



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Bankruptcy Cause 59 of 2004

IN THE MATTER OF ABDUL RAHIM ISMAIL
AND
IN THE MATTER OF THE BANKRUPTCY ACT CAP. 53 LAWS OF KENYA
RULING

This Ruling is very much similar to the Ruling in the matter of Mrs. Amina Hajji, Ex parte the Debtor in Bankruptcy Cause No 58 of 2004, and the reasoning in that case applies largely to this cause as the applications, the grounds and the Supporting Affidavits are identical, except for the names of the Petitioners, one of whom in this cause is called Abdul Rahim Ismail.

On 19th April 2004, the Applicant Mr. Abdul Rahim Ismail presented a bankruptcy petition under the provisions of Section 5 of the Bankruptcy Act, Chapter 53, Laws of Kenya (the Act) for a receiving order for the protection of his estate. When the petition was placed before my sister, Lady Justice Kasango on 26th April 2004, she declined to issue a receiving order "because the debts alleged to be due and the debtor is unable to pay the debts payable by Target Carriers Limited".

In the application dated 30th April 2004 and filed on the same day under a Certificate of Urgency by his Advocates, Alex Karanja Ndungu & Co. the Petitioner seeks a variation of the Court's order made on 26th April 2004 declining to make a receiving order against the Petitioner. The Petitioner swears in his Supporting Affidavit,

Paragraph 6 -

"That almost all the debts listed as being payable by Target Carriers Limited are actually personally guaranteed by the Directors including myself making me liable to court action," and in paragraph 9 -

9. "That the list of creditors above was not meant to be held together with the statement of affairs but was meant to assist my Advocates prepare all the documents for presentation to the court."

and in paragraph 10

10. That the inclusion of the list was merely inadvertent and was not meant to mislead the court at all."

The application is expressed to be brought under the provisions of Sections 3(1) (f) 11, 97, 100, & 133 of the Act and Rules 1, 15, 16 and 144 of the Bankruptcy Rules and all enabling provisions of the law. The application prays for orders that-

- (a) The court do vary the order it made on 26.04.2004
- (b) A Receiving Order be issued in respect of the estate of the Petitioner,
- (c) The courts do order for a stay of any intended legal action against the Petitioner.

The application is grounded on the grounds-

- (1) that the Petitioner has consciously and after careful consideration of the consequences voluntarily presented this petition,
- (2) that the petitioner has as an individual fallen into bad times and has completely been overwhelmed by his commercial obligations to adopt this painful course of action.
- (3) that the company Target Carriers Limited whose list of creditors was inadvertently filed together with the statement of affairs was not meant to be filed and almost all the debts included therein were incurred by the petitioner and are due from him.
- (4) that it is meet and just that the orders sought by the petitioner(s) be granted to enable the Official Receiver to take delivery of the petitioner(s) estate. For completeness of the record and the eventual conclusion and decision in this Ruling, I set out below the various provisions of the Bankruptcy Act and the Bankruptcy Rules (the Rules) upon which this application is brought. Section 3 of the Act lists the various acts of Bankruptcy. Section 3(1) (f) declares that a person commits an act of bankruptcy if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition. Section 11 of the Act grants the court jurisdiction to stay any action or other legal process against the property of the person of the debtor, and on proof of presentation of a petition, the court may either stay the proceedings or allow them to continue on such terms as it may think just. Section 97 of the Act invests the jurisdiction in bankruptcy in the High Court, unless specifically or generally delegated by the Chief Justice to any subordinate Court. Section 100 of the Act grants the court "full power to decide all questions of priorities, and all questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within its cognizance, or which the court may deem fit for the purposes of doing complete justice or making a complete distribution of property in any such case.

In a real sense, Section 100 is both an enabling provision, and a consequential provision upon the onset and finalization or completion of a bankruptcy situation. Its effect would be felt more at the conclusion or release of the debtor from the clutches of bankruptcy.

Section 133, will be the issue in this ruling. No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court". S.133 (1), and "no defect or irregularity in the appointment or election of a receiver, trustee or member of a committee of inspection shall vitiate any act done by him in good faith."

