REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
BANKRUPTCY CAUSE 4 OF 1990

CLEMENT BENSON GACHANJA …….……...…….APPLICANT

VERSUS

ARAB AFRICA LIMITED……RESPONDENT

RULING

By the motion filed on 8/5/91 in the court the applicant/debtor sought to move the court under section108 of the Bankruptcy Act and Rules 144 and 147 made there under for orders that the receiving order made on 7/6/90 be rescinded, discharged and/reviewed.

The applicant represented by Mr. Mogikoyo further asked this court to stay / adjourn all subsequent orders made after that of 7/6/90 to enable him to sell off some of the real properties he has and pay off his creditors. It was heard that the respondent herein was owed sh.1.5 million while applicants total liabilities amounted to about sh.44 m. it was stated that applicant, however has assets worth well over sh.61m. Mr. Oyatsi appeared for the respondent while Mr. Ndisya appeared as the Official Receiver.

Both counsel argued their position very strongly i.e. for the applicant and the respondent. Provisions of the law were referred to as well as judicial authorities. The official receiver too made his representation. At the end of the day the court drew the following conclusions: the applicant was served with a bankruptcy notice after the HCCC No.400/87 where he had been a party. This was stated for the respondent and not disputed. It was admitted that applicant was served with the petition herein. He did not respond to it in any way. The matter appeared on the cause list of 31/5/90.

Applicant had at no time served a notice on the Registrar under Rule128 under the Bankruptcy Act. So when the senior Deputy Registrar before whom the matter was wrongly listed on 31/5/90 adjourned the petition to be listed before a judge on 4/6/90 no service was affected on the applicant for the new date. Applicant did not appear but respondent did. A receiving order was made on 7/6/90. It was also seen from the record that the applicant made a similar application to one before this court and that application was heard by my brother Justice Githinji on 25/4/91. After hearing the Respondent together with the Official Receiver in absence of the applicant, the applicant was dismissed for want 0f prosecution. But the judge actually wrote a ruling incorporating the arguments of Respondent and the Official Receiver. That order has neither been appealed against, set aside nor reviewed on the instigation of the applicant. Yet he brought this other and similar application on the grounds that Githinji j did not hear the merits on 25/4/91 and that applicant choose to bring a fresh application rather than seek an appeal, setting aside or a review.

After noting that Githinji J had the parties present and delivered a ruling, in absence of the applicant who gave no reason for non-appearance, it is strange for this court to accept that the issue was in fact not res judicata. Were there fresh new or unknown matter and circumstances that necessitated this application before me? Or is this court being asked to sit on appeal over a ruling and order of a brother judge? (See MBURU KINYUA VS GACHINI TUTI [1978] KLR 69.81). This can hardly be expected from this court.

In this court's view once the receiving order was made on 7/6/90 all along and even to date all matter known to the applicant,

"The processes of bankruptcy (were) fully launched. (there can only be) limited scope for undoing the bankruptcy or halting it in its course".

(See Re a DEBTOR (No.12 of 1970), ex parte the official Receiver vs. the debtor [1971] 2 All ER 1494, 1496).

And so is the case here. The receiving of 7/6/90 in this courts view was regular. It got going under full force and only a very limited scope is allowed this court to change the course or halt the bankruptcy. This court will not therefore grant applicants prayers of either to rescind discharge or review the orders of 7/6/90. The Re a Debtor (supra) envisages the limited scale in exceptional circumstances. None are stated here. There is nothing new. Applicant knew everything all along i.e. the debt, the judgment in a civil suit giving rise to these proceedings, notice, petition and the hearing. He also knew that he had properties which he could sell to pay the debt due and one in which he was a guarantor.

This court will not halt the bankruptcy process at this point to allow applicant to sell his property and pay. This court has no jurisdiction to deal with the so called stay directly with the applicant. His refuge at this juncture lies with the Official Receiver. That is his man. The applicant should actually not appear before this court unless it is through the Official Receiver. Even in the present predicament of his, he can still do so by approaching the Official Receiver who may then move under Rule 160-onwards. It was said in his only favor in this applicant that applicant had at last filed a statement of assets and liabilities with the Official Receiver on or about 30/5/91. Quite late, but a move nonetheless. Should he consider and take the course available through the Official Receiver under those Rules? i.e. propose a scheme of repaying the creditors with all seriousness so that when the proposed meeting 7/6/91, as stated by the official Receiver comes, he has to move the creditors to allow him to sell his properties by private treaty in order to pay and get off the hook? Well that is left to him with his counsel.

As for now this application dated 7/6/91 is dismissed with costs.

Delivered on this 6th day of June, 1991.

J.W. MWERA

JUDGE