



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

Bankruptcy & Winding-Up Cause 8 of 1990

Kimemia APPLICANT

versus

Commercial Bank of Africa LtdRESPONDENT

RULING

This is an application to set aside the receiving order given on 14/2/91 against the appellant – Debtor.

The application is made vide order 1XB rule 8 of Civil Procedure Rules s 3A of the CPA is 11 and s 108 of the Bankruptcy Act.

While I agree that s 11 and s 108 of the Bankruptcy Act give the court the power to pay stay proceeding which was the first player and which was granted on 19/2/91 on temporary basis, I do not agree that the application to set aside the receiving order was one made under the provisions if not Civil Procedure Act and Rules.

The Bankruptcy Act and the Bankruptcy Rules is a ----- code which governs proceedings in Bankruptcy with a little effort the counsel for the applicant could have found help in s 103 (1) of the Bankruptcy Act and rule 147 (1). Receiving orders are set aside but rescinded. It is clear then that at the application should have been brought under s 103 (1) of the Bankruptcy Act and Rule 147 (1). However no technical injection was raised to the application and the application has been argued on its merit and it is just then that I take at defect as -----.

The application is brought on the basis that the debtor was neither served with Bankruptcy notice nor was the petition.

As rule 99 of the Bankruptcy Rules provides the credit should present two copies of the Bankruptcy Notice he had sealed and issued out for service.

Bankruptcy Notice is served in the same manner as a creditors petition. – rule 103. A creditors petition requires he verified by an affidavit and he filed together with two or more copies to the sealed and issued out for service – rule 110 of Bankruptcy Rules.

The debtor is served personally by delivering to the debtor a sealed way of the filed petition – rule 114.

The service of the petition is proved by affidavit with a sealed way of the petition attached while around he filed a -----for the ----- after the service.

The Bankruptcy Notice is served in the same manner as a creditor's petition.

At the hearing of the creditors petition, the Court shall require proof inter alia if service of at petition – s 7 (2) of the Bankruptcy Act.

Where a debtor contends and the order was wrongly made e.g. because the bankruptcy until or the petition was at duly served he may apply the rescind on that ground by way of re hearing the petition under s 108 91) of the English Act (s 103 (1) of Kenya Act – Williams on Bankruptcy 18th Ed p 48 last paragraph

But it is duly the most exceptional circumstances that the court would go behind a judgment (Decree) on an application for recession of a receiving order – National R Grindleys Bank Ltd v Sherrif & Anor [1972] EA 413

Request for issue of Bankruptcy Notice was filed in court on 30/8/90 together with Bankruptcy Notice No 10 of 1990 – see file.

It was signed be the senior Deputy Registrar on the same day. There is in the Bankruptcy Notice no 10 file notice of appointment by the debtors advocates filed on 8/10/90 and also a letter by the Debtors advocates dated 15/10/90 asking for copies of the pleadings for service and action.

The debtor depones that he found a way of the Bankruptcy Notice in October 1990 in the flowers near the fence in his house at Buruburu. He depones that he resides at Buruburu phase 5 house no 127 and not at Karati scheme S Kinangop ----- where the Bankruptcy Notice was purported served on 29/9/90. He admits however that he has a herdsman's house, Cattle, Goats and building material at Karati Scheme but that he does not reside there.

I have perused the exhibits marked "NJMM I" annexed to the affidavit of Mr Nelson Joel Manyeki Mainnah of the creditor Bank sworn on 25/2/91.

I note that in para 3 of the plaint in ----- no 1554/80 in which the creditors----- judgment the subject matter of this petition at debtor was described as a "businessman residing and working for gain at Nairobi".

That plaint was filed by the creditors advocates. In the several subsequent documents which the debtor filed in ----- no 1554/80, the debtor consistency gave his address as P.O. Box 56378 Nairobi though the return of service is that file shows that he was served with the summons to enter appearance at Karati village, Njabini loc N Kinangop.

It has not been denied by the orders served or by the creditor that the debtor resides at Buruburu and not at Karati Scheme.

In para 13 – 23 of the debtors affidavit sworn on 19/2/91, the debtor has made some serious accusations against process server. He states serving other things that the process served called to his house on his absence on 12/2/91 leaving his telephone numbers and that on 15/2/91, the debtor called the process server who gave him particulars of location of his office and informed the debtor that he still had summons in his possession to serve him and that debtor should call at his office when he did on several occasions but missed him.

The process server denies all those allegations but states that he was informed by his secretary that debtor had called to his office, found the processor absent but was given the process servers telephone numbers.

I find this perplexing because there is no reason why the debtor would have visited the offices of the process server if the process server had not called him. There is no explanation how the debtor would have known the creator of the process server's offices.

The service of the Bankruptcy while like the service of a creditor's petition is proved by affidavit with a sealed copy of the Bankruptcy Notice attached should be filed in court forthwith after service. The petition which was filed on 4/12/90 was not accompanied with the original affidavit of service with a sealed copy of the Bankruptcy Notice which should have been signed by the debtor when he received service purportedly on 29/9/90. Remember that two sealed copies of the Bankruptcy Notice are issued out for service – one for the debtors and one to be returned to court to prove service.

I have perused the record and I do not find the original affidavit of service or a signed copy of the sealed and served Bankruptcy Notice. The process server in my affidavit filed on 27/2/91 in opposition of this application however annexed a Photostat copy of a Bankruptcy Notice. It does not have the endorsement of the debtor at the bank. He has also annexed a plain Photostat main sheet which purportedly has the endorsement of the debtor but it is plain that separate piece of paper is not part of the Bankruptcy Notice which had only two pages.

The Photostat copy of the affidavit of service sworn on 24/10/90 has no court stamps and it has not been deposed that the original was due filed in court. Why would the debtors advocate file on 15/10/90 a letter asking the Registrar of this court to supply him with pleadings of the debtor had been served with Bankruptcy Notice and relevant documents on 29/9/90?

In view of the foregoing I am satisfied that the Bankruptcy Notice was never served on the debtor. In any case service should have been at his residence in Nairobi and not at Karati Scheme where the debtor irregularly visits.

As regards the service of the petition which was purportedly done on 24/1/91, it should have been served at the debtors residence in Nairobi as creditors advocates indicated in the plaint in ----- no 1553/80 that debtors resides in Nairobi.

The debtor was shown by documents that on 24/1/91, he was at Mombasa Nyali Beach Hotel. The process server says that he served him at Karati Scheme S Kinangop ----- at 3.10 pm but that he refused to sign.

It is fairly a long distance from Kabati to Nairobi and then to Mombasa. True that here is air travel which is quick but the creditor has not proved that the debtor in fact traveled by air to Mombasa on 24/1/91.

The debtor had appointed a counsel who had entered appearance and filed a notice of appointment on 8/10/90. Those documents are lying in the Bankruptcy Notice No 10 file. The same advocates filed fresh appearance and Notice of appointment in his Bankruptcy Cause on 18/2/91 – four days after the receiving order was given.

That conduct shows that the debtor was interested in defending the cause. The debtor had by 24/1/91 an advocate on record. There is no explanation given as to why the advocate was not served. Further it is unlikely that the debtor on 24/1/91 would have said that he would consult his lawyer. When he had already one on record. The natural reaction would have been to ask the process server to serve his lawyers.

Again, I am not satisfied that the bankruptcy petition was served.

I allow the application and set aside the receiving order given on 14/2/91.

Cost to the applicant. Leave to debtor to file opposition Notice within 7 days.