IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SIMPSON AG CJ, LAW & POTTER JJ A)

CIVIL APPEALS NOS 51 OF 1981 & 3 OF 1982

(CONSOLIDATED)

PAUL JOSEPH NGEI.....APPELLANT

VERSUS

OFFICIAL RECEIVER.....RESPONDENT

JUDGMENT

(Appeals from the Orders of the High Court at Nairobi Hancox J, dated 10th July 1981 and 4th December 1981 in Bankruptcy Cause No 3 of 1980)

February 16, 1982, the following Judgments were delivered.

Law JA: These two appeals were argued consecutively, without interruption. They concern the same parties, and the subject matter in both appeals is closely related, so that with the concurrence of the advocates for both parties they can be dealt with in a single judgment. I shall refer to No 51 of 1981 as "the first appeal" and to No 3 of 1982 as "the second appeal". The appellant in both appeals is Paul Joseph Ngei, to whom I shall refer as "Mr Ngei", and the respondent in both appeals is the Official Receiver, to whom I refer as such. References to "the Act" are references to the Bankruptcy Act (Cap 53), and references to rules are to the Bankruptcy Rules, unless otherwise stated. The background to the two appeals is as set out by the Official Receiver in his Report to the Court submitted by him in the second appeal. It is as follows.

A receiving order was made against Mr Ngei on 28th March, 1980, on the petition of a creditor. The first meeting of Creditors was held on 4th June, 1980, and concluded on 18th June, 1980. At this meeting, the creditors unanimously accepted a composition proposed by Mr Ngei by which he would pay all his unsecured creditors shs 20/- in the pound of all debts proved against him. The Public Examination of Mr Ngei was held and concluded on 4th July, 1980. The proposed composition was approved by the Court on 4th July, 1980. Mr Ngei was to pay Shs 5/- in the pound by 18th September, 1980, and the balance of Shs 15/- in the pound by 18th June, 1981. He failed to make these payments on time, although on the 10th March, 1981, he paid to the Official Receiver Shs 650,000/- out of shs 1,400,000 due on the 18th September, 1980. He failed to pay the balance due on 18th June, 1981, and on 6th July, 1981, the Official Receiver applied by chamber summons for the composition to be annulled and for Mr Ngei to be adjudicated bankrupt. This application was heard by Hancox J in chambers on 10th July, 1981. Mr Sharma appeared for Mr Ngei, and told the court that he (Mr Sharma) had been served on the afternoon of

6th July, that Mr Ngei had not been served personally, and that he had been unable to contact Mr Ngei who was absent from Nairobi on Government business. Mr Sharma objected to the application having been made by chamber summons instead of by notice of motion as required by rule 15, in which case under rule 17(1) not less than eight days' notice for hearing the motion was required, whereas in fact only three clear days' notice had been given , and he asked for more time. The Official Receiver submitted that his application did not fall under rule 5(1), but under rule 5(2), which reads –

> "Any other matter or application may be heard and determined in chambers"

so that he had correctly proceeded by chamber summons, and as to the length of notice he said that he had written to Mr Ngei on 16th June, and spoken to him on the telephone, about his intention to apply in the near future. Of course, no hearing date had then been fixed, so that Mr Ngei did not learn from that letter or telephone conversation that the application would be heard on 10th July, 1981. The learned judge proceeded to rule on the objection as to the procedure adopted and the length of notice given.

He held *inter alia* –

> "In the circumstances I am satisfied that the debtor has had perfectly adequate opportunity to arrange for proper representation today."

He also held that it was "perfectly clear" that the Official Receiver was entitled to bring the application in the way he had, and he proceeded to hear the application on its merits, Mr Sharma making it clear that his appearance henceforth was under protest. After hearing the Official Receiver and Mr Sharma, the learned judge proceeded to deliver a second ruling annulling the composition and adjudging Mr Ngei bankrupt. He did not, however, specify the period at the expiration of which Mr Ngei should apply for his discharge, as appears to be necessary under section 20(1) of the Act. All the matters referred to above as being contained in the two rulings delivered by the learned judge on 10th July, 1981, are the subject of grounds of appeal in the first appeal.

The next step was that on the same day as the first appeal was filed in this court, the 18th September, 1981, Mr Ngei paid to the Official Receiver the sum of shs 5,439,451 which was sufficient to pay all Mr Ngei's proved debts in full. On the 29th September, 1981, Mr Ngei applied to the Court, by notice of motion, under section 33(1) of the Act, for an order annulling his adjudication as a bankrupt, on the ground that his debts had been paid in full. That application was heard by the same learned judge on the 13th November, 1981, when Mr Le Pelley for the Official Receiver is recorded as saying-

> "We can say that the debts are paid in full. Discretion of Court under section 33".

