



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

BANKRUPTCY NOTICE NO. 9 OF 2014

DR. VICTOR KIOKO MUNYAKA.....JUDGMENT DEBTOR/RESPONDENT

VERSUS

RISING STAR COMMODITIES LIMITED.....JUDGMENT CREDITOR/PETITIONER

R U L I N G

1. By his application dated the 11/8/2014, the judgment debtor Applicant, sought an order of stay of any steps pursuant to the bankruptcy notice dated 19/5/2014 pending the determination of the application, that the said Bankruptcy notice be set aside and bankruptcy proceedings be dismissed with costs.
2. The reasons said to ground the application disclosed in the face of the Application and the Affidavit in support are that the bankruptcy notice was never served as mandated by the law and therefore the proceedings had been commenced in bad faith with the sole aim to intimidate, embarrass and disparage the judgment-debtor, being a Member Of Parliament; that no act of bankruptcy has been demonstrated to have been committed and therefore the criteria for commencement of bankruptcy proceedings had not been met.
3. When served the judgement creditor opposed the application by the judgment-debtor on the basis that there was a valid judgment debt which the debtor had failed to settle hence an act of bankruptcy had been committed; that the Bankruptcy notice had been duly served upon the debtor who was not disputing the actual service but the form of the Affidavit of service.
4. Since the dispute was narrowed down to whether or not the notice was served or not, parties sought and it was ordered that both the process server and the debtor be called for cross examination. However before the process server could be cross examined, he filed an Affidavit he called '**Affidavit of protest**', in which he denounced the Affidavit of service while asserting that his signature was forged.
5. Faced with such a scenario the court ordered that the Directorate of Criminal Investigations, Mombasa County, investigate and establish if Ms. TITUS KITETU NKEKETHA did swear the Affidavit of service sworn on the 3/6/2014 and filed in court on the 16/7/2014.
6. Pursuant to that order the DCI did file a Forensic Document Examination Report dated 15/4/2019 which returned a verdict that the Affidavit of Service and Affidavit of Protest, after examination, were signed by different authors. When the matter came up for argument therefore me, the two counsels relied not only on their filed submissions but also on the Forensic Document Examiner's Report.
7. My view is that once the DCI filed the forensic document examiners report confirming the process servers protest that he did not sign the Affidavit of Service it ought to have become clear to all that there was no service of the statutory Bankruptcy Notice. Even though the document examiners report is not binding on me, I do read it together with the process servers own Affidavit on record stating that he did not sign the Affidavit of Service.
8. In my view service of court process is fundamental and safeguards the right to a fair hearing as well as the right to be heard and thus must be done and done as by law mandated. For the reason that the Affidavit of Service is denounced, I do find that the service has been put to doubt for which reason I direct that the notice be taken out afresh and served in accordance with the law.
9. I would have stopped here but parties have both submitted on the merits of the petition and regarding whether or not the debtor has committed an act of bankruptcy.
10. This to me is a matter that goes to the merits of the petition and ought not to be dealt with prior to the petition being properly served. It is worth noting from the record of this file including the complaints by the petitioner/Decree-holder to The Commission for The Administration

of Justice and the attempts made at serving and executing warrants of arrest that the debtor has not been easy to serve. From the record of the file and in the Affidavit or support of the application I am to determine here, the debtor says that he learnt of the petition from an employee of the court that this petition had been filed but in the same affidavit he proceeds to swear that he is not aware of any judgment against him. That assertion is made with full disregard that the existent of this decree among others has been the subject of court orders issued by different judges and dated 29/9/2011, 16/9/2010, 8/7/2010, 25/6/2010 all delivered before the Affidavit was sworn and with the participation of the debtor. In fact in the decision dated 29/9/2011 the judge was not very happy with the debtors conduct when the said:-

“Although Dr. Victor Kioko Munyaku has filed a “constitutional petition” and an application under it, he has not denied that his sole object is to create a new forum that, ex facie, has the colour of legitimacy and urgency, for contesting a valid decree of the Court which, certainly, he has attempted to evade for several years. What the applicant brings as a constitutional petition, therefore, is but subterfuge, intended to defeat the constitutional process as it is conducted through regular litigation before the High Court.

The applicant’s application by Chamber Summons dated 15th March 2011, consequently, is an abuse of the process of the Court, and a vain invocation of the provisions of the Constitution. The said application is hereby struck out, with costs to the other parties.

The Decree and the orders made in HCCC No. 66 of 2007 remain in force, and shall be appropriately enforced”.

11. I take it that since 29/9/2011 the debtor has been all aware of the debt, failed to pay same by evasion and he was in fact being misleading, if not mischievous, to assert at paragraphs 14 and 15 of the Affidavit in support that he was unaware of any debt. In my view, knowledge of a court decree and failing to pay it, by a person whose duty to Kenyans is to make law, is a glaring act of bankruptcy conducted brazenly and what would be called elsewhere, with impunity. It is for that reason that I decline to strike out the petition and direct the steps be taken to prosecute this petition with some promptitude.

12. On account of the less admirable conduct of the debtor, even though he has succeeded, I direct that the cost be in the cause.

Dated, signed and delivered at Mombasa this 6th day of December 2019

P. J. O. Otieno

Judge