



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
BANKRUPTCY CAUSE NO. 3 OF 2012

MARY MUENI MAWEUAPPLICANT

VS

MOSES WAMBUA MULANDIRESPONDENT

RULING

1. The application before me was brought pursuant to Section 33 (1) of the Bankruptcy Act.
2. The applicant, **MARY MUENI MAWEU**, was asking this court to annual or lift the Receiving Order which had been made against the respondent, **MOSES WAMBUA MULANDI**.
3. It is common ground that the applicant had filed suit against the respondent, at the Makindu Law Courts. The said case was **MARY MUENI MAWEU VS MOSES WAMBUA MULANDI, PMCC NO. 7 OF 2009**.
4. That civil suit arose from an accident involving a motor vehicle belonging to the respondent. The applicant was a passenger in the respondent's said vehicle, Registration Number **KAZ 961 B**.
5. After prosecuting the case, the applicant obtained a judgment against the respondent for the sum of Kshs. 86,112/-, plus costs amounting to Kshs. 46,515/-.
6. The record of the proceedings before the Magistrate's Court at Makindu shows that judgment was entered against the respondent on 7th April 2011.
7. The record of proceedings in this file shows that the respondent, (who is the debtor) filed his own petition for Bankruptcy on 17th February 2012.
8. In the said petition, the debtor had not acknowledged that the applicant herein was one of his creditors. The creditors whom he acknowledged were as follows;
 - a. **GLADYS KANYIVA MUSEMBI & ANOTHER (in PMCC No. 249 of 2008);**
 - b. **SAFARI MUTUKU (in PMCC No. 312 of 2009); and**
 - c. **NIC BANK LIMITED (in Milimani CMCC No. 3109/2010).**
9. According to the respondent, the total judgment debt which he owed his creditors was in the sum of Kshs. 3,076,394/-.
10. As the respondent considered himself unable to pay the money owed to his Judgment-Creditors, he asked the court to make a Receiving Order against him.
11. On 14th February 2012 the Deputy Official Reciever issued a Certificate of Compliance. The said certificate was issued after the debtor had submitted his Statement of Affairs to the Official Receiver.
12. On 9th March 2012 Kimondo J. issued a Receiving Order against the Estate of the debtor. The learned Judge further directed that the Official Reciever be constituted as the Interim Receiver of

- the debtor's property.
13. Meanwhile, at the Makindu Law Courts, the debtor had failed to pay the money owed to the applicant, **MARY MUENI MAWEU**. As the applicant was aggrieved, she applied for execution of the Decree against the respondent.
 14. The Principal Magistrate's Court at Makindu duly issued warrants for the attachment and sale of the respondent's property.
 15. On 26th July 2011, the Court Broker executed the warrants of attachment.
 16. In response to the attachment, a person by the name of **SIXTUS NGOI** filed an objection, asserting that the items which had been attached belonged to him.
 17. After being served with the Notice of Objection, the applicant duly notified the court and the respondent that she had every intention of proceeding with the process of execution.
 18. The objection proceedings culminated in a Ruling delivered on 6th October 2011, when the court dismissed the objection.
 19. Obviously, the dismissal of the objection paved the way for the applicant to proceed with the process of execution. It was therefore not at all surprising that the applicant moved forward to seek the re-issuance of the warrants for attachment and sale of the respondent's property.
 20. However, the respondent had, by then, obtained the Receiving Order against his Estate. On the strength of the said Receiving Order, the respondent obtained an order staying execution.
 21. It is in those circumstances that the applicant felt obliged to ask this court to annul or to lift the Receiving Order which had been made against the Estate of the respondent.
 22. Pursuant to the provisions of Section 5 of the Bankruptcy Act, a Receiving Order is issued for the purposes of providing protection to the Estate of the debtor. The protection is provided through the mechanism specified in Section 9 of the Bankruptcy Act, which stipulates as follows;

“9 (1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect to any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose”.