On 4th December, 1981, Hancox J delivered a considered ruling dismissing the application. He accepted that the debts had been paid in full, but he refused to annul the adjudication, basing the exercise of his discretion on two grounds. The main ground he stated as follows –

> "There is no explanation whatsoever of how the debtor suddenly came into possession of adequate funds, having been impecunious for so long a period. Candour about all his affairs is in my view required from the debtor before the court should exercise its discretion....."

He also mentioned "the falsity in his statement of affairs to which the Official Receiver refers". This is a reference to two immovable properties which Mr Ngei had stated to be his property, but which according to the Official Receiver, had been disposed of before the making of the receiving order. This ruling of the 4th December, 1981 is the subject of the second appeal.

I now turn to a consideration of the appeals. I must pay tribute to the industry displayed by Mr Sharma, for Mr Ngei, who cited some 90 authorities to us, all of which I have read but I hope I will be forgiven if I only refer to a few of them which I consider to be of real importance and relevance. I would also like to express my appreciation for the considerable assistance I have derived from Mr Le Pelley's very fair and

objective arguments and submissions put forward by him on behalf of the Official Receiver.

I begin with the first appeal. Mr Sharma's many grounds of appeal against the validity of the adjudication include some which can be disposed of without difficulty. For instance, the omission to specify the period at the expiration of which Mr Ngei shall apply for his discharge. Mr Sharma submitted that this omission, coupled with the rejection of his annulment, means that Mr Ngei is condemned as a bankrupt in perpetuity. With respect, this is an over-dramatization of the position. At the most, there was a slip or omission which the learned judge would have corrected at the time he delivered his ruling, had his attention been drawn to it by one of the many advocates then present. The judge could also have done so, and no doubt have done so, if moved under section 103(1) of the Act, or section 3A or section 99 of the Civil Procedure Act. This ground of appeal can hardly be described as more than a technicality not affecting the validity of the adjudication. More substantial are the grounds of appeal which challenge the procedure adopted by the Official Receiver in connection with his application for Mr Ngei to be adjudged bankrupt. An adjudication in bankruptcy is a serious matter for the person affected, involving very serious consequences and disabilities. I bear in mind what was said by Horne J in *In the matter of Mota Singh* (1934) KLR 33, that –

> "To make a man bankrupt is a very serious matter. The power to do so is given by the Ordinance and because of the penal consequences, the procedure there laid down must be strictly followed."

and by Spry JA (as he then was) in *Nandra and Others v Munshi Ram & Co Ltd* [1965] EA 753, at page 757 –

> "Counsel ..... has relied on..... two propositions: first, that because bankruptcy has a quasi-penal aspect, procedural matters have to be viewed strictly and secondly, that where there is any question of a notice misleading, the issue is whether the debtor might have been misled, not whether the particular debtor was in fact misled. I accept both these propositions."

The first ground of complaint against the procedure followed in this case is that the application of 6th July, 1981, was made by chamber summons and not by notice of motion. Rule 5(1) provides that certain matters and applications shall be heard in open court, and rule 5(2) provides that any other matter or application may be heard and determined in chambers. The subject matter of the application dated 6th July, 1981, was not one falling within rule 5(1) but was one which could be heard in chambers. Rule 15 provides that –

> "Every application to the court (unless otherwise provided by these rules, or the court in any particular case otherwise directs) shall be made by motion supported by affidavit".

The learned judge and the Official Receiver, in the court below, were of the view that as the application of 6th July related to a matter which "may" be heard in chambers, a chamber summons was appropriate; and Mr Le Pelley supported this view before us. With respect, I do not agree. Rule 5 is concerned solely with what matters shall be heard in open court, and what matters may be dealt with in chambers. Rule 5 is not concerned with procedure. Rule 15 lays down clearly that every application to the court shall be made by motion. The exceptions "unless otherwise provided by these rules or the court in any particular case otherwise directs" do not apply to this case. There is nothing in the Rules providing that applications to the court in chambers shall be by chamber summons. No such inference can in my opinion be drawn from the wording of rule 5(2), because –

> (a) nowhere in the rules is the procedure by way of chamber summons recognized or even mentioned, and
>
> (b) to import such a procedure by inference, even if this were possible, would involve reliance on the Civil Procedure Rules, which by rule 317(2) "shall not apply to any proceeding in bankruptcy."

