



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Bankruptcy Cause 14 of 1999

RE:MOHAMMED MEHBOOB MUGHAL (DEBTOR)

RULING

The official receiver has moved this court by way of Notice of Motion dated 9th July 2003.

Before laying out the orders sought thereof it is pertinent to state that the court during the hearing of the aforesaid application granted the official receiver leave to amend the prayers in the said Notice of Motion in that the property described in prayer 1 and 2 was amended to read MAKUENI/KALI/878.

The said Notice of Motion is brought under S.9, 47 and 49 of the Bankruptcy Act Cap 53 and any other enabling provision of law.

Mrs. Mwaniki appeared for the official receiver and she said that the applicant sought from this court the following orders:-

- That the property MAKUENI/KALI/878 in Makueni, Wote District formerly registered in the name of MOHAMMED MEHBOOB MUGHAL (Debtor) and son but currently registered in the names ZULIFIKAR QAMAR DIN, ABDUL SATAR KARIM, ELIAS BARE SHILL and ESLIAS ARBI be reinstated to the former owner MOHAMMED MEHBOOB MUGHAL (Debtor).
- That the present registered owners ZULIFIKAR QAMAR DIN, ABDUL SATAR KARIM, ELIAS BARE SHILL and ESLIAS ARBI be restrained from dealing in any manner with the property known as MAKUENI/KALI/878.
- That the Commissioner of Lands be ordered to reverse and cancel all entries pertaining to the transfer of MAKUENI/KALI/878 as at 28th June 2001.

Mrs. Mwaniki relied on the grounds on the face of the application and on the supporting affidavit by LUCY NDUNGU dated 9th July 2003.

Mrs. Mwaniki gave the background of this matter as follows:-

- The debtor applied for a receiving order which was issued on 14th May, 1999 after the debtor declared that he was unable to pay his debts.
- After the receiving order was made and the official receiver was constituted as the receiver of the estate of the debtor the debtor wrote to the official receiver and requested consent to sell some of his properties.
- The official receiver gave the consent to the debtor to sell his property. The important words were “sale of the land property”.

- Then the official receiver learnt that the debtor had transferred the property the subject of prayer No. 1 in circumstances that were not clear.
- The said transfer did not amount to a sale which the official receiver had granted his consent.
- The sale proceeds should have been received by the official receiver prior to the transfer being affected.
- The official receiver tried to register a caution but the said effort were frustrated.
- Despite those efforts to register the caution the transfer was affected.
- The said transfer amounted to the giving of an advantage to the transferee over the other creditors.
- That some of the transferees are indicated as creditors in the statement of affairs, as unsecured creditors.
- The debtors total indebtedness is Kshs.1, 999, 413, 376/=.
- The transfer hereof seems to have been without consideration and in any case is illegal because it was done after the receiving order had been issued and that amounted to making the transferee a preferred creditor.
- Once the receiving order is made all creditors are supposed to be treated equally.
- It was in view of that the aforesaid and to avoid injustices that the official receiver seeks orders to have the property revert to the debtor which can then be sold and the proceeds thereof be shared equally amongst the creditors.
- Three people amongst the transferee have not filed proof of debt with the official receiver, the only thing shown to this court is a copy of a promissory note.
- The property the subject of this transfer is large and if sold the proceeds can go along way to assist to clear the debtors debt and that way justice will be done.

Mrs. Mwaniki relied on the authority:-

WILLIAM'S Law and Practice in Bankruptcy.

This quotes section 44 of the English Law which is equivalent to Section 52 of Cap 53. the provision of S.52 of Cap 53 in summary are that all transactions with a bankrupt, bona fide and for value are valid against the Trustee.

Mrs. Mwaniki said that in this present case the debtor has sworn an affidavit clearly showing that he was forced to transfer the land to the interested parties.

The other authority which Mrs. Mwaniki relied on is RE WARREN QBD (1900) page 138. this authority explains what constitutes fraudulent preference. It makes it clear that fraudulent preference is a payment made by the debtor to one of his creditors intending to be preferred.

Mrs. Mwaniki said that in this present case it can be fraudulent because the transfer was directly.

RE COHEN 2 Cha.(1924) pg 315. Mrs. Mwaniki said payment was made by the debtor to his creditor on the eve of his Bankruptcy and the court held that the payment was made with a view to prefer creditor and was therefore deemed fraudulent.

Mr. Mutua for the interested parties respondent to the application by stating that the same was opposed. Further that there were replying affidavits filed on 31st July 2003 and 22nd August 2003.

Mr. Mutua first contention was that the property quoted in the application did not correspond to the one which was the subject of the transfer.

As stated earlier the official receiver sought and was granted leave to amend the Notice of Motion and consequently this argument by Mr. Mutua fall by the way.

Mr. Mutua's other contention was that the transaction was authorized by the official receiver. Mr. Mutua in support of this contention drew the courts attention to S.59 Cap 53.

Mr. Mutua said that the official receiver having authorized that sale he cannot now turn and say that, that transfer was fraudulent.

Mr. Mutua said that the official receiver cannot be heard to say that this transaction was fraudulent without the said official receiver saying what he has done since the receiving order was issued in May 1999.

Mr. Mutua in reply to the authorities quoted by Mrs. Mwaniki stated that the payments thereof were made before bankruptcy and that was not the case here.

The court has considered the submission by counsels and the authorities relied on.

The court relies to exhibit "ZODI" annexed to the affidavit of ABDUL SATTAR filed in court on 22nd August 2003.

The court in looking at that said exhibit notes that it is a letter written by the official receiver whereby the debtor was authorized to sell MAKUENI/KALI/878.

The official receiver, it will be noted gave consent to sell. The operative word here is "to sell"

The court in perusing the application and the affidavits filed by the interested party and the debtor, finds that indeed there was no sale that took place with regard to the property in question, it was in fact a mere transfer to the interested party.

For such a transaction to have binding affect on the official receiver the same would have to be bona fide and for value see section 52 cap 53.

Whether or not it is bona fide it is answered by the uncontraverted affidavit of the debtor filed in court on 5th September.

He depones that his life and the life of his family was threatened if he failed to transfer the property to the interested parties. He indeed said that he did not execute the said transfer freely.

The court also in perusing the documents is unable to find the consideration given by the interested parties to the debtor.

The promissory notes and the agreement annexed to the affidavit of ZULIFIKAR OMAR DIN relates to transaction of Consumer Hire Purchase Limited, a very separate entity to the debtor herein.

The court is of the opinion in view of what is stated hereof that the application is merited.

The court notes that the property was originally registered jointly in the debtors name and in the name of his son. The court also find the title issued to the interested parties is MAKINDU/KALII/878.

Accordingly in order to do justice hereof the court orders as follows:-

- 1) The property known as MAKUENI/KALI/878 in Makueni District be transferred to MOHAMMED MEHBOOB MUGHAL and FEISAL MEHBOOB MUGHAL and the interested parties do execute the said transfer.
- 2) That if the interested parties hereof fail to execute the transfer in accordance with order No.(1) hereof within 30 days from this date hereof, the Deputy Registrar of this court do execute the said transfer.
- 3) That the cost of this application be paid by the interested parties be execute the said transfer.
- 4) That the cost of this application be paid by the interested parties hereof.

Dated and delivered on 18th December 2003.

MARY KASANGO

JUDGE