



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
BANKRUPTCY CAUSE NO. 5 OF 2014

PAUL KAMAU NDUNG’U.....1ST PLAINTIFF

AND

PAMELA ATIENO ONYANGO.....CREDITOR/APPLICANT

RULING

1. On 17th February 2014 the Court issued a Receiving Order in respect to **PAUL KAMAU NDUNG’U**, a debtor.
2. **PAMELA ATIENO ONYANG’O**, a creditor, has now asked the court to stay the Receiving Order, and to direct that the debtor should be examined on oath, with a view to being compelled to disclose all his properties.
3. The applicant pointed out that the debtor was still operating a business called **THIKA TOPVET SERVICES**, which was located along the Thika Highway, in Thika Town.
4. It was the applicant’s contention that the debtor had failed to make a full and honest disclosure of his businesses and his properties. The applicant holds the view that if the debtor disclosed all his assets, the court could ascertain that the debtor had the requisite financial ability to pay his debts.
5. In other words, the applicant believes that the debtor was not bankrupt, as the debtor had allegedly led the court to believe.
6. The applicant thinks that the debtor’s intentions were simply to escape his personal responsibility for the debts he had incurred.
7. The applicant produced copies of cheques which the debtor had issued to her, but which were dishonoured by the debtor’s bankers.
8. As the debtor had obviously not deposited money in his bank account when he issued the cheques to the debtor, it is understandable that the creditor should be very upset with the debtor.
9. I also find that the creditor, therefore, had every reason to feel cheated by the debtor. There is no justification for a person issuing a cheque to another person when the person is well aware that he did not have sufficient funds in his account to meet the cheque. In this regard, sufficiency of funds in the account is deemed to include the existence of an overdraft facility, which would enable the bank to remit payment

to the payee.

10. The issuance of a “*bad cheques*” has also been criminalized in Kenya. To my mind, that is a reflection of how seriously the people of Kenya view the actions of persons who issue such cheques.

11. Having incurred liability, the debtor is said to have rushed to this court, where he obtained a Receiving Order. The creditor perceives that conduct as constituting an abuse of the court process, as the debtor was “*using*” the court to avoid paying his creditors.

12. In **MOSES WACHIRA WAMUNYU Vs FREDRICK KAGIO KINYUA & 4 OTHERS Hccc No. 254 of 2001**, Visram J. (*as he then was*) emphasized that no person should be allowed to use the process of the court for any purpose that was patently mischievous. The reasoning of the learned Judge was that;

“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act...”

- Per the Court of Appeal in **KAMAU MUCHUHA Vs THE RIPPLES LTD C.A No NAI 186 of 1992**.

13. I am in complete agreement with that pronouncement.

14. And whereas that pronouncement was about a situation in which a party had obtained a position of advantage through a planned and blatantly unlawful act, the court will not allow a party to benefit from an illegality, whether or not the party had planned or executed such illegality.

15. When the debtor assessed that he was unable to settle his many debts, the law allows him to commence bankruptcy proceedings.

16. When the court granted the Receiving Order, it cannot be deemed to have been acting illegally. It was performing a judicial function, in accordance with the law, and on the basis of the material placed before it.

17. To the extent that the debtor issued “*bad cheques*”, which were dishonoured by his bankers, that may have constituted a criminal offence. In that regard, there was an ongoing criminal case before the Makadara Law Courts. If the debtor is found culpable, he would have to answer for it, in accordance with the law.

18. However, this court is not dealing with the issue of the alleged criminality of the “*bad cheques*”. And as the case is ongoing before another court, it would be inappropriate for this court to make any comments on it.

19. As regards the alleged failure by the creditor to file a proof of Debt with the Official Receiver, I note that the debtor listed the creditor in his Statement of Affairs. Indeed, the debtor acknowledged that he owed the creditor Kshs. 1,700,000/-.

20. However, the debtor cited the address of the creditor, and of all his other creditors as being **P. o Box 673 – 0100, THIKA**.

21. As the creditor was pointed out, that postal address actually belonged to the debtor. Therefore, if the Official Receiver or anybody else dispatched any communication using that postal address, it could not have reached the creditor.

22. It would thus be most unreasonable for the creditor to be blamed for failing to provide proof of Debt, when she had never received any information that the debtor had instituted bankruptcy proceedings, and that the Court had granted a Receiving Order.

23. As I understand the creditor, she wishes to have an opportunity to have her debt paid, if the debtor has the means. That was the reason why she wanted to have the debtor cross-examined.

24. Nonetheless, the procedure chosen by the creditor is not in accordance with the law. A creditor may participate in Creditors Meetings and in the Public Examination of the debtor. However, the applicant does not need an order from this court to participate in those processes.

25. The court directs the Official Receiver to receive from the creditor, a late presentation of her Proof of Debt, so that the creditor may thereafter have the *locus* to participate in the other stages of the bankruptcy proceedings in respect to the debtor.

26. The creditor has 14 days to present her Proof of Debt to the Official Receiver.

27. Finally, each party will pay his or her own costs of the application dated 11th November 2015.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of October 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Jaakofor the Applicant (Pemela Atieno Onyango)

Miss Othieno for the Debtor

Collins Odhiambo – Court clerk.