I have not doubt that rule 15 to 24, under the heading "Motions and Practice", presribe the procedure governing every application made to the court in respect of any matter covered by Rule 5, whether or not it is a matter which "shall" be heard and determined in open court or one which "may" be heard and determined in chambers. This is borne out by a reference to the definition of "court" in rule 2. I would not go as far as Mr Sharma would have us go, and hold that the recourse to a chamber summons was in itself fatal to the subsequent adjudication. If the other procedural requirements of the Rules had been complied with, I would feel inclined to hold that there had been no more than a misnomer in the proceedings, with no ensuing prejudice. But this case goes far beyond mere misnomer. Had the correct procedure by notice of motion been followed, then rule 17(1) and rule 21 would have required service of the motion personally on Mr Ngei, which was not done in this case, and more important still Mr Ngei would have been entitled to 8 days' notice of the hearing date, whereas in this case, according to Mr Sharma (and there is no reason to doubt what he says) Mr Ngei had no notice at all, and only became aware that he had been adjudged bankrupt after adjudication, Mr Sharma himself only having had 3 clear days' notice during which time he was unable to contact Mr Ngei and obtain instructions. That it should be possible for a person resident in Kenya to be adjudicated bankrupt without even knowing that a date had been fixed for such an application to be made is, to say the least, an undesirable state of affairs, and it is one which could not happen if the practice and procedure laid down in the rules were followed, as it should have been. Mr Le Pelley submitted that service on Mr Sharma was as effective as service on Mr Ngei himself, under rule 72(2), which provides that –

> "All notices, orders, documents and other written communications which do not require personal service shall be deemed to be sufficiently served on such advocate if left with him at his address for service."

"Such advocate" in that sub-rule relates back to the expression "advocate" in sub-rule (1) and means an advocate "suing out or serving any petition, notice" etc. who must endorse thereon his address for service. Mr Sharma was not such an advocate. Mr Ngei's advocates on record were Messrs Shretta and Rao, and no service was effected on them. In any event, the service on Mr Sharma gave quite inadequate notice, and I have already indicated my view that personal service is required on any party affected by an application under rule 5, in terms of rules 17 (1) and 21.

I would allow the first appeal, and annul the adjudication order of the 10th July, 1981 and restore the Composition of 18th June, 1980. If directions are required under section 33(2) of the Act, the necessary applications can be made to the High Court.

In case I am wrong in my conclusion on the first appeal, and the adjudication order made on the 10th July, 1981, was validly made, then it is necessary for me to deal with the second appeal, and I propose to do so briefly. It involves the exercise by a judge of his discretion, a matter with which an appellate court will rarely interfere. In the case of *In re Taylor, Exparte Taylor* [1901] 1 KBD 744, the appellant appealed against the refusal of a registrar to make an order annulling his adjudication in bankruptcy. His counsel, Mr Muir Mackenzie, is reported as having said

> "it is not disputed that the debts have been paid in full, with interest and expenses, and that being so the bankrupt is absolutely entitled, under the Bankruptcy Act, 1883, section 35, sub-section (1), to an order annulling the adjudication. "May" in that section is almost, if not quite, equivalent to "must". There is no reported case of a refusal of such an order where the creditors had been paid in full".

Section 35(1) aforesaid is identical with section 33(1) of the Kenya Act. The correctness of Mr Muir Mackenzie's submissions was not challenged, but the appeal was nevertheless dismissed because, in the words of Wright J.

> "I do not think that we can say that the discretion of the registrar was wrongly exercised. He has a discretion, under the section, as to whether he will annul the adjudication or not. This debtor admittedly was guilty of two of the worst crimes which a bankrupt can commit – the crime of falsifying his statement, and the crime of substantial concealment of assets."

