



THE BANKRUPTCY ACT (CAP 53)

- On receiving order being issued or on adjudication of a debtor, there is no automatic stay of pending proceedings against the debtor.
- Under section 11 (1) a stay can be sought in the Bankruptcy court or in the court where the proceedings are pending.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Bankruptcy Cause 116 of 2005

IN RE SAMUEL MORIASIDEBTOR

RULING

The official receiver by a Notice of Motion dated 7th October 2005 and brought under sections 9, 11 and 97 of the Bankruptcy Act; seeks the following order: -

- **“ That the debtor herein SAMUEL MORIARI be released from civil jail pursuant to section 9 (1) of the Bankruptcy Act Cap 53 of the Laws of Kenya.”**

The background of this matter is that the debtor was committed to civil jail on 3rd October 2005, pursuant to warrants issued under Nairobi Milimani CMCC No. 8474 of 2003. On 5th October the said debtor petitioned for his bankruptcy. On 6th October a Receiving order was issued by this court.

The Notice of Motion is supported by an affidavit of Mrs Mwaniki advocate, counsel appearing for the official receiver. Learned counsel deposed that the debtor was committed to civil jail on 3rd October 2005, and annexed thereof the warrants of committal. Counsel further deposed that pursuant to the Receiving Order the debtor according to section 9 (1) of the Bankruptcy Act, is protected from further execution against him or his property except him as may be ordered in the Bankruptcy cause. Counsel finally deposed; **“That in the circumstances it is only fair that the debtor be released from civil jail to enable him attend the official receiver for his preliminary examination and also to attend the creditors meeting.”**

The official receiver relied on WILLIAM, Law and Practice in Bankruptcy; and the case RE MANNING [1886]. With regard to that case relied upon by the official receiver, there was one page missing in the copy supplied to the court and the court was therefore unable to determine if the authority was useful in respect of this case. In regard the book of WILLIAM; I was not able to confirm whether the sections stated therein were similar to those in our Bankruptcy Act. I did find however that under a paragraph entitled: - **“Power to restrain”** there was a statement as follows: -

“The remedy being discretionary the court refused to exercise it on the grounds inter alia of the bankrupt’s failure to fulfill his statutory duties in the bankruptcy.”

Learned counsel Mr. Kyayega opposed the applications, on behalf of the only creditor disclosed in the debtor’s petition, that is the decree holder in CMCC 8474 OF 2003.

In opposition learned counsel stated that the application did not meet the requirement of section 11 (1) of the Bankruptcy Act. He submitted that under that section the court had discretion to stay proceedings upon reasons being preferred. He said that stay is not automatic. He submitted that there was no application for stay before court.

I find that I fully agree with the submissions of Mr. Khayega advocate. I also find that, that submission is supported by an authority, that is THE OFFICIAL RECEIVER – VERSUS – UNITED STORES LTD AND OTHERS [1962] E.A. 180. This is a case of Appeal at Kampala. The court after reciting section 11 (1) states as follows: -

“It will be seen that the first part of the subsection relates to application to the Bankruptcy court for a stay, and the latter part of the sub-section relates to applications for a stay to the court in which proceedings are pending.”

The judges in, that case, proceeded to refer to the case ‘REALISATION INDUSTRIELLES LOESCHER & PARTNER (1) 1957 3 ALLER 241 and quoted the judgment of Lynskey J as follows: -

“.....proceedings against a defendant were not automatically stayed as a result of an adjudication, because a discretion was vested in the court under section 9 (1) of the Bankruptcy Act 1914 (which is similar to section 11 of the Ordinance), and that the proceedings continued until an order was made staying them.”

The creditor’s advocate quite rightly stated that there is no application for stay before court, and without stay the court cannot grant an order of release from civil jail of the debtor.

The application dated 7th October 2005 is incompetent and the same is dismissed with costs being awarded to the creditor to be paid by the official receiver.

Dated and delivered this the 11th day of November 2005.

MARY KASANGO

JUDGE