



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
BANKRUPTCY CAUSE NO. 35 OF 2003**

ORARO & COMPANY ADVOCATES.....PETITIONER

VERSUS

STEPHEN OMONDI OWINORESPONDENT

RULING

The Respondent in this petition, Stephen Omondi Owino, has moved this court by way of Notice of Motion dated 17th September 2004.

The same is brought under Rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of Individual) Practice and Procedure Rules, 2001. The application seeks the following prayers: -

1. That a declaration that further proceedings in this suit before the hearing and determination of **HCCC 275 OF 1995 NAJU INVESTMENT LTD –GEORGE ADONGO & 5 OTHERS** is in contravention of the respondent's right under Section 77 (a) of the Constitution of Kenya to the Protection of Law in general and specifically to fair hearing and is unconstitutional.
2. An order that further proceedings in this suit be stayed until hearing and determination of HCCC NO. 275 OF 1995.

The background of this case which is ascertainable from the Petitioner's Replying Affidavit is that he Petitioner acted for the liquidator of Post Bank Credit Ltd in the recovery of a debt due from a company known as **ROTHS (KENYA) LIMITED** which debt was secured by a charge over property L.R. NO. 205/81 Nairobi. The petitioner was instructed to sell the security L.R. NO 205/81 Nairobi, which was registered in the name of NAJU INVESTMENTS LTD. It transpired that Naju Investments Ltd requested the Liquidator to allow it to sell the charged property in order to reduce the debt. The Liquidator acquiesced to that request. The Petitioner on the respondent's professional undertaking released the title documents and the discharge of charge relating to the security held. Due to the Respondents failure to honor the professional undertaking the petitioner filed a suit seeking to enforce the undertaking. On 14th June 2001 the court found the respondent and his partner liable to the Petitioner and because they both failed to satisfy that judgment the Petitioner filed this bankruptcy petition against the respondent and Bankruptcy cause No. 45 of 2003 against his partner.

The Respondent by his application says that there is a suit namely HCCC NO. 275 OF 1995 whereby the Plaintiff Naju Investment Ltd. have assigned to him that claim. Amongst the defendants sued in that action is the Liquidator of Post Bank Credit Ltd. The respondent therefore deponed that "*in essence now there is a suit pending in court against the judgment credit herein by the judgment –debtor by virtue of the aforesaid assignment.*" The Respondent also says that the petitioner has been acting oppressively in prosecuting this present petition since if they are aware of HCCC 275 OF 1995 which if the respondent is

successful the petitioner will have no claim against him.

I must admit that I did not fully appreciate the latter argument. Does the respondent mean that a judgment in HCCC 275 OF 1995 will cancel out the judgment the subject of this petition. Why that line of argument is not easily understandable is because the respondent has not filed an appeal or an application to set aside that judgment. Indeed to the contrary after that judgment was entered, the respondent either personally or through his counsel, entered into correspondence with petitioner or their client and attended meetings with them with a view to settlement of the amount the subject of that judgment.

The Respondent has invoked Section 77 (9) of the Constitution, which states: -

“A court or other adjudicating authority prescribed by Law for the determination of the existence or extent of a Civil right or obligation shall be established by Law and shall be independent and impartial, and where proceedings for such a determination are instituted by a person before which a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

Since the respondent was not specific on how his fundamental right has been breached in regard to this section I want to fathom that his allegation is in relation to fair hearing. The respondent’s argument is that if this suit is not stayed he will not have a fair hearing of the HCCC 275 OF 1995. This argument is in the backdrop of a judgment, which the respondent has not appealed against or applied to set aside.

The word fair is defined in Black’s Law dictionary as: -

“Having qualities of impartiality and honesty; free from prejudice, favoritism, and self interest. Just; equitable, even-handed; equal as between conflicting interests.”

Justice Ringera (as he then was) had an opportunity to consider Section 77 (9) of the Constitution and stated as follows: in the unreported case of **MBAGE NJUGUNA NGANGA & ANOTHER – V – CO-OPERATIVE MERCHANT BANK LTD: -**

“The constitution has not elaborated the guarantees which a litigant in a civil case has as it has done with respect to an accused person in a criminal trial. It has only provided the right to a fair trial by an impartial court established by Law. The right to a fair trial is conceptually elastic one. Its parameters can only be determined on a case basis”.

The petitioner relied on 7 authorities and although I will not refer to them in this ruling I have had an opportunity to read them.

Some of those authorities are

(i) HCCC NO 666 OF 1990 KENNETH NJINDO STANLEY MATIBA – V – THE ATTORNEY GENERAL where the judges quoted from the case of **ANARITA KARIMI NJERU – V – THE REPUBLIC (No 1) (1979) KLR 154** with approval: -

“An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiments and emotions; but a court of Law has to gather the spirit of the constitution from the language of the constitution. What one may believe or think to be the spirit of the constitution cannot prevail if the language of constitution does not support that view.”

(ii) NURANI V NURANI (1981) KLR 88 to quote a portion from page 99: -

“Whether the proceedings are of a civil or criminal nature the court will not protect an imaginary deprivation of a fundamental right or allow it to be capriciously pushed to absurd lengths”

Indeed in this present case, looking at the spirit of Section 77 (9) from its

language thereof the infringement alleged by the respondent can only be stretching this section to absurdity.

For the Respondent to allege that the petitioner who has an unsatisfied judgment cannot petition for bankruptcy because he has another claim in another suit is absurd. Section 3 (1) (g) of the Bankruptcy Act provides that a party will have committed an Act of Bankruptcy if there is a final decree, which is not subject of stay. So the Petitioner has rightly to come to court under this petition and nothing in that act of coming under this petition infringes or violates the rights of the Respondent enshrined in Section 77 (9) of the Constitution.

The end result is that the Respondent's application dated 17th September 2004 is dismissed with costs to the petitioner.

Dated and delivered this 9th day of November 2004.

MARY KASANGO

AG JUDGE