

The bankruptcy Act (Cap 53)

The court, which has jurisdiction to hear an application for stay of proceedings brought under section 11, is the High Court.

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

Bankruptcy Cause 116 of 2005

RE: SAMUEL MORIASI.....DEBTOR

RULING

The debtor hereof was sued for a debt of kshs 325, 000 in CMCC No. 8474 of 2003. After judgment was entered against the debtor, he was unable to pay the judgment debt and on 3rd October 2005, on the plaintiff (hereinafter called the creditor) making an application, obtained the committal to civil jail of the debtor.

On the debtor's petition a receiving order was made on 6th October 2005 against the debtor's Estate.

On 7th October the Official receiving on a certificate of urgency moved this court by Notice of Motion seeking an order that the debtor be released from civil jail pursuant to section 9 (1) of the Bankruptcy Act (Cap 53).

The creditor, before the hearing of that application raised a preliminary objection in the following terms: -

“The application is fatally defective, bad in law and incompetent and ought to be struck out as the order sought can only be granted by the court which ordered the committal to civil jail.”

Counsel for the creditor argued that there is nothing in the Bankruptcy Act that authorizes the official receiver to move the High Court for an order for the release of the debtor. That the official receiver ought to have moved the court that committed the debtor to civil jail. His argument therefore, was that the official receiver had moved the wrong forum.

In response the official receiver stated that the application is made under sections 9 and 11 of the Bankruptcy Act, and court recognized to have jurisdiction to entertain such an application was the High Court, as seen in section 97 thereof. Counsel further stated that the High Court having issued the receiving order against the debtor's Estate, the High court is the correct court to hear all matters relating to the debtor.

There are two sections that the official receiver states that the Notice of Motion is brought under. Firstly is section 9. I find that section 9 deals with debts, which are not the subject of court action. That section provides that no debt provable in bankruptcy and no action can be commenced against the debtor after a receiving order has been issued. The second section relied on was section 11. This section deals with action, which was on going before the presentation of the bankruptcy petition. The section provides the court may, after presentation of the bankruptcy petition stay execution, any action or other legal process against the debtor.

In view of that finding above the relevant section is section 11, thereof. That section states that the power to stay such execution, action or legal process is vested in “The court”. The court by section 2 is defined as: -

“Court means the having jurisdiction in bankruptcy under this Act.” Section 97 states: - “The court having jurisdiction in bankruptcy shall be the High Court.”

There lies the answer to the preliminary objection raised by the creditors. The High Court is indeed the correct forum for the debtor to seek orders of stay. That being this court’s finding the preliminary objection must fail and dismissed. There shall be no orders as to costs thereof.

Dated and delivered this 26th October 2005.

MARY KASANGO

JUDGE