



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
BANKRUPTCY CAUSE NO. 7 OF 2012
IN THE MATTER SAVERINO MWONGELA.....DEBTOR

J U D G M E N T

1. MR SEVERINO MWONGELA, the debtor filed a petition for bankruptcy dated 11/10/2012 filed in Court on the 16/10/2012 and sought that a receiving Order be made against him.
2. The petition was accompanied by a Statement of Affairs showing that he owed the sum of Ksh.1,022,226/10 against assets of worth Kshs.330,000. The particulars of creditors was shown in 'list 'C'. When the disclosed debts are added to the debts due to the estate, the debtors property came to Kshs.435,000(List H + List I).
3. According to the foregoing facts the net deficiency ought to have been Kshs.587,226.10 and not the 1,022,226.10 as shown in the statement of affairs. What is however more critical is the fact that the total sum shown in the statement of affairs doesn't add up with the particulars given in "List C". My calculation of "list 'C'" gives me a total of Kshs.3,400,000 which when added to the creditors for rent in "list G" give an aggregate of Kshs.3,460,000.
4. Upon the receiving order being issued which constituted the Official Receiver the receiver of the estate of the debtor, the Official Receiver convened the first creditors meeting on the 28/11/2012. During that meeting only one creditor, Kenya Commercial Bank Ltd, had filed proof of debt in the sum of Kshs.347,690.20. By the time the first creditors meeting was adjourned, the debtor committed himself to pay Kshs.10,000 per month but a report by the Official Receiver dated 21/2/2017 reveal that no payment was ever made.
5. That seems to have necessitated an application by the official receiver for the public examination of the debtor by an application dated 24/6/2013. The public examination was conducted on the 9/10/2015 in the presence of Mrs. Chidagaya for the Official Receiver while Mr. Munyao appeared for the creditor, Kenya Commercial Bank Ltd.
6. In his introductory remarks as to inability to pay, the debtor said that his business in Malindi were ran down by the relatives he entrusted to run the same and that after that he sold his two plots and a tour van and used all the money to pay Kenya Commercial Bank Ltd and Equity Bank Ltd. When asked questions by the court the debtor said that he sold the plot at 650,000 and Van at Kshs.180,000 and that he also sold his stock in trade worth about 300,000/=. From those sales, he said that he paid to KCB Kshs.50,000 once and Kshs.30,000 twice making a total of Kshs.110,000/= and that the debt to Faulu Kenya of Kshs.200,000/= not 400,000/= was recovered in full by his shares offered as security.
7. What became more telling is the fact that the debtor disowned his Statement of Affairs and said that he

owed the disclosed creditors as follows:-

Kenya Commercial Bank Ltd - Kshs.400,000/= and not

1,800,000/=

Equity Bank Ltd - Kshs. 100,000/= not

Kshs.700,000/=

Faulu Kenya - Kshs.200,000/= not 400,000/=

and the debt had been paid in full.

Real people Kshs.100,000/= out of which 30,000/= had been paid.

8. I say this evidence is critical because it totally contradicts the Statement of Affairs which itself did not match with the particulars it was to be aligned with. All in all, the evidence says the debtor owed Kshs.670,000/= or thereabout, which to this court was adequately covered by the sales he made after obtaining the receiving order.

9. Also, important is the fact that in his Statement of Affairs, the particulars of property he admittedly owned being two plots and a motor vehicle, tour van, were never disclosed at all. Had those been revealed even at the value he said he sold them, his net possession would have been in the region of Kshs.1,265,000/= and therefore his assets were valued at higher than the debts owned.

10. That to this court was a critical and important fact that if brought to the attention of the court, the court ought not to have issued the Receiving Order. To this court the Receiving Order issued on failure to make full and frank disclosure was so procured out of an outright reckless and dishonest act which point more to abusing the court process. If not deliberate, then it was done recklessly and without regard to the need to make full and frank disclosure. Either way the debtor failed in its obligation to be candid and forthright with the court.

11. I have found that had the Statement of Affairs been accurately and candidly made out there would have been no disability to pay disclosed and therefore his petition ought to have been disposed off at that early juncture. The court can only adjudge a debtor bankrupt if there is demonstrated inability to pay.

12. In this matter, I am not in no doubt that the petition was presented to evade paying just debts and due. For the lack of candor and failure to prove of inability to pay, I dismiss the petition and discharge the Receiving Order issued on the 17/10/2012.

13. I award the costs of the Petition to the Kenya Commercial Bank, the creditor who filed its proof of debt.

Dated at delivered at Mombasa this 14th day of March 2017.

HON. P.J.O. OTIENO

JUDGE