23. In effect, when a Receiving Order is made against a debtor, the property of the said debtor is deemed to have been placed in the hands and the control of the official receiver. It is for that reason that the said property of the debtor and the debtor himself are then placed beyond the reach of creditors, except as provided for in the Bankruptcy Act.
24. After a Receiving Order is made, the Official Receiver is required to immediately call for a general meeting of all the Creditors. That meeting is intended to provide a forum at which the creditors give due consideration to whether or not a proposal for composition or a scheme of arrangement would be accepted.
25. The alternative to the acceptance of the proposal for composition or of the scheme of arrangement is to have the debtor adjudged bankrupt.
26. Therefore, the first creditors meeting provides creditors the opportunity to determine the mode of dealing with the debtor's property. That is expressly provided for at Section 14 of the Bankruptcy Act.
27. In the light of the importance of the first creditors meeting, it is vital that the official receiver notifies all the creditors mentioned in the debtor's Statement of Affairs about the said meeting.
28. In this case, the debtor's Statement of Affairs did not name the applicant as one of the creditors. As the debtor was well aware of the Judgment which the applicant had obtained against him, it was a serious error of omission to exclude the applicant from the Statement of Affairs.
29. The applicant has emphasised that she and the debtor know each other very well. And the debtor has not denied that fact. In the event, it would appear that the exclusion of the applicant from the Statement of Affairs was deliberate. I so find not just because the two parties knew each other, but more so when it is borne in mind that the applicant had undertaken the execution process by having the debtor's assets attached.
30. Of course, a brother of the debtor objected to the attachment, claiming ownership of the attached goods. But the court dismissed the said objection.

31. In those circumstances, the applicant was, understandably, livid, when she learnt that notwithstanding the dismissal of the objection, she could not proceed with the process of execution because of the Receiving Order.
32. The applicant came to the conclusion that the respondent was simply utilising the Bankruptcy laws to defeat his creditors. That conclusion was based upon the applicant's observation of the luxurious life which the debtor continued to enjoy, whilst simultaneously keeping his creditors at bay under the pretext that he was unable to pay his debts.
33. The debtor did not file any affidavit to dispute the facts stated by the applicant. Therefore, the said facts are deemed to be uncontroverted. In other words, the debtor is continuing to maintain a lifestyle which was inconsistent with his contention of inability to pay his creditors.
34. Should this court now invoke the powers under Section 33 of the Bankruptcy Act, to annul or to lift the Receiving Order?
35. The answer is provided by that very same statutory provision, which reads as follows;

“33 (1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication”.

36. In effect, Section 33 deals with the annulment of the adjudication of bankruptcy. It does not deal with the Receiving Order.
37. As earlier indicated herein, the issuance of the Receiving Order is simply the first step in determining whether or not a debtor was truly bankrupt.
38. After a Receiving Order is made, the creditors should be accorded the opportunity to determine how to deal with the debtor's property.
39. The debtor herein excluded the applicant from his Statement of Affairs, thus depriving her of her legitimate right to take part in the first creditors meeting. I therefore appreciate the applicant's feeling of frustration and also her conclusion that there may be a deliberate attempt to use the Bankruptcy Law to defeat the course of justice. But that alone cannot be a basis to “*annul a Receiving Order*”.
40. I therefore reject the application dated 15th September 2014. Each party will bear his or her own costs.
41. Finally, it is directed that the debtor should provide the Official Receiver with a comprehensive List of all his known creditors. The same should be done within the next **TEN (10) DAYS**.
42. Thereafter, the Official Receiver shall call for a Creditors Meeting within **FOURTEEN (14) DAYS** of receipt of the List.
43. The Court will continue to keep an eye on the unfolding developments, to ensure that neither the law nor the processes of the court were being abused or misused, at the expense of justice.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of February 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

..... for the Applicant.

..... for the Respondent.

Collins Odhiambo – Court clerk.