Petitioner would have committed a Bankruptcy offence, pursuant to the provisions of Section 138 of the Bankruptcy Act.

Furthermore, if the Petitioner thereafter removed his property; or even if he failed to either truly discover or deliver-up all his property to the Official Receiver, the Petitioner would have committed further Bankruptcy Offences. In those circumstances, the Respondents would be best placed to collaborate with the Official Receiver to have the Petitioner charged and prosecuted.

Finally, I note that there is no receiving order dated 10th October 2002. My reading of the record reveals that the order for the issuance of the Receiving Order was signed by the Hon. Mwera J. on 23rd October 2002. Thereafter, the sealed copy of the Receiving Order was dated 25th October 2002.

Whereas, I can find no legal or other explanation for the two different dates, I nonetheless hold that there is no Receiving Order dated 10th October 2002. Indeed, there appears to be no event which took place on 10th October 2002, for the Petition which is dated 9th , was filed in court on 11th October 2002.

For all those reasons, I find no merit in the Respondent’s application dated 30th June 2004: it is therefore dismissed with costs.

Dated and Delivered at Nairobi this 28th day of September 2005.

**FRED A. OCHIENG**

**JUDGE**