



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
BANKRUPTCY CAUSE NO. 2 OF 2015
IN THE MATTER OF WILBERFORCE MASON ODONGO
AND
IN THE MATTER OF BANKRUPTCY ACT

(Being an application by the official receiver for release of the debtor from civil jail)

RULING

On 9th February 2015 the Debtor herein presented a petition for Bankruptcy upon which this Court made a receiving order for the protection of his estate but did not issue an order for stay under section 11 of the Act. Therefore when an application was brought before the Children's Court in Kitale for him to be committed to civil jail for defaulting to pay child maintenance the Court allowed the application and committed him to sixty days civil jail.

The application now before me is the Notice of Motion dated 18th June 2015 in which the Official Receiver is seeking the immediate release of the debtor from the GK Prison Kitale. He also seeks an order to stay all execution against the debtor. The application is brought under Section 9 and 11 of the Bankruptcy Act and Rule 15 of the Bankruptcy Rules. The Official Receiver's argument is that once a receiving order is made there can be no execution either against the property or person of the debtor by any creditor and there can be no action or legal proceedings commenced against the debtor without the leave of the Court. Section 9 of the Bankruptcy Act was brought to the attention of the Learned Magistrate dealing with the matter who holding that in view of Section 11 of the Act stay was not automatic and there being no order for stay granted by this Court nevertheless committed the debtor to civil jail. In so doing she considered the best interest of the child as she is obligated to do both under the constitution and the Children's Act under which the orders were sought. Now, whereas Section 5 of the Bankruptcy Act does not specify at what point in time a receiving order is made upon presentation of the petition Section 8(1) and rule 125(1) of the Bankruptcy Rules requires that where the petition is filed by the debtor, as is the case here, the Court shall forthwith make a receiving order. Section 9(1) of the Act, then provides as follows:-

"On the making of a receiving order the official receiver shall be thereby the 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 of 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."

It is clear from the wording of this section that once a receiving order is issued no execution of process or even commencement of legal proceedings against the debtor can take place except with the leave of the Court. This section is couched in mandatory terms and in the circumstances whereas this Court did not issue a stay the execution against the person of the debtor ought not to have proceeded without the leave of this Court. I must however state that there appears to be a conflict between Sections 9 and 11 of the Act as Section 9 provides for an automatic stay whereas Section 11 leaves it to the discretion of the Court.

The debtor herein was committed to civil jail for defaulting in child upkeep. The best interest of the child is the paramount consideration in all matters touching on children so that whereas this Court has allowed the application to release the debtor from prison the Official Receiver must within seven (7) days of this ruling inform this Court how he intends to make provision for the child of the debtor.

In the circumstances this matter shall be mentioned on 15th July 2015 for that reason.

Costs be borne by the debtor. It is so ordered.

Signed, dated and delivered at Kisumu this 8th day of July 2015

E. N. MAINA

JUDGE

In the presence of:

Official Receiver

Debtor

CC: Moses Okumu