



IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
BANKRUPTCY CAUSE NO. 16 OF 2012

SALLY KURIA

BERNARD MUSYOKA :::::::::::::::::::: APPLICANTS/CREDITORS

MARSHA NINDI

VERSUS

MARY NDUKU NDUNDA ::::: RESPONDENT/PETITIONER/DEBTOR

R U L I N G

1. The **Notice of Motion** before the court is dated **19th September 2012** and is expressed to be filed under Section 33 and 100 of the Bankruptcy Act Cap 53, Rule 15 and 147 of the Bankruptcy Rules, Order 51, Rule 1, 3 of the Civil Procedure Rules and all other enabling provisions of the law and procedure.
2. The application seeks the orders:-
 - i. *That the Honourable Court be pleased to rule and/or declare that the Receiving Order dated 18th June 2012 issued herein stands revoked, vacated and/or set aside.*
 - ii. *That the Honourable Court does permit the Creditors herein to execute the Decree issued in the Co-operative Tribunal (Nairobi) Tribunal Case No. 335 of 2011.*
 - iii. *Costs of the application be by the Respondent.*
3. The application is premised on grounds set out therein and is supported by an affidavit jointly deposed to by the three Applicants. It is dated 19th September 2013 with annexures. It is also supported by a supplementary affidavit of the same parties dated 16th May 2014.
4. The application is opposed through a **Replying Affidavit** of the Respondent dated **29th October 2013**.
5. In brief, the history of the application is that the Applicants are some of the Creditors who had guaranteed the Respondent a loan of Kshs.6,000,000/= from the United Nations Sacco Society Limited sometime back. The Respondent defaulted in the repayment of the said loan and subsequently resigned or left the employment of the United Nations before repaying the loan balance then amounting to Kshs.3,248.025 and each of the Applicants being some of the guarantors had to pay Kshs.649,605/= to the said Sacco. The Applicants then filed a claim against

- the Respondent of the Co-operative Tribunal pursuant to which a default judgement was entered against the Respondent. A Notice to Show Cause was then issued against the Respondent to show why she should not be jailed pursuant to the same. The Respondent instead moved to this court on 13th June 2012 petitioning for a Receiving Order which was granted on 18th June 2012.
6. On 16th October 2012 when the matter was set for the 1st Creditor's meeting the Respondent Debtor failed to appear at the set place and venue. The date for Creditor's meeting was then set for 26th November 2012 when again the Debtor failed to show up. Now the Applicants allege that the Petitioner/Debtor is not interested in pursuing her Petition and so the Receiving Order should be rescinded, so that they can continue with the case in the said Tribunal and enjoy the fruits of their Judgement. To this end the Applicants have asked that this court does permit the Applicants/Creditors herein to execute the Decree issued in the Co-operative Tribunal (Nairobi) Tribunal Case Number 335 of 2011.
 7. The Applicants further state that the Petitioner/Debtor is not honest in petitioning this court and that she has showed bias in settling the claim of one of the guarantors, one Grace Wanjiru Wanjama to the exclusion of other Creditors. It is further alleged that the Petitioner misled the court when she stated in the Petition that she had lost her job while the truth is that she resigned from the job.
 8. The Respondent/Debtor does not deny the veracity of the foregoing. However in her affidavit in reply she states that she was not notified of the two Creditor's meetings set on 16th October 2012 and 26th November 2012 because her advocates had closed her firm when she got another job, and so she did not set out to intentionally avoid the scheduled Creditor's meeting. She submitted that she has a right to be heard on merit, and that the Receiving Orders should not be rescinded. She further replied that the payment made to one of the creditors Grace Wanjiku Wanjama was made before she filed her Petition.
 9. In response to above, the Applicants through their supplementary affidavit aforesaid have annexed "**SBM 1**" a Notice sent by the Official Receiver to the Debtor and the Creditor notifying them of the 1st Creditor's meeting. The addressed used therein is that given by the Debtor and that of her advocates. By annexure "**BM 2**" is a letter from the Official Receiver addressed to the Applicant's advocate's expressing the Official Receiver displeasure at the conduct of the Debtor for failing to attend Creditor's meeting held on 16th October 2012.
 10. The Official Receiver does not oppose this application and submitted that the Debtor has been difficult in cooperating with that office. Letters posted to her are not acknowledged, and she makes no effort to contact the Official Receiver. It is almost 2 years since the Receiving Orders were issued.
 11. I have considered the application and the opposing submissions. I raise the following issues for determination:-
 - a. ***Whether the Respondent Debtor abused the court process when she applied for the Receiving Order***
 - b. ***Whether the Respondent Debtor has offended Sections 23 and 24 of the Bankruptcy Act.***
 12. To address the first issue, it is within the right of any Applicant to seek a Receiving Order whenever necessary, provided that there is adequate proof of the same. That application is made *ex-parte*, and should be made in good faith. At the time the application is made, the Creditors are not before the court, and court would not know greater details of the relevant circumstances. It is therefore always very important that the Applicant acts in utmost good faith. To use the process in order to defeat another legal process, is an abuse of the process of this court. The Respondent/Debtor had resorted to secure the Receiving Order only to avoid the said Notice to Show Cause Why she could not be jailed for failure to satisfy the decree arising from the Co-operative Tribunal (Nairobi) Tribunal Case Number 335 of 2011. The Applicant did not disclose to the court at the time she sought the order that she was using this court's process to avoid another legal process. She acted in bad faith and abused the process of this court.
 13. As if that was not enough, the Respondent/Debtor, after securing the Receiving Order, made absolutely no effort to progress the matter, and indeed failed to attend two scheduled meeting with the Creditors on 16th October 2012 and on 26th November 2012. I am satisfied that the Respondent/Debtor received the notifications for those meetings. The address used was provided

