



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

Bankruptcy Cause 14 of 2000

RE: CAPTAIN MUSA HASSAN BULLHAN - *Debtor*

EXPARTE – “KENYA AIRWAYS LTD” A *Creditor*

J U D G M E N T

This matter has come on a long and winding road, where for many reason the same has been part heard before many judges but never concluded. It finally concluded on 31st October 2005.

Petitioner, hereof, seeks an order for a receiving order to be issued against the debtor, who failed to comply with the terms of a Bankruptcy notice No. 20 of 1999, served upon him on 21st July 1999. The debtor applied to set aside the Bankruptcy notice No. 20 of 1999, and that application was finally dismissed by the Hon Justice Mbaluto on 20th January 2000.

The creditor therefore alleges that the debtor committed an act of Bankruptcy on 20th January 2000.

The debtor’s petition is in respect of debtor’s debt to the creditor, of the aggregate sum of kshs 51, 828, 284. 80 together with interest thereon at 4% over and above the Barclays Bank of Kenya Ltd’s basic lending rate from 13th July 1999 until payment in full plus costs of the suit, HCCC NO. 1033 OF 1995, between the creditor and the debtor, hereof.

The debtor hereof filed an affidavit on 18th May 2000 and thereby denied the creditor’s debt. This matter therefore proceeded under section 7 (5) of the Bankruptcy Act (Cap 53). This section provides: -

“Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.”

The petitioner called two witnesses. P W 1 was *Lewis Gachucha Kamau*, a retired employee of Kenya Airways, hereinafter called KQ (the creditor).

P W 1 gave evidence and gave details of a once close working relationship and trading between the African Airline International and KQ. P W 1 said that the said African Airlines International accepted liability for debts owed to KQ and paid for them except for the amounts owed to KQ, in respect of maintenance and materials used in maintenance, which amounted to kshs 20, 910, 825. 20. This figure is made up of two amounts, namely kshs 19, 834, 812. 20 and kshs 1, 076, 013/-. P W 1 stated that the

debtor executed a guarantee, guaranteeing the said debts of African Airline International by a guarantee dated 22nd December 1994.

P W 1 gave evidence that that guaranteed amount was the subject of the suit HCCC NO. 1033 OF 1995 – Kenya Airways Ltd – Versus Captain Musa Bulhan. That judgment was entered by the late Hon Justice Pall for kshs 20, 910, 825. 20 with interest on kshs 2.7 million as prayed in the plaint from 31st March 1995 to 20th April 1995. This judgment was entered on an application, by the plaintiff, on summary judgment. P W 1 said that the amount of that judgment was the subject of the present petition.

On being cross-examined P W 1 stated that the business relationship between KQ and the African Airline International was between the early 1990s up to mid 1990s.

That the debts guaranteed by the debtor were debts owed by African Airline International, and that the debtor often by correspondence offered to guarantee these debts and finally did so guarantee them by the guarantee dated 22nd December 1994.

P W 1 gave evidence of the business relationship between the KQ and AAI (African Airline International) and alluded to cheques that were issued to KQ, which cheques were dishonoured on presentation, but most of those debts, which were reconciled following many meetings, were paid except the guaranteed amount.

P W 1 said that the debtor, after many failed proposal for the payment of the amount subject of this petition, voluntarily signed a guarantee, to guarantee AAI's debts.

P W 1 gave evidence in cross examination and stated that **HCCC NO. 4125 of 1993 Kenya Airways Ltd – Versus – African Airlines International**, was abandoned by KQ and KQ chose to proceed with the suit, relating to the guarantee. That it was a decision of the Board of Directors of KQ that the debts that were to be pursued, were the admitted debts, hence the suit on the guaranteed amount.

P W 1 accepted that the judgment in **HCCC NO. 1033 OF 1995** did not clearly indicate the date and place of issue.

P W 1 agreed that the debt, the subject of this suit was reflected in the annual report of KQ for the years 2003 and 2004. That this was a contingent disclosure necessitated by the requirements placed on a company such as KQ, listed in the stock exchange.

P W 1 disagreed with the suggestion of counsel for the debtor, when he said that KQ withheld the release of AAI plane, in order to coerce the debtor to sign the guaranteed. He said that the debtor signed the guarantee because the money was owed to KQ by AAI.

In re-examination P W 1 referred to the decree issue, following the judgment of the late Hon Justice Pall, which he said had not been set aside by the debtor. That the debtor did not appeal against that judgment on the basis that the guaranteed amount was disputed by the debtor.