In the 80 years which have elapsed since the decision cited above, Mr Sharma and Mr Le Pelley have not been able to trace a single other reported case, whether here or in the United Kingdom, in which a bankrupt who has paid his debts in full has been refused an annulment. At the other end of the spectrum is the case of *Re a Debtor,* [1980] 1 All ER 138, in which an annulment was granted by the registrar, although no public examination had been held, and there was a long history of misconduct on the part of the debtor. On appeal, a Chancery Court consisting of Fox and Browne – Wilkinson JJ refused to interfere. The petitioning creditor who appealed had resisted the application for annulment so as to ensure that the debtor remained bankrupt and thus incompetent to conduct litigation against the creditor. Browne-Wilkonson J commented that in these circumstances the petitioning creditor had no direct financial interest in keeping the bankruptcy on foot. What financial interest would be served in keeping Mr Ngei's bankruptcy on foot? Certainly not that of the creditors, who have been paid in full. The Official Receiver did not press before the judge the matter of two false statements allegedly made by Mr Ngei. One of these matters had been the subject of cross-examination at the Preliminary Examination, and Mr Ngei's explanations were apparently accepted as the matter was taken no further. Mr Ngei was not asked any questions about the second alleged false statement. All this is a far cry from the two admitted "worst crimes which a bankrupt can commit" which were held in *In re Taylor* (supra) to have justified refusal of an annulment. Here all we have are two unadmitted allegations of false statements, one of which Mr Ngei apparently explained satisfactorily, and the other of which he has never been asked or given an opportunity to explain.

In so far as the learned judge based his discretion on a purported application of the decision in *In re Taylor* (supra) I am, with respect, of the view that he took an erroneous view of the matter. As regards the main ground on which the learned judge based his refusal of an annulment, that is to say lack of candour in explaining the source of the funds used by Mr Ngei to pay his debts, Mr Le Pelley has frankly conceded that he knows of no authority for the proposition, relied on by the learned judge, that a debtor who has paid his debts in full is under any duty to explain how he came to be in possession of the necessary funds. His creditors, having been paid in full, have no financial interest in keeping the bankruptcy alive, and only proved or admitted bankruptcy crimes (a factor totally absent in this case) could in my view have justified the refusal of the annulment in this case. For these reasons, I would also allow the second appeal.

Simpson Ag CJ. The material facts and submissions in these two consecutive appeals have been fully stated by Law JA whose judgment I have had the advantage of reading in draft.

A receiving order was made against the appellant on 28th March, 1980. The debtor's proposal for a composition was accepted unanimously by his creditors and subsequently approved by the Court. Many of the creditors had been waiting for their money for several years. Mr Ngei, the debtor – appellant, undertook to pay his trustee, the Official Receiver, a sum sufficient to enable the trustee to distribute a dividend of shs 5/- in the pound on or before 18th September 1980. Despite several reminders from the Official Receiver he defaulted. The Official Receiver then made his first application to the Court under s.18(16) of the Bankruptcy Act (Cap 53) to annul the composition and adjudge the debtor bankrupt. The application was made by way of notice of motion. On 10th March, 1981, the day before the hearing of the application the debtor paid Shs 650,000/-, slightly less than one-half of the amount due estimated to be Shs 1,400,000/-. As a result he succeeded in obtaining further time to pay. This order was subsequently rescinded.

The debtor had further undertaken to pay by 18th June, 1981 such sum as would be sufficient to pay his creditors the remaining Shs 15/- in the pound estimated to be Shs 4,200,000. He defaulted despite a reminder from the Official Receiver. He defaulted also on an undertaking to provide by way of security a legal charge on property in Nairobi belonging to him in favour of his trustee.

Section 18(16) of the Bankruptcy Act enables the Court, if it thinks fit, to annul a composition if default is made in payment of any instalment due thereunder. The Official Receiver made a second application under that provision to annul the composition and adjudge the debtor bankrupt. There was ample justification for this application. The debtor in his statement of affairs had shown securities in the form of immovable property amounting to Shs 13,432,472 and a surplus estimated at Shs 10,355,333. The failure

to comply with the terms of the composition could reasonably be attributed to reluctance on the part of the debtor to pay his creditors.

This time however the Official Receiver proceeded by chamber summons instead of notice of motion. The chamber summons is dated 6th July, 1981, and was served on the same day not on the debtor nor on Messrs Shretta & Rao, his advocates on record but on Mr M G Sharma who had in fact appeared in previous proceedings sometimes with Mr Shretta, at other times alone. The application was to be heard on 10th July. Mr Sharma had thus only 3 clear days notice. He appeared on 10th July and informed the court that he had tried without success to contact his client to obtain instructions.

Mr Sharma submitted to the learned Judge in a preliminary objection that he should have had at least 8 days and had no instructions which would enable him to argue the application on its merits. The Judge dismissed the preliminary objection and proceeded to hear the application on its merits and make the orders sought by the Official Receiver. It is against these orders that the debtor now appeals. He filed his appeal which may be termed the first appeal on 18th September 1981 and on the same day he paid Shs 5,439,431/- to the Official Receiver. His main grounds of appeal relate to procedure. The application should he says have been made by notice of motion not by chamber summon, he should have been served personally and he should have been given not less than 8 days notice. These he said were not merely formal defects or irregularities which under s. 133 of the Bankruptcy Act did not invalidate the proceedings unless substantial injustice had been caused.