Reference to rule 1 of the Bankruptcy Rule in the Petitioner's application is not understood as this reference is merely to the short title and application of the Rules, and is thus of no consequence to this application. Rule (5) requires that an application under the Act shall be brought by way of motion on notice (Rule (5)), and the court will ordinarily not make any order which may affect another person unless that person has given his consent to be shown to the court, or upon proof that notice of the intended motion and a copy of the affidavits in support thereof have been duly served upon that party, (Rule 16).

An ex parte order will only be made where the court is satisfied that delay in proceeding in the ordinary

way would entail serious mischief, and the ex parte order would be made on terms on costs and otherwise, and may be subject to such undertaking (if any) as the court may think just and any party affected may move to set the ex parte order aside. Rule 144 is akin to section 11 of the Act, and provides that there may be included in a receiving order an order staying any action or proceedings against the debtor or staying the proceedings generally.

The above completes my survey of the applicable or enabling provisions of the Act and the Rules. When this cause went before my sister, Justice Kasango, she declined to issue a receiving order. Touse her very words I decline to issue a receiving order because the debts which the alleged debtor states that he is unable to pay are debts payable by TARGET CARRIERS LIMITED"

The application in issue seeks orders "to vary the order made on 26.02.2004". The ground in support of that prayer is contained in paragraphs 6 of application, of the Supporting Affidavit of Abdul Rahim Ismail, - and it is in these terms:-

"That almost all the debts listed as being payable by Target Carriers Ltd are actually personally guaranteed by the Debtors including myself making me liable to court of action."

Ground 3 of the grounds in both causes are identical -

"That the Company Target Carriers Limited whose list of creditors was inadvertently filed together with the statement of affairs was not meant to be so filed and almost all the debts included therein were incurred by the Petitioner(s) personally and are due from him."

I want to believe that when my sister Lady Justice Kasango declined to issue the receiving order in both causes, she must have had at the back of her clear mind, the good old case of Salmon vs. Salmon & Co. Ltd the leading case that held that Mr. Salmon and Salmon & Co. Ltd are two separate legal entities, and debts by one are not necessarily the debts of the other. This concept is today embodied in Section 16 of the Companies Act, (Cap. 486) that upon the date of incorporation mentioned in the Certificate of Incorporation, the subscribers to the memorandum of association and other persons who may later become members of the company become a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company with power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up.

For the petitioners to want to assume the liabilities of the company Target Carriers Ltd. merely by their declaration so, is a matter that calls for a little more proof. Reference has been made to personal guarantees. How were these guarantees made? We observe that the creditors list of Target Carriers Ltd as at 30th November 2003 contained some well-known petroleum products suppliers, and the other well-known names in the motor vehicle industry.

In as much as the Petitioner seeks the protection of the court of bankruptcy cognisance must also be taken of the needs of those creditors outside there who are unaware of the Petitioner's move and will only be caught and barred from pursuing their legitimate claims with the defence of a receiving order staying all current and prospective litigation. The court of bankruptcy will therefore not hesitate to decline to issue a receiving order in bankruptcy where there is even a whiff of suspicion that the petition is brought largely to defeat the legitimate claims of a large number of creditors like in the present case. This would really be an abuse of the process of the Court, *Re Bond* (1888) 21 QBD 17. The clear intention of the bankruptcy legislation being that a debtor should be enabled to put his affairs together during the period of the receiving order and be protected from the pressure of a committal order by obtaining an adjudication in bankruptcy against himself, he must come to court with clean hands. He must show how the debts of Target Carriers Ltd suddenly became his. For there is a method, a way, a procedure for dealing with such or delinquent companies like Target Carriers Ltd, that way is not through or by its directors seeking receiving orders.

To avoid therefore an abuse of the process of court, and as the Petitioners, Abdul Rahim Ismail has stated

on oath in his Supporting Affidavit that the debts of Target Carriers Ltd were personally guaranteed by him, let the petitioner make full disclosure before the receiving orders can be granted, how he guaranteed these debts before he can be afforded the protection of the bankruptcy court. These disclosures will enable the court to decide on the matters of the receiving orders, and thus do complete justice as envisaged under Section 100 of the Bankruptcy Act.

For these reasons, I decline to vary the order made on 26th April 2004 by Lady Justice Kasango and also decline to issue the other orders sought. The Application filed by Mr. Abdul Rahim Ismail in Bankruptcy Cause No. 59 is dismissed with costs.

Dated and delivered at Nairobi this 31st day of May 2004.

M. J. ANYARA EMUKULE

JUDGE