P W 2 was *Jerremy Macharia Mutero*, who is legal counsel of KQ.

P W 2 referred to the request for Bankruptcy notice dated 8th July 1999, which he produced as an exhibit and also referred to a decree in **HCCC NO. 1033 OF 1995** and produced the same as an exhibit in this matter. P W 1 similarly produced, as an exhibit the certificate of costs in **HCCC NO 1033 OF 1995**, and also produced Bankruptcy notice No. 20 of 1999. P W 2 produced as an exhibit a guarantee dated 22nd December 1994.

In cross examination P W 2 accepted that he joined the employment of KQ a month before he testified and that he had not sworn an affidavit in support of the evidence he gave before court.

The debtor ***Captain Musa Hassan Bulhan*** stated that he is a professional airline pilot, but that for the

last few years he had concentrated on administration. He said that he has in the past been a C.E.O., M.D. for a few companies which include AAI, which he said was in receivership, and African Express Airways Ltd. The latter one is an International Airline, operating scheduled Airline, operating scheduled Airline services for passengers, and cargo.

He said that he was guarantor to a debt of “Kshs 19 million, or so, owed to KQ by AAI” He accepted that he signed a guarantee for that debt sometimes in 1993. The debtor denied that the amounts in the guarantee are still owed to KQ by AAI but accepted that the debt of Kshs 19, 834, 812. 20 was owed and he accepted that he guaranteed this amount. The other amounts he said, in the guarantee were either paid, or they are disputed

The debtor stated that AAI has sued KQ for 2, 460, 000 U.S dollars, and that given the rate of today's exchange, the amount owed would be approximately kshs 170 million.

The debtor denied knowledge of the finalisation of the case, **HCCC No 1033 of 1995**. He attributed to his lack of knowledge to his then counsel, who passed away, and who was always in and out of hospital and that he, the debtor was often out of the country.

Debtor said that the judgment produced in the agreed bundle of documents, of HCCC NO 1033 OF 1995, was not signed and was not dated. Debtor said that he finally got to know of that judgment when the bankruptcy notice was served on him. He said that when he signed the guarantee, he was very sure that KQ owed more money to AAI and that he therefore signed the guarantee as a business good will gesture, since both companies were doing business.

He said that, business wise AAI depended on KQ, which was the bigger organisation. That AAI depended on KQ for maintenance of aircraft and other services. That in turn AAI had a large stock of spare parts which KQ needed from time to time either as purchase or on loan. That KQ obtained certain services from AAI, which they failed to pay for and have not, to date, paid for the same.

The debtor stated that business between KQ and AAI was good until foreigners joined KQ. That from that period KQ began to make demands to AAI and he saw the reason behind that demand as, KQ'S attempt to avoid paying AAI's debts and secondly to black mail the debtor into reducing his competitiveness toward KQ.

Debtor referred to a letter written to him a managing director of AAI, by KQ. He said the letter although admitted that KQ was indebted to AAI, no payment had been received to date. Similarly, the debtor referred to the claim in HCCC No 2072 of 1999, which he said KQ had not to date paid AAI.

Debtor referred to defence exhibit No. 2, the KQ annual report. He referred to notes on contingent liability and stated that it was clear, thereof, that the debt the subject of this petition was set off against the counter claim shown, thereof.

Debtor referred to hand written statement by KQ on page 53 of the affidavit of P W 1 filed in court on 23rd May 2000. He said that from that note AAI was only indebted to KQ, for kshs 17, 813, 220. 60, but that amount was against a larger amount that KQ owned AAI.

The debtor was cross-examined by petitioner's counsel. Debtor stated that the guarantee that he signed, he executed it because KQ had refused to repair AAI aircraft unless he signed it.

He accepted that the suit HCCC No 2072 of 1999 was filed on 28th October 1999 and that since filing the suit had never been heard.

Debtor accepted also that after being served with the decree in HCCC No 1933 of 1995, that he had not paid that decretal amount.

On being re-examined the debtor retracted his prior statement and said that he had not been served with

the decree in HCCC 1033 OF 1995.

He further stated that KQ owned AAI 2 million U.S dollars “or there about.” He accepted that he signed the guaranteed, which he said he signed it because of the co-operation between KQ and AAI.

In submissions, learned counsel Mr Mwenesi, on behalf of the debtor filed written submission and also orally submitted before court.

