



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
BANKRUPTCY CAUSE NUMBER 1 OF 2010

AND IN THE MATTER OF: BANKRUPTCY ACT CHAPTER 53 OF THE LAWS OF KENYA

AND

AHMED MOHAMED SAID.....DEBTOR

RECEIVING ORDER ON DEBTORSPETITIONER

RULING

The Judgement Creditor (Abubakar A. H. Mohammed) has filed a preliminary objection seeking that this court sets aside the Petitioner`s application and that the issuance of the order should not act as stay of all actions. The creditor also seeks for costs.

The grounds for this preliminary objection are that the debtor/petitioner can pay the sum of 1.5m and has filed this cause falsely as there is no evidence to show that the debtor/petitioner cannot pay the entire sum.

It is supported by the affidavit sworn by the creditor who says that the Judgement Debtor filed Application Number 1 of 2010 falsely claiming that he is unable to pay his debts and that the application is simply an abuse of the court process. The creditor/objector had filed for execution of decree as exhibit 2 and the debtor (petitioner) is a multi-business operator, so the bankruptcy order should be set aside and the creditor be at liberty to recover his money.

The creditor laments that since the year 2006, he has been unable to pay rent and has even been sued in CMCC Number 21/10(Malindi) by his landlord, for rent. The creditor`s property was received as distress for rent of kshs.200,000, on 27th October 2010.

From the record, what I understand is that the debtor petitioned this court on 16th March 2010 to be adjudged bankrupt as he is unable to pay his debts and prays that there be a receiving order made in respect of his estate. His affidavit in support of the application is simply that he cannot meet his obligation that is he is unable to pay his debtors.

On the same date, a receiving order was made against the said Ahmed Mohamed Said and an official receiver of the estate was constituted. Pursuant to section II of the Bankruptcy Act, Cap 53, there is now in place an order of stay of action, execution or any other crucial legal process against the Debtor`s property.

Meanwhile the Judgement Creditor, who now objects to this receiving order says he obtained judgement against the debtor in **Civil Case Number 209 of 2009** in the sum of kshs.1,486,650/- and a notice to show cause why execution should not issue for the Judgement Debtor's personal arrest and committal to civil jail was obtained.

The Judgment Creditor has raised complaints with the Honourable The Chief Justice regarding what he termed as delaying tactics in this matter which tactics he perceived to be steered by the court so as to favour the Judgement Debtor.

Subsequently this matter was listed for hearing on 1st December 2010 and the Judgement Debtor served on 17/11/10 at his home in Barani opposite Sheikh Nassir Mosque although he declined to sign. To confirm that the Judgement Debtor was aware of the hearing date, he was pointed out in court by the Judgement Creditor although an advocate who had been sent to hold brief that is Mr Gekanana had instructions that the Judgement Debtor had only seen the matter listed on the courts notice board that morning and called his advocate. The court was not inclined to believe him and ordered the matter to proceed – so it proceeded ex-parte.

On a perusal of the receiving order, I have now seen that the name of the Debtor's advocate is indicated as Nzioki Ogoti – which is the same advocate who had sought an adjournment through Mr Gekanana. What I understand is that Nzioki Ogoti Advocates drew the document for the judgment debtor but has not yet entered appearance. The matter then proceeded exparte upon this court so directing. The Judgement Creditor submitted that after successfully prosecuting the case against the Judgement Debtor, later changed ownership of his property and registered them in the names of someone else so as to pose that he is Bankrupt. It is the creditor's contention that the person the Judgement Debtor has named as owing him Kshs.1.5m cannot even afford that kind of money and has infact been arrested several times over debts owing.

The Judgement Creditor further points out that Judgement Debtor has failed to list him as one of his creditors yet he is required to list all his creditors and that this confirms he is not genuine. He argues that the alleged creditor listed by the Judgement Debtor is a common man who obtains money from people by false pretences and has many cases in Malindi among them being Malindi CMCC 21 of 2010.

