



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Bankruptcy Cause 26 of 2012**

**PATRICK WAHOME KAMANGU ..... DEBTOR**

**RULING**

1. The Application before this Court is the Defendant/Applicant's Notice of Motion dated 11<sup>th</sup> January 2013 seeking to rescind and set aside the Receiving Order made on 19<sup>th</sup> July 2012. The Application is supported by the affidavit of **Josephine Musembi** dated 11 January 2013, in which the deponent identifies herself as the Manager, Legal of the Applicant bank – K-Rep Bank Ltd. The grounds upon which the Application are based are firstly, that the Receiving Order was obtained by nondisclosure of material facts, secondly, that the Petition herein was an abuse of the Court process and only filed to defeat the execution against the Debtor in *HCCC No. 88 of 2012* K-Rep Bank Ltd v. Patrick Wahome Kamangu. Thirdly, the Applicant had in its possession credible information that the Debtor was in gainful employment and consequently capable of paying off his debts.

2. To this end, the Supporting Affidavit noted that the Debtor was granted a loan facility by the Applicant bank in the November 2006

in the amount of Shs. 7,680,000/- which was secured by two motor vehicles registration numbers KBA 200N and KBS 144N. The deponent went on to say that on or about February 2008, the Debtor failed in the repayment of his loan. The Applicant attempted to repossess and sell the aforesaid vehicles which it maintained the Debtor had hidden at a garage in the Nairobi Industrial area. Eventually the vehicles were located in June 2006 and were sold off and the Applicant recovered the sum of Shs. 5,700,000/-. That left the balance owing of Shs. 1,036,000/-which the Debtor attempted to clear by issuing post-dated cheques which were all dishonoured. This led to the filing by the Applicant of *HCCC No. 88 of 2012*, process for which was served upon the Debtor on 13 July 2012. By that time, the Bankruptcy Petition herein had been filed on 22 June 2012. Ms Musembi detailed that the Debtor had not revealed the existence of the Bankruptcy Petition to the Applicant. She related that Judgement was entered by default and a Decree issued on 18 September 2012 in the amount of Shs. 3,839,387.09 such amount to accrue interest at 24% per annum. The Applicant was also awarded costs in the amount of Shs. 131,524.02. Finally, the deponent noted that upon the advocates for the Applicant inspecting this Court's file, the Debtor has failed to include the debt owed to the Applicant in his Statement of Affairs duly filed on 12 July 2012.

3. In his turn, the Debtor filed a Replying Affidavit but only on 25 April 2013. The Debtor admitted the loan taken from the Applicant secured by the two motor vehicles as aforesaid. He maintained that he had paid the monthly instalments in repayment of the loan until early 2008 when he said that his business suffered destruction as a result of the post-election violence. He agreed that the Applicant had recovered the large part of the loan from the sale of the said motor vehicles. He maintained that the balance left to pay was about Shs. 1 million and he was unable to understand why the Applicant's claim in *HCCC No. No. 88 of 2012* had escalated to almost Shs. 4 million. As he was unable to pay the balance of the loan to the Applicant and other amounts owing to other creditors, he had filed the Bankruptcy Petition herein. He denied that the Petition had been filed to frustrate the efforts of the Applicant to execute its Judgement entered against him. He then maintained that his failure to include the debt owed to the Applicant in his Statement of Affairs, was an oversight and that he believed that the same was a "minor technicality" and not a ground for setting aside the Receiving Order herein. To his limited knowledge, a Receiving Order can only be set aside on grounds of fraud, mistake and contempt and the Applicant had not demonstrated any of these. He maintained that the Receiving Order was only a small-time relief to assist him to settle his debts which he had every intention to pay.

4. In her submissions on the part of the Applicant, Mrs. Osoro stated that the Applicant sought the setting aside of the Receiving Order made herein on 19 July 2012. She maintained that that the Receiving Order was made as a result of deliberate concealment of the fact that the Debtor had a case outstanding against him brought by the applicant being *HCCC No. 88 of 2012*. Counsel noted that the Debtor had admitted the debt and that he had inadvertently left the Applicant out of his list of creditors in the Statement of Affairs filed as aforesaid. Counsel referred the Court to **section 138 (1) (f)** of the *Bankruptcy Act*, which provided for punishment of up to 3 years imprisonment for deliberate omission by a debtor of salient details in a Statement of Affairs.

5. Mr. Rading, for the Official Receiver, referred the Court to the Replying Affidavit of the Debtor filed on 25 April 2013. He pointed to **section 3** of the Bankruptcy Act and commented that **section 138 (1) (f)** of the Act to which the court had been referred by counsel for the Applicant related to issues of fraud. There was no fraud by the Debtor as per his Replying Affidavit. No prejudice would be suffered by the Applicant if the Receiving Order was to stay in place. The Official Receiver was collecting monies from the Debtor which would be paid to the other creditors, 4 in total. He maintained that there was no contempt on the part of the Debtor who was making regular payments to the Official Receiver's office. He noted that offences under the Bankruptcy Act are generally prosecuted by the Official Receiver and at the present time the actions of the Debtor herein were not under investigation. He asked that the Receiving Order should stay in place and the Application before court, dismissed.

6. I have perused the Debtor's Statement of Affairs filed herein on 12 July 2012. At list A – Unsecured Creditors, there is no mention of the Applicant herein but details of 4 loans taken by the Debtor in 2007/2008. These loans reflect borrowings of Shs. 25,006,632.70 from Equity Bank Ltd, Shs. 460,140.10 from Bank of Africa Ltd, Shs. 1,016,482.69 from N. I. C. Bank Ltd and what I would assume is a personal loan from one Nixon Waweru for Shs. 80,504/- totalling Shs. 26,453,760.09. Under List H – Property, the Debtor has listed cash expectancy of Shs. 110,000/- which includes Shs. 50,000/- deposited with his advocates in respect of fees for the Petition herein. In the Question and Answer section of the Statement of Affairs, the Debtor has detailed that the said Equity Bank Ltd has filed suit against him in *HCCC No. 735 of 2009* and N. I. C. Bank Ltd has filed a further suit against him being *CMCC No. 461 of 2011*. It also appears from the Statement of Affairs that the Debtor was anticipating that the said Nixon Waweru was also planning to file suit against him. Faced with all these debts in a total amount considerably in excess of the sum owing to the Applicants in *HCCC No. 88 of 2012*, this court can appreciate the Debtor's precarious financial situation. In this regard, I tend to agree with Mr. Rading that in the broad picture of things, the Receiving Order should stay in place. In my opinion, there will be no prejudice suffered by the Applicant if it so remains. Unfortunately, what has not been revealed to this Court is exactly how far the other suits brought against the Debtor have progressed but it should be borne in mind that both suits as currently filed as against the Debtor were earlier in time than the Applicant's suit – *HCCC No. 88 of 2012*.

7. Accordingly, I dismiss the Application dated 11 January 2013 but with no order as to costs. Further, this Court issues a stern warning to the Debtor that it will not tolerate any further concealment of relevant facts in relation to the Petition and the Receiving Order herein. Justice demands that in finding sympathy with the Debtor, he owes a duty both to this Court and to his creditors to be open and honest in dealing with the same.

**DATED and delivered at Nairobi this 3<sup>rd</sup> day of May, 2013.**

**J. B. HAVELOCK  
JUDGE**