



REPUBLIC OF KENYA

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

Bankruptcy Notice 9 of 1990

Kibaki APPLICANT

VERSUS

Middle East Bank Kenya Ltd RESPONDENT

RULING

By a Notice of Motion taken out on 20th September, 1990, the debtor has applied under Section 4 of the Bankruptcy Act (Cap 53, hereinafter called the Act) and rule 15 of the Bankruptcy Rules that bankruptcy notice dated 30th August, 1990 issued by the Court at the request of the respondent should be set aside.

The respondent's request to issue the said notice under Section 3(1) (g) of the Act states that on 6th July, 1990, the creditor / respondent obtained a final judgment against the debtor in High Court Civil Case NO 2013 of 1989.

An office copy of the said decree is attached to the affidavit of Mr Kihara Muttu for the applicant. By the said decree the applicant was ordered to pay the creditor a sum of shs. 1,456,102/- together with interest thereon at 14% p.a from 30th April, 19789 until payment in full. Execution of the decree was stayed for a period of 30 days from the date of the decree to enable the applicant to make proposals to the creditor for payment of the judgment debt. It was further ordered by the decree that in default of any agreement on any proposal for the payment of the judgment debt, the creditor would be at liberty to execute the decree after the expiry of the said period of 30 days.

By the said bankruptcy notice the applicant was required to pay to the creditor a sum of shs 1,720,274/80 which represented the decretal amount including further interest up to 15th August, 1990. Obviously no payment was made in pursuance of the said notice within the prescribed period of 7 days.

The ground upon which the applicant has applied is that he will secure the judgment debt by providing a charge in favour of the creditor on Nairobi / Block 92/73 which is allegedly worth 3.8 million Kenya shillings.

Mr Kihara Muttu has stated in his affidavit in support of the said application (inter alia) that Lucia & Co Ltd, a limited liability company which is the registered owner of the above mentioned property is desirous of guaranteeing and securing the applicant's debt by signing a guarantee and also a charge on the said property in favour of the creditor. He has said that the said property is valued at shs 3,800,000/- and is situated in Lakeview Estate. The property in question is free from encumbrances.

He has further stated in his said affidavit that he personally talked to Mr Le Pelley for the creditor who

informed him that he had no objection to the proposed security. It would have made my task much easier had Mr Le Pelley accepted the security offered by the debtor. However as Mr Pelley has stated in his notice of grounds of objection, his client the creditor is not prepared to accept this proposal. He confirmed his said instructions in the course of his submission as well.

Mr Le Pelley has argued that an application to set aside a bankruptcy notice can only be made for the reasons set out in Rule 100(2) of the Bankruptcy Rules that is on the grounds of counterclaim set off or cross demand. Otherwise, he has submitted, the notice cannot be set aside and the debtor has either to pay or secure the debt to the satisfaction of the creditor.

The bankruptcy notice itself requires the debtor within 7 days either (a) to pay the judgment debt or (b) secure or compound for the said debt to the satisfaction of the creditor or to the satisfaction of this Court or (c) satisfy the Court that he has a counterclaim set off or cross demand which equals or exceeds the sum claimed by the creditor and which could not set up in the action or proceeding in which the judgment was obtained. It appears therefore that the debtor can oppose the notice if he shows that he is in a position to secure or compound for the judgment debt to the satisfaction of the Court. Article 273 of Halsbury's Laws of England 4th Edition Vol 3 reads (inter alia):-

“Application may however be made by motion to set aside a bankruptcy notice on grounds (for example satisfaction of the judgment debt or illegality) other than those mentioned in the statutory provisions.”

In *Re A Ex parte The Debtor vs Harman and another* (1957) 2 All E.R 216 it was held that in a proper case the Court will set aside a bankruptcy notice for reasons other than those mentioned in the Bankruptcy Act S1(1) g which corresponds with our Section 3(1) (g). I therefore hold that the debtor's application is properly before me.

Bankruptcy is, of course, a very serious matter, more so in this case as the applicant is a man of very great social and political importance. He is an important member of the Council of Ministers. But then I must also concede that unless the debtor / applicant has set up a very strong case, I cannot deprive the creditor of his right to file bankruptcy petition in pursuance of the act of bankruptcy available to it. Alternatively the debtor/applicant must satisfy me that the creditor is trying to exercise its said right in an oppressive manner.

The only evidence placed before me to show that the security offered by the applicant is worthwhile is a blank statement by Counsel for the applicant that he believes the value of the property offered as security is 3.8 million Kenya shillings. He does not even say whether it is a vacant piece of land or a built up property. There is evidence to show that the approximate area of the property is 0.2316 hectare only. There is no valuation report. In the circumstances there is no evidence before me to show that the creditor has unreasonably declined to accept the security.

Lucia & Company Limited has offered to guarantee payment of the judgment debt. No evidence has been adduced to prove the company's financial ability. I therefore cannot exercise my discretion in favour of the applicant in that respect either.

Mr Le Pelley has further contended that in view of the Memorandum and Articles of Association of the Company, a photostat copy whereof has been produced to me, the company is not empowered to guarantee the debts of third parties or to charge its land in support thereof. At the very least I am in doubt if Clauses 3(m) and 3(n) of the Memorandum of Association of the company do authorize it to guarantee the debts of third parties or to charge its land in support thereof.

Lastly Mr Le Pelley has argued that this is an old debt; the effect of accepting the debtors proposal would be to postpone the repayment of the debt for at least another seven months for this is the minimum period which would be required to enforce repayment in view of the provisions of the Registered Land Act which governs the property offered as security.

Taking everything into account, I cannot exercise my discretion in favour of the applicant and his

application is hereby dismissed with costs.

February 11, 1991

Pall, J