It is I think quite clear that the application for annulment of the composition and adjudication should have been by notice of motion and not by chamber summons. The application did not fall under rule 5(1) of the Bankruptcy Rules. Therefore rule 5(2) applied.

> "Any other matter or application may be heard in chambers."

There is no reference either in the Bankruptcy Act or the rules made thereunder to a chamber summons.

Rule 15 provides –

> "Every application to the court (unless otherwise provided by these Rules or the court in any particular case otherwise directs) shall be made by motion supported by affidavit."

The Court as defined in rule 2(1) includes a Judge exercising jurisdiction in chambers.

The court gave no direction and the rules do not provide otherwise. If rule 5(2) had been intended to provide for procedure by chamber summons it would have been more specific and detailed procedure would have been provided in the rules. Rule 5(2) does no more than enable other matters and applications not specified in the previous subrule to be heard in chambers instead of in open court.

Failure to adopt the correct procedure is of course in itself not fatal to the application.

Was the appellant properly served? The rules relating to service might have benefited from more careful drafting. Rule 16 provides –

> "Where any party other than the applicant is affected by the motion, no order shall be made unless upon the consent of such party duly shown to the court, or upon proof that notice of the intended motion and a copy of the affidavits in support thereof have been duly served upon such party"

There is a proviso which is not material to the instant case.

This may be compared with rule 114 which provides that a creditor's petition "shall be personally served by delivering to the debtor a sealed copy of the filed petition." Rules 50, 70 and 103 provide for personal

service of a witness summons, an application to commit for contempt and a bankruptcy notice respectively. There is no specific provision for service of an application to annul a composition and adjudge the debtor bankrupt.

Rules 72 reads as follows:-

> "(1) Every advocate suing out or serving any petition, notice, summons, order or other document shall endorse thereon his name or firm and place of business, which shall be called his address for service.
>
> (2) All notices, orders, documents and other written communications which do not require personal service shall be deemed to be sufficiently served on such advocate if left for him at his address for service."

No document is served on an advocate as such. Rule 72(2) I think must be taken to mean that where a party is represented by an advocate unless personal service is required service maybe effected on that party's advocate. The words "such advocate" however refer back to subrule (1) and to the advocate who has endorsed on a document his address for service. In the present instance this was Messrs Shretta & Rao. Whether or not rule 72 was applicable in the present case service on Mr Sharma was not proper service.

Rule 17 provides however for eight days notice of the hearing of a motion and under rule 18 a respondent who wishes to file an affidavit in opposition must serve it on the applicant not less than 2 days before the day appointed for hearing. In the present case notice was served on Mr Sharma only 3 clear days before the date of the hearing. Even if there had been no specific provision 3 days were clearly inadequate to enable Mr Sharma to contact a busy Minister, take instructions and prepare an affidavit. The fact that Mr Ngei was aware that such an application was to be made is immaterial since he would expect to receive notice of the date and time in due course. Nor was it relevant that he could not dispute his failure to comply with the undertakings given in the composition. The failure to give the debtor proper notice was I think fatal to the application.

Hearing of this first appeal was deferred for the reason *inter alia* that the debtor had applied for annulment of his adjudication and since the payment to the Official Receiver of Shs 5,439,431/- was sufficient to pay all the creditors in full it appeared to this court not unlikely that the applications would be granted and the hearing of this appeal would become unnecessary. The application was however dismissed. Hence the second appeal before us.

In dismissing the application the learned Judge said –

> "I do not think it is right that after a scheme of composition which is presumably put forward *bona fide*, but which is then not kept to and the matter pushed to the absolute limit so that the ultimate step of adjudication has to be applied for, the debtor by then being well aware of all the consequences that that entails, that he should come to the Court literally a matter of weeks later with the means to pay all his creditors in full; a matter which he said he was unable to achieve before by the very act of putting forward a scheme of composition. There is no explanation whatsoever of how the debtor suddenly came into possession of adequate funds, having been impecunious for so long a period. Candour about all his affairs is in my view required from the debtor before the Court should exercise its discretion, otherwise the whole of the extremely serious process of bankruptcy becomes meaningless. Quite apart from the falsity in his Statement of Affairs to which the Official Receiver refers, this has not been shown in the instant case."

