



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Bankruptcy Cause 4 of 2007

IN THE MATTER OF NANCY ALICE WANGUI KIMANI

RULING

1. The application before me is a notice of motion dated 16th February, 2012, under Sections 9, 11, 13, 24, 97, 100, 104, 110 and 138 of the Bankruptcy Act and Rules 15, 16, 17, 147 and 148 of the Bankruptcy Rules. It is brought by Unga Farm Care (EA) Ltd a Creditor of the Debtor/Petitioner.
2. The motion seeks orders that the court do lift and or rescind the Receiving order on the Debtor's petition dated 23rd August, 2007, together with the stay of action, execution or other civil legal process against the Debtor's property in any court. It also seeks other orders the court may deem just.
3. The grounds for the application are:
 - That after the filing of the Petition the court issued a Receiving Order appointing the Official Receiver as Receiver of the Debtor's estate and staying any action or execution against the Debtor's property and person;
 - That since then, the Debtor has not co-operated with the Official Receiver or fulfilled her duties as to discovery or realization of property;
 - That the Debtor owes the creditor shs. 1,515,790.50 and has taken advantage of the Receiving Order to avoid paying the debt;
 - That the Debtor is a fraudulent Debtor within the meaning of the Bankruptcy Act and it is in the interest of justice that the application should be granted.
4. The application is supported by the Affidavit of Agnes Mulei the Human Resource and Legal Manager of the Creditor, deponed on 16th February, 2012. In it, the deponent repeats the assertions in the grounds of the application and proves the amount owed by the Debtor to the Applicant.
5. The application was duly served upon the Petitioner/Debtor and on the Official Receiver as deponed in paragraph 2 and 8 thereof.
6. By her Replying Affidavit deponed on 22nd March, 2012 the Petition Debtor stated in essence as follows:
 - That when the Receiving Order was served on her, she went to the Official Receiver's office and furnished all her details and contacts and detailed disclosures and information;

- That she was not aware of the filled proof of debt, which was not served on her or her advocates; and that
- The Receiver concealed the same from her until they were served with the application on 17th February, 2012;
- That she has never refused to co-operate with the Official Receiver or failed to fulfill her duties as to discovery and realization of her property;
- That she has not failed to attend the Official Receiver as he has not convened any meeting under Section 24 of the Bankruptcy Act;
- That she has not committed any acts of fraud, and no particular of fraud, have been specified by the applicant, nor has she concealed any material facts.
- That the Official Receiver is to blame for any failure into communication.

7. The Official Receiver also filed his Report as to Debtor's conduct and affairs dated 13th April, 2012. He states, *inter alia*, as follows:

“a) The Receiving Order was made on 23rd 2007.

b) The Receiving Order was never gazetted as per Section 13 and Rule 1 of the first Schedule Bankruptcy Act.

c) The first meeting of creditors was not summoned or called within sixty days.

d) The public examination of the Debtor has not been carried out.

e) The Creditor/Applicant has filed proof of debts mounting to Sh. 1,515,790.50 on 20th November, 2011.

f) That it is the duty of the Debtor to visit the office of the Official Receiver to peruse her file, but she as not done so for the last four days.

g) That the Public Examination of the Debtor under Bankruptcy proceeding would be the best form for holding the Debtor to account regarding all matters alleged by Creditors.”

8. I have considered the application, the reply, the report and all documents relevant to the same.

The empowering provision for an application to rescind a Receiving Order is Rule 147 of the Bankruptcy Rules. I note that pursuant to that provision notice of the application and affidavit were served on the Official Receiver, within due time.

9. Bankruptcy Rule 148 provides that where an application is made to rescind a Receiving Order, the official Receiver shall file a Report of the Conduct and Affairs of the Debtor. That also has been done, as earlier noted. The Report points to several failures or inaction by the Receiver. Among these are:

a) That the Receiving Order was not gazetted. Rule 14 of the bankruptcy Rules provides:

“Where a receiving order is made, the receiver shall forthwith send notice thereof for insertion in the Gazette and in one of the local papers”.

b) The first meeting of creditors was not summoned by the Official Receiver as required by Rules 1 and 2 of the First Schedule to the Act. Rule 1 requires the meeting to be summoned within sixty days of the date of the receiving order unless the court dispenses with the time frame and grants another time

frame. Rule 2 places the obligation of summoning the meeting on the Receiver and requires him to give six clear days notice in the Gazette.

In light of the above, public examination of the Debtor could not be done.

10. The Applicant's ground (b) suggesting that it was the Debtor's responsibility to do discovery and realization of property is, considering the previous paragraph, inaccurate. In addition, ground (d) alleging that the Debtor is fraudulent, has no basis as neither particulars of fraud nor evidence of fraud were provided either in the application or supporting affidavit. The assertion in paragraphs 7, 8 and 9 casting blame on the Debtor are unsupported.

11. In light of the foregoing, there is no basis to rescind the Receiving Order. I therefore agree with the Official Receiver that the proper course to take is to allow the matter to proceed to public examination. Accordingly I decline the application and order as follows:

- a) **Leave is granted for the Receiver to:**
 - i) **Advertise the Receiving order, and**
 - ii) **Call a meeting of creditors, and thereafter**
- b) **Proceed with public examination of the Debtor under Bankruptcy proceedings.**

Orders Accordingly.

Dated, signed and delivered this 6th day of September, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)