



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL, TAX & ADMIRALTY DIVISION
BANKRUPTCY CAUSE NO 10 OF 2013
IN THE MATTER OF BANKRUPTCY ACT CHAPTER
RE: EX PARTE BHUDIALALAJIRAVJI.....DEBTOR

RULING

Leave to withdraw petition

[1] The Debtor has applied through a Motion dated 12th March 2015 for leave of the court to withdraw the petition herein. The Application is expressed to be brought under section 23A and 8(2) of the Civil Procedure Act and Bankruptcy Act, respectively. The application is supported by the affidavit sworn by the debtor. The major reasons for the application are said to be;

- a) That the creditors herein are not interested in pursuing the debts in question and, therefore, subsistence of the receiving order which is equitable order is in vain.
- b) That the debtor will suffer great disability and disqualification in law if declared bankrupt for debts he did not contribute in incurring; this will be inequitable.
- c) That the debtor is no longer willing to repose his property in the official receiver as he has lost faith in the official receiver.

[2] The Debtor averred that he was a dormant partner in Kaka Wholesalers Ltd and was never involved in the daily running of its business. He was not also involved in incurring the debt by the said company of the sum of Kshs. 75,585,462.49. the other two directors namely RITESHSHOBAG and SAIJULSHOBAG were the active members of the company. Creditors then filed suits against the debtor on the debt alleging fraud on his part. These cases are CMCC NO 246 OF 2009 and CMCC NO 3006 OF 2006. The debtor denied fraud on his part. The debtor averred that he has been advised by his advocates that he cannot be liable for the debts of the company unless the corporate veil is lifted. For those reasons he does not wish to be incapacitated or suffer any form of disqualification of a bankrupt person for a debt he does not owe.

[3] The Debtor also averred that on advice of his advocates that he is aware of his vulnerability to execution if he withdraws this petition. And if the worst come to the worst, he is confident he will convince the judge to make a receiving order rather than committal as provided for under section 102 of the Bankruptcy Act. He is ready to take the chance of seeking for receiving order in execution of the debts. In any case, the creditors are now pursuing the other two directors and have therefore lost interest in pursuing the debtor. To him this is upon realization that he was not involved in any fraud. Again, the creditors were called to several meetings for a composition from the debtor but they absconded. So far

none of the creditors have proved their debts. Therefore, the receiving order is unequitable and in vain.

[4] Further averments were made by the debtor that he lost faith in the bona fides of the official receiver after she hurriedly called for public examination of the debtor despite the lethargy shown by the creditors. He pleaded with the court to be allowed to withdraw the petition on the reasons given.

Official receiver: not to fast

[5] The Official Receiver herein filed an affidavit sworn By CHRISTINE ATIENOOYUGI on 15th April 2015 and opposed the withdrawal of the petition. She relied on the following grounds;

- a) As a receiving order has been given, this matter is not at paly in court and so, no leave to withdraw the petition which can be entertained by the court.
- b) The debtor refused to attend creditors meetings despite formal invitation hence request for his public examination. And as the debtor refused to willingly submit to the process herein, the alleged loss of faith in the official receiver is just misplaced. The debtor has never even proposed any scheme of arrangement despite requests for him to do so.
- c) The debtor personally who approached the official receiver to file these proceedings and so it is suspicious that he can now claim ignorance of the existence of the debt or lack of proof of debt. For instance, one creditor Oscar Midenyo filed proof of debt.
- d) The debtor provided wrong address for the creditors in his statement of affairs and that is the reason why some of the letters to the creditors were returned with remarks "RTS". Therefore, the Debtor is not being honest in claiming that the creditors have not attended meetings and so have lost interest in pursuing him.
- e) The conduct of the Debtor shows that his main aim of filing these proceedings is to shield himself from paying his debts. Before the Debtor can claim the receiving order is unequitable, he should examine his bona fides to see whether he has come to equity with clean hands. The Debtor's request for leave to withdraw petition should be denied and matter proceed to public examination.

DETERMINATION

[6] The major ground of the application is that, the receiving order is inequitable and in vain since the creditors have neither filed proof of debt nor shown any interest to pursue the Debtor. Therefore, incapacitating the Debtor in the manner of the Bankruptcy Act is unfair. The official receiver has filed an affidavit wherein she averred that, by law, as a receiving order has already been made, the matter is not at play before the court. She also averred that the Debtor has never attended a single meeting for the creditors; he provided wrong addresses for creditors and merely used the petition to shield himself from paying his just debts. By law and the conduct of the Debtor, leave to withdraw the petition should be denied.

[7] After considering the above arguments by parties, the pleadings, affidavit evidence and the law applicable, I take the following view of the matter. According to section 8(2) of the Bankruptcy Act, a debtor's petition shall not, after presentation be withdrawn without the leave of the court. Leave should, therefore, be granted within the law and after considering the grounds adduced by the Debtor to see whether they are justified. Given the grounds being raised, I should start by setting out the principal objective of the Act. The principal objective of the Act is to protect the estate of the Debtor. See section 5 and 9 of the Act that the purpose of a receiving order is for the protection of the estate of the debtor and the protection thereof is achieved through the processes provided in the Act. The official receiver is part of the linchpin of the entire process. Therefore, it is not the intention of the law to aid the Debtor not to pay his just debts. The process of bankruptcy proceedings rely entirely on good faith and conduct of the Debtor and any misconduct will always have a serious bearing on the process. The debtor should always

be willing to submit to the court processes set out in the Act, abide by orders of the court as well as obligations placed on him by the Act. Public examination of the Debtor is one such legal process; it entails a public sitting for the examination of the debtor as to his conduct, dealings and property. See section 17 of the Act. Public examination of the Debtor is held by the court but the official receiver and any creditor who has filed proof of debt also takes part and may question the Debtor. Therefore, the requisitioning of the public examination is by the court and cannot constitute mala fides even if it is requested for by the official receiver. The argument by the Debtor that he has lost faith in the official receiver on the basis of requisitioning of public examination of the Debtor is unfounded and is hereby rejected.

[8] Under section 24 of the Act, every Debtor against whom a receiving order has been made shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require. He shall also give such inventory of his property, list of his creditors and debtors and all debts due to him. This is a mandatory obligation on the Debtor. This Debtor did not attend any of the creditor's meeting called by the official receiver despite receiving notice thereof. He did not provide any sufficient reason for his failure to attend the said meetings. Therefore, his conduct is running contrary to the spirit of the Act and his request to withdraw the petition herein is tainted with insincerities and mala fides. The assertion by the official receiver that the Debtor filed this petition with the aim of merely shielding himself from paying his just debts is not far-fetched. I note the Debtor provided wrong information in his statement of affairs which is yet another infringement of the law.

[9] For the above reasons, I decline to allow the Debtor to withdraw this petition. Let it proceed as by law provided. The upshot is that I dismiss the Motion dated 12th March 2015. It is so ordered.

Dated, signed and delivered on court at Nairobi this 10th day of June 2015.

F. GIKONYO

JUDGE