The court will deal with the different issues raised by the debtor separately. The debtors counsel began by stating, generally, that in bankruptcy proceedings the court ought to construe evidence, submitted in proof of debt, strictly. The debtor relied, in regard to this proposition, to the case: **RE BINSTED. EXPARTE DALE [1983] I QB 199**. Amongst other portions, debtor’s counsel read out the following: -

“And when the legislature enacts that particular act or default shall be an act of bankruptcy, I think we ought not to give to their words any but their strict proper meaning, unless we are clearly satisfied that it was the intention of the legislature to use the words in a larger sense.”

The debtor raised an issue in regard to the guarantee, which was the subject of the suit **HCCC NO 1033 OF 1995**, and whose judgement which is in turn the subject of the present petition. Debtor stated that the guarantee was not dated and the debtor’s signature was not witnessed.

It ought to be noted that the said guarantee is now subject of a judgment in **HCCC NO. 1033 OF 1995**, and in his evidence the debtor did not deny executing the same. The necessity of proving his signature by a person who witnessed his signature did not, and does not, arise.

The main issue raised by the debtor related to the judgment of the late Hon Justice Pall, which is on page 31, plaintiff’s exhibit No. 1. That judgment is typed and at its conclusion it lacks a date a signature and it is not certified to be a copy. Debtor’s counsel said that since the bankruptcy proceedings are anchored on this judgment the same must fail in view of the shortcomings of that judgment. The debtor relied on the case of FREDRICK JONES KINYUA & PETER KIPLAGAT KOECH – VERSUS – WANDA BAIRD **Civil application No. NAI 17 of 1999**. In this case the appellant filed an undated judgment with the result that the record of appeal was struck out.

Debtor’s counsel stated that the affidavit of **Lewis Kamau**, which sought to prove the debt, relied on unsigned and uncertified judgment.

The debtor also stated that when the bankruptcy petition was served on him, the process server did not serve him with a verifying affidavit as required by Law. This failure, debtor’s counsel submitted, must be construed strictly. The debtor relied on the case **IN THE MATTER OF THE STANDARD LIMITED and IN THE MATTER OF THE COMPANIES ACT HC winding up cause NO 14 of 2002**. This case however dealt with the Companies Winding up rules, which are at variant with the Bankruptcy rules.

Debtor’s counsel submitted that the parties KQ and AAI had held several negotiations meetings and in view of those meetings and as he said, “*if one is forgiven debts you ought not to go to bankruptcy to recover that debt.*” Counsel submissions, hereof, were on the basis of the provisions of the gospel according to Mathew 18. He said that since KQ, by an affidavit sworn on 4th October 1999, by **Mr Lewis Kamau**, had indicated that it did not wish to destroy the debtor and in accordance with Mathew 18, they ought not to have brought the present bankruptcy proceedings.

Debtor’s counsel finally submitted that the debtor had brought evidence before court which evidence showed that the petition ought to be dismissed. Counsel quoted the case **RE A DEBTOR Exparte DEBTOR [1935] 1 CHAN 353**, and quoted the following: -

“Bankruptcy being a matter which affects not only the debtor and his creditors but also the general public, a duty is imposed upon the court to see that all the requirement of the Bankruptcy Act,and rules have been observed.”

In response petitioner's learned counsel Miss Malik started by attacking the submissions of the debtor relating to the unsigned judgment. Counsel referred to section 3 (1) (G) of Cap 53. In that section counsel pointed out that no reference is made of judgment, but rather of the decree. She stated that the Bankruptcy notice was issued as a result of a decree, and further submitted that the debtor, never set aside the judgement, on account of it being unsigned, nor had he appealed against it. Counsel stated that the judgment relied upon by the petitioner, of **HCCC 1033 of 1995** was not the original judgment. She referred to a practice whereby when judgments and rulings are delivered by judges, typed copies are given to counsels. Counsel, anyway argued, that the onus of proving that the original judgment was unsigned lay upon the debtor.

Petitioner's counsel found fault in the debtor's reliance of the Civil Procedure Rules, particularly Order 20 and stated that the Civil Procedure Rules do not apply to Bankruptcy proceedings as per Bankruptcy Rule 317.

On service of the verifying affidavit, petitioner's counsel submitted that the affidavit of service did not state that the debtor was not served with a verifying affidavit. She further submitted that under section 7 (1) Cap 53 under Bankruptcy Rules 110 and 114, there was no requirement of service of verifying affidavit on the debtor.

I have considered the aforesaid evidence and submissions by counsel and my findings are as follows.