He further submits that the Judgement Debtor (Petitioner) has changed record of ownership as per letters dated 17th November 2008 @ Kshs.700,000/- and he says this was done just so as to defeat his pursuit to recover from the Judgement Debtor what is owing having started that pursuit in 2008 by way of several correspondences to the Chief Justice. He pointed out that immediately after he obtained judgment on 12/03/10, the Judgement Debtor changed his hotel's name and now the owner of the hotel is shown as Saffiyah(who incidentally is Judgement Debtor's wife) and is the one said to have brought the building – that is Saffiyah Mohammed Ahmed.

It is his contention that the Petitioner (Judgement Debtor) has committed perjury under section 110 of the Penal Code and should be imprisoned. He also urges this court to dismiss the bankruptcy proceedings and the deposit which Judgement Debtor (Petitioner) had deposited in this court, being the sum of Kshs.20,000/- be released to the Judgment Creditor.

There is indeed a sale agreement produced dated 13th November 2003 between Ahmed Mohammed Said and Saffiyah Mohamed Ahmed for a consideration of Kshs.700,000/- which transaction is confirmed by a letter dated 17/11/08 written by M.M. Kupalia(who was the advocate who witnessed the Sale Agreement notifying the Town Clerk of Malindi Municipal Council of the sale and requesting the Council records to be changed to reflect that change of ownership. I note that the sale was in 2008, yet the suit filed by the Judgement Creditor against the Petitioner, was instituted in 2009. I have perused the list of unsecured debtors which lists only **ZAKI ABDULRAHMAN SAID** as being owed Kshs.1.5m.

Before dealing with the substantive issues, I think it is imperative that I address the issue of the Judgement debtor (Petitioner's representation) and service of the objection. Should the court have considered the contents of the Receiving Order which named Nzioki Ogoti Advocate as the Judgement

Debtor's advocate as sufficient notice of appointment. My view is that the information at the bottom of the receiving order is not a notice of appointment or entering appearance by Nzioki Ogoti. From the documents the Petitioner relied on, he presented himself under the conditions contemplated by section 3 (h) and (g) of the Bankruptcy Act and that is why a Receiving order was made. The purpose of a receiving order is to protect the Petitioner's estate.

The Debtor's Petition is deemed under section 8 (1) to be an act of bankruptcy and this receiving order which was made has its effect clearly spelt out under section 9 of the Act. It in effect bars any legal action by his creditors unless the court grants leave to do so. This is what the present applicant seeks and the reason is because he has not been included in the list of unsecured creditors.

The applicant here is aggrieved because in the Judgement Debtor's statement of affairs he does not show the list owing to the present applicant nor is the applicant listed as one of his creditors. Section 16 (1) requires the debtor to submit to the official receiver;-

"a statement of and in relation to his affairs in the prescribed form four.....showing the particulars of the debtor's assets, debts and liabilities, the names, residences and occupations of his creditors."

The Statement of affairs submitted does show unsecured creditors in the column of liabilities as Ksh.1.5m and details of the unsecured creditor is on the List A which is annexed. List A gives the name of the unsecured creditors as ZAKI ABDULRAHMAN SAID who is described as a businessman. The applicant **ABUBAKAR A.H MOHAMED** is not mentioned as a creditor in the liability arising out of the Judgement and decree in Civil Appeal Number 209 of 2009 **Abubakar A.H Mohamed V Ahmed Mohamed Al-Moody and 2 Others mentioned.** The applicant attached a copy of the notice to show cause in HCCC 209 of 2009 which was issued to **Ahmed Mohamed Al-Moody** seeking for Committal of the said individual to Civil Jail for failing to pay the decretal sum of Kshs.1486,650. This notice to show cause is not issued to Ahmed Mohamed Said nor has it been demonstrated that Ahmed Mohamed Said is the same person as Ahmed Mohamed Al-Moody.

The applicant attached only the last page of the Court of Appeal's decision – so I was not able to tell which case these orders refers to and in the interest of justice I thus summoned the applicant and requested him to supply the court with the entire copy of the judgement – this is so because that last page clearly states;-

"For the avoidance of any doubt, this judgement is entered only against the 1st respondent"

So who is the 1st respondent - is it Mohamed Al-Moody or is it the Judgement Debtor whose name appears as Ahmed Mohamed Said. The Proceedings before the Court of Appeal clearly locks out the applicant from his present pursuit and so his application is dismissed.

Delivered and dated this 1st day of March 2011 at Malindi

H A OMONDI
JUDGE