

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS

Bankruptcy Cause 29 of 1999

THUO COMMERCIAL AGENCIES LIMITED.....PLAINTIFF

VERSUS

JACKSON MUGO MATHAI.....DEFENDANS

RULING

In Bankruptcy jurisdiction of this court. Notice of Motion brought under **Rules NO.47 15 and 16 Bankruptcy rules Section 108 of Bankruptcy Act.**

This application is brought by Mary Wanjiku Mugo the personal representative of the debtor Jackson Mugo Mathai (now deceased) seeking order dated 14/01/2008 against deceased be rescinded and vacated. That ex parte court proceedings and hearing dated 14/1/2008 be set aside and the matter be set down for hearing inter partes and that the costs be paid by creditor. The orders were obtained by creditor by misrepresentation to the court.

The court's record shows that on 14/1/2008 before the court was Mr. Shigiti of petitioner. The advocate for Respondent was absent although it is recorded that he was served. The hearing proceeded and after hearing the petitioner ex parte the court issued a receiving order. It was creditors that was heard (Thuo Commercial Agencies Ltd.) creditor. The creditors claim was for decretal amount –plus taxed costs. In a decree in case HCC 1550 of 1991 between creditor and debtor.

Rule 147 Bankruptcy Rules makes provision for Notice of application to rescind a receiving order or to stay proceedings or to annul adjudication shall be served and application shall not be heard except unless proof notice have duly been served upon the receiver. This rule is not applicable here. Rule 16 and 15. rule 15 provides the application be made by the motion and Rule 16 requires notice of motion and ex parte application orders shall be made upon proof of service, have been tendered.

The supporting affidavit discloses that there is another application in succession in Nakuru (matter regarding the estate of deceased and that the creditor opposes that application on the ground of the receiving order made on this Bankruptcy suit. The receiving order was invalid for being contrary to provisions of the Bankruptcy rules.

It is on record that the parties were negotiating settlement and it was hoped that the debts would be paid in full. And therefore there was no need to obtain receiving order against the deceased.

A state counsel official receiver has filed an affidavit citing **Section 107 of Bankruptcy Act** which states:-

“if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall unless otherwise ordered be continued as if he were alive.”

I believe this to be the provision of law. In this case the receiving order was made as a result of the debtor committing Bankruptcy offence. Decree in HCCC No.1550 of 1991 is still unpaid. That it is now openly known that the deceased estate is worth Kshs.50,000,000/=. The deceased did not die a bankrupt. It is also clear in the circumstances the deceased estate is in the legal hands of the official receiver by virtue of the Receiving Order but in possession of the family who have obtained a grant of representation of the estate of their father.

The advocate for the creditor has filed an affidavit. Paragraph 12 is not correct. On 14/1/2008 the receiving order was made after hearing evidence. It was made on 14/1/2008 after hearing the petitioner ex parte. Furthermore when a client dies his advocate has no client or instructions and ceases to act as advocate for deceased. Mr. Mindo did not have authority to continue acting for deceased after death.

I have perused the record. It is clear that the deceased died possessed of substantial estate. The official receiver states that the estate is valued at Kshs.50,000,000.00. The creditor says as on 14/1/2005 the debt was Kshs.8,724,246,70. Therefore it is possible for the estate to clear the debt.

Upon reading the affidavit of the official receiver and that of applicant, I do not see any reason to rescind the Receiving Order for the time being.

The applicant has not proved her case. On the other hand, the estate has sufficient funds to clear the debt. I would order a stay of further proceedings in Bankruptcy by official receiver and creditor for a period of 3 months to enable the family to settle the debt out of the estate of deceased. In default the stay order shall lapse. This matter shall be mentioned on 26/2/2010 for confirming compliance.

Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of November, 2009.

JOYCE N. KHAMINWA

JUDGE