The debtor's allegation that the petition is actuated by need to drive out the debtor from business was not sufficiently proved. All the witnesses, hereof, agreed that KQ and AA1 had a very close working relationship. According to P W 1, that relationship became strained on AAI failing to pay the amount it owned KQ. The debtor on the other hand blamed the foreigners, who he said joined KQ. That allegation by the debtor was not proved and is rejected.

The guarantee I find that it was dated, contrary to the allegations of the debtor, see Petitioners exhibit No. 6. The first page of that exhibit shows the date of 22nd December 1994.

On the issue of the debtor's signature not being witnessed, I find that such a witness is not material, because the debtor did not deny signing it. However as rightly stated by the petitioner's counsel, that guarantee, having been the subject of HCCC No 1033 of 1995, whereby judgement was entered and decree drawn, cannot be the subject of this tribunal because that would be tantamount to this court sitting in appeal against the judgement of the late Hon Justice Pall.

The debtor's counsel did raise an issue, whereby he stated that the judgment of the late Hon Justice Pall was subject of an interlocutory application and accordingly did not fall within a judgment envisaged under the Bankruptcy Act, where it requires that the judgment be a final judgment, see section 3 (1) (G) Cap 53. Let me here ask a rhetorical question. On entry of judgment on a summary judgment application, what other action would be expected from the plaintiff, other than proceeding with execution.

In find I cannot accept the debtor's submissions that the petitioner's judgment, on a summary judgment application, was an interlocutory application. Interlocutory, is defined in the Black's Law Dictionary as: -

“Provisional; interim; temporary; not final.”

That definition does not fit with the petitioner's judgment, where a decree was subsequently extracted.

The debtor in evidence, in regards to the guarantee stated that he signed the guarantee because KQ had refused to repair AAI plane, unless he so signed. The debtor, whoever kept shifting when later asked and did accept in cross-examination that he did voluntarily execute that guarantee. Indeed he chose to sign it because there was cooperation between KQ and AAI. He later again said that he executed the guarantee because, he believed KQ owed AAI much more than what was reflected in the guarantee. Having heard the debtor's evidence on this issue and P W 1's evidence I reject the debtor's contention that the judgement on the summary judgment application was interlocutory.

The debtor, submitted that the judgment on page 31, of the petitioner's Exhibit No. 1, was not signed; this was responded to by the Petitioner, that the Bankruptcy Act, only required a decree be used to proof a debt. Petitioner relied on section 3 (1) (G), which in part states: -

“.....any person who is, for the time being, entitled to enforce a final decree or final order shall be deemed to be a creditor who has obtained a final decree or final order.”

Order 20 Rule 2 (2) of the Civil Procedure Rules requires a judge, on pronouncement of a judgement to sign the same. It provides: -

“A judgement pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.”

Judgments that have been unsigned and undated, have indeed been held to be nullity in the court of appeal.

In our case hereof, the parties agreed a bundle of documents to be presented to court by consent. Amongst those documents was the unsigned, undated typed judgement in **HCCC NO 1033 OF 1995**. If that was the only document that the petitioner relied upon, the petitioner would have found itself in problems in regard to this petition. However by calling P W 2 the petitioner exhibited a filed and signed decree. That decree conforms to the requirements of section 3 (1) (G) Cap 53. That decree has to date not been set aside or reviewed.

The debtors submissions that the foreigners who joined KQ, are behind his present woes, that the petitioner had made an admission to a debt owed to AA1, and that **HCCC NO 2072 OF 1999** is reason why the receiving should be made and that a verifying affidavit was not served are rejected by the court and similarly are the submissions on the Gospel according to Mathews 18. I find I do not accept the debtors statement that, the debtor has shown by evidence why the petition should be dismissed. I ought to state that section 7 (1) and Rules 110 and 114 do not require a verifying affidavit to be served on a debtor.

To the contrary the petitioner has proved that the debtor was served with a Bankruptcy Notice No. 20 of 1999 and failure to respond to the same as required by section 3 (1) (G) Cap 53, the debtor has committed an act of Bankruptcy, which was committed on 20th January 2000.

The petitioner, therefore, has satisfied the court that a receiving order, as petitioned should be made in respect of the Estate of Captain Musa Hassan Bulhan in that he committed an act of Bankruptcy on 20th January 2000, in that he failed to comply with a Bankruptcy Notice issued by this court on 13th July 1999, which was served upon him on 21st July 1999; and the Official Receiver is hereby constituted, Receiver of the Estate of the said debtor. The costs of the Petition are to be borne by the debtor and paid out his Estate.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of December 2005.

MARY KASANGO

JUDGE