REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Bankruptcy Cause 14 of 1988

IN THE MATTER OF BANKRUPTCY ACT ……..............................……………PLAINTIFF

Versus

IN THE MATTER OF HON. PAUL JOSEPH NGEI……........................……..DEFENDANT

RULING

The official receiver has applied to the court under S.17 of the Bankruptcy Act (Cap 53) (hereinafter called the Act) and r.151 of the bankruptcy rules (hereinafter called the Rules) for an order appointing a date to hold a public sitting for the examination of the debtor PAUL JOSEPH NGEI.

Mr. Mwirichia for the debtor has raised a preliminary objection to the validity of the application. Before I deal with this objection I shall hereunder briefly set out the history of this matter:-

On 30th November, 1988 receiving order was made against the official receiver was constituted as receiver of the debtor estate. However an interim stay of the receiving order was granted on 18th May, 1989 following exparte hearing of an application by the debtor to set aside the said receiving order. Interparte hearing of said application was adjourned eight times at the request of the debtor. Ultimately on 9th November, 1989 I dismissed the debtors said application for his non appearance. On 24th January, 1990 sheikh Amin J. granted the official Receivers application for a creditors meeting to be held within 60 days from the said date. Accordingly the first meeting of the creditors was held on 3rd May, 1990 in which the creditors resolved that the debtor be adjudged bankrupt. Then on 14th June, 1990 Akiwumi J adjudged the debtor bankrupt. The debtor appealed to the court of appeal in civil appeal No.111 of 1990 (hereinafter called the Appeal) against the said order of 14th June, 1990 but on 20th November, 1990 the court of appeal dismissed the appeal and upheld the said order of 14th June, 1990.

Mr. Mwirichia has argued that S.17 of the Act lays down that the public examination should be held as soon as conveniently may be after the expiry of the time for the submission of the debtors statement of affairs and that under r.151 of the Rules when a receiving order has been made it is the duty of the Official Receiver to make an application to the court to appoint a day and hour for holding a public examination of the debtor. Such an application, he went on to say should have been made by the Official Receiver before the debtor was adjudged bankrupt. He further said that there is no provision in law which empowers the court to order public examination of a debtor after he had been adjudged bankrupt. He further said that the debtor could only be examined before being adjudged bankrupt. He also said that the court of appeal did not order that the debtor should now be examined. At any rate he said as the purpose of examination of a debtor was to see whether or not he should be adjudged bankrupt, the public exanimation of the debtor now would serve no purpose.

Miss Gachegu for the Official Receiver has pointed out that the very same point was addressed on behalf of the debtor in the court of appeal and rejected by it. She further said that a debtor can be under certain situation examined after adjudication. She also said that the debtor could not be examined before he was adjudged bankrupt as he had failed to submit his statement of affairs as requested by law.

The courts of appeal have already held in the appeal that the debtor failed to submit a statement of affairs. See p.18 of the typed judgment of the appeal. The Court of Appeal further held at p.19 of the judgment:

"A public examination of him as to his conduct dealings and property would not, in our view be meaningful without the debtor's statement of affairs".

The debtor could not be effectively examined either by the court or by his creditors in the absence of his statement of affairs. I therefore hold that the Official Receiver had a valid reason for not applying to the court to fix a date for the public examination of the debtor before he was adjudicated bankrupt.

Mr. Mwirichia contends that there is no provision in the act to empower the court to order public examination of a debtor after he has been adjudged bankrupt but equally there is no provision in the act which expressly prohibits public examination of a debtor because he has already been adjudged bankrupt.

Public examination of a debtor is a necessary step in bankruptcy. It is a very important step. Its object is to investigate the affairs and dealings of the debtor which led to his bankruptcy. It is a vested right of every creditor who has proved his debt to interrogate the debtor in the public examination. Public examination is the only means to find out if the debtor has committed any bankruptcy offence under the act. Otherwise it is difficult to bring a defaulting debtor to book. So public policy demands that every debtor with a few exceptions which are hereinafter mentioned must face a public examination.

As I have said there is nothing in the act to suggest that a debtor cannot be examined after his adjudication. In fact in section 16 (3) a debtor who fails to submit his statement of affairs within 14 days of the service of the receiving order on him without any reasonable excuse may on the application of the official receiver be immediately adjudged bankrupt and that is what has happened here in this case. The court of appeal has has already upheld the high courts decision to adjudge the debtor bankrupt. The debtor should not be allowed to get away from the rigors of public examination and thus benefit from his own default to submit his statement of affairs.

A public examination is a must in every case of bankruptcy so that he is made accountable for his acts and omissions. It cannot be dispersed with unless the debtor is a lunatic or suffers from mental or physical disability rendering him unfit to attend the examination. See rule 159(1) of the Rules.

So, I am on the view that public examination can be held even after the adjudication, in fact at ant time before the hearing of the debtor's application for discharge. See Section 29(1) (a) of the Act which prohibits the court from hearing the debtor's application for discharge unless his public examination has been concluded.

The court of appeal has already held in the appeal at p.19 of their judgment as follows:-

"If the court is satisfied of the fact that no statement of affairs was submitted and therefore that a crucial step in the ordinary process of bankruptcy was not undertaken, we find it difficult to suppose that the legislature intended that a public examination must in all cases be held before adjudication".

The court of appeal went further to say, as they have done at p.20 as follows:

"In our judgment, therefore, there is no reason why a public examination could not be held after debtor submits his statement of affairs".

So if the statement of affairs was not submitted by the time the debtor was adjudged bankrupt there is no reason why he cannot be examined after the adjudication. To rule otherwise would tenta-mount to

frustrating the process of bankruptcy and open it to abuse and scandal.

I do not agree with Mr. Mwirichia that the purpose of public examination is to see whether or not a debtor should be adjudged bankrupt. Its object per the court of appeal's above mentioned judgment at p.18 is to investigate the debtors conduct dealings and property.

Mr. Mwirichia has further argued that as the court of appeal has not ordered that the debtor be now examined, he cannot be examined. But the court of appeal did not have any occation to make such order. The appeal before it was against the adjudication of the debtor in bankruptcy.

The debtor is a public figure. The act of bankruptcy is a serious matter. It is a stigma. I would have thought that the debtor would, instead of avoiding his public examination, willingly face it inorder to redeem himself as an honest man who has nothing to hide from his creditors or fro m the court. It seems the debtor on the other hand is trying to run away from it. Be that as it may, I do not find any merit in Mr. Mwirichia's objection and hereby dismiss it.

27.1.92

G.S PALL

JUDGE