by herself. She also appointed her advocates, and had the obligation to communicate with her advocates if she was interested in her matter. It seems to me that once the Debtor secured the Receiving Order herein, and succeeded in frustrating the said Notice to Show Cause, she became satisfied and her sense of triumph against the law deluded her reasoning, and for a moment, she believed that she was above the law. It is really sad that a worker can request her colleagues to guarantee her a loan, only to resign from employment without the slightest regard to the plight of her co-workers who had graciously agreed to support her. This is dishonestly, pure and simple, and this court recognises it from afar. Under Section 24 (1) of the Bankruptcy Act, every Debtor against whom a Receiving Order is made:-

“ . . . shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his Creditors, and shall submit to such execution and give such information as the meeting may require.”

Subsection (2) of Section 24 requires the Debtor to give inventory of his property, and list his Creditors and Debtors and of the debts due and from them. This first meeting is very important to the entire process as it sets stage for the entire process and identifies the debtors and debts and other property. It is a meeting which, if a debtor fails to attend, the debtor must give reasons and another meeting must be scheduled as soon thereafter. The Receiving Orders were issued against the estate of the Debtor by this court on 8th June 2012. This application to rescind the said Receiving Orders was filed in this court on 19th September 2013, one year and 3 months apart, during which the Debtor did absolutely nothing.

14. I am, for the foregoing reasons satisfied that the said Receiving Order ought to be rescinded forthwith.

15. In the upshot, I make the following orders:-

- a. ***The Receiving Order dated 18th June 2012 issued by this court against the estate of the Respondent Debtor Petitioner is hereby rescinded, annulled, revoked and set aside.***
- b. ***The Applicants/Creditors are hereby permitted and granted the leave to execute the Decree issued in the Co-operative Tribunal (Nairobi), Tribunal Case Number 335 of 2011.***
- c. ***The costs of this application shall be for the Applicant/Creditors.***

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 8TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Karungo holding brief for Mwinzi for Applicant/Creditors

M/s Othieno for Respondent/Petitioner/Debtor

Teresia – Court Clerk