I agree with respect with the views the Judge expressed in regard to the debtor's conduct. It was very far from satisfactory. Nevertheless he had paid his creditors in full. Our attention was invited to only one case – *In re Taylor ex parte Taylor* (1901) 1 QBD 744 – in which annulment was refused where the creditors

had been paid in full. In that case the applicant had committed two of the "worst crimes which a bankrupt can commit". In the present case no bankruptcy offence was proved. Refusal of an annulment was of benefit neither to the creditors nor to the Official Receiver and was I think contrary to the spirit and intention of bankruptcy legislation. Refusal of an annulment in such circumstances would tend to discourage bankrupts from making any effort to pay their creditors in full. I think with respect that the learned Judge exercised his discretion on wrong principles.

I would allow both appeals. I would annul the adjudication order of the 10th July, 1981 and restore the composition dated 18th June, 1980. If directions are required under section 33(2) of the Act the necessary applications may be made to the High Court. Since both Law JA and Potter JA agree it is so ordered. We shall hear submissions on the costs of both appeals.

Potter JA As I have had the advantage of reading in draft the judgments herein of Simpson Ag CJ and Law JA, and as I have come to the same conclusions, I shall state my reasons briefly.

When a man becomes bankrupt he undergoes a change of status resulting in certain civil disqualifications and possible quasi penal consequences. For this reason it is well established law that the practice laid down in the Bankruptcy Act and Rules must be strictly adhered to for the protection of persons made or liable to be made bankrupt. This principle was recognised by the Supreme Court in Kenya (as it then was) in *In the Matter of Mota Singh* [1934] KLR 33, and by the Court of Appeal for Eastern Africa in *Nandhra and Others v Munshi Ram & Co Ltd* [1965] EA 753.

The Official Receiver's application to the High Court for an order that the appellant be adjudicated bankrupt was an application which, under Rule 5 of the Bankruptcy Rules could be heard by a judge in chambers. Rule 15 lays down the general rule, in the absence of other provision in the Rules or direction by the court, that applications to the court, which by definition of the word "court" in rule 2 include applications to a judge in chambers, are to be made by motion. There being no other provision or direction, it is clear that the Official Receiver's application should have been made by motion, and not as it was by chamber summons. That defect in the proceedings would not of itself have been fatal to the application, but it no doubt resulted in attention being deflected from rule 17, which provides that notice of motion shall be served on any party affected thereby not less than eight days before the day named in the notice for hearing the motion, unless leave to serve short notice has been granted.

The chamber summons was filed on Monday 6th July, 1981 for the parties to attend before the judge in chambers on Friday 10th July at 9.30 a.m. The hearing commenced at 10.30 a.m. on that day. The summons was served on Mr Sharma in the afternoon of Monday 6th July. Thus Mr Sharma had three clear days in which to take instructions from his client and to oppose the motion by affidavit, if so instructed. Rule 18 requires a respondent proposing to oppose a motion by affidavits to deliver copies of such affidavits to the applicant not less than two days before the day appointed for the hearing. Thus Mr Sharma and the appellant his client had only one clear day, namely Tuesday 7th July, in which to prepare, swear and deliver an affidavit to the Official Receiver.

At the hearing in chambers on Friday 10th July Mr Sharma objected to the shortness of notice and stated that he had been unable to communicate with his client. The Official Receiver submitted that the appellant had received adequate warning of the matter in a letter from him dated 16th June and in a subsequent telephone conversation between him and the appellant. It was not contended by the Official Receiver that either of those communications gave the appellant notice of the actual date of the hearing. In dismissing Mr Sharma's objection the learned judge ruled that he was satisfied "that the Debtor has had perfectly adequate opportunity to arrange for proper representation and instruction today". The learned judge also refused to stay the matter pending an appeal.

It may well have seemed to the learned judge that the appellant could have no possible answer to the application of the Official Receiver. But that was not the point of Mr Sharma's objection. The appellant was denied the time allowed by the rules and the opportunity afforded by them to oppose the application with affidavits. Whether that opportunity would have been taken by the appellant and if taken, whether it would have profited him, is beside the point. As was accepted by the Court of Appeal in *Nandhra's* case

(supra, see per Spry VP at pp 757 I to 758 A), bankruptcy having a quasi–penal aspect, and procedural matters therefore to be viewed strictly, the question is not whether a procedural defect has in fact caused a substantial injustice to the debtor, but whether it might have done so. In my opinion it cannot be said that, had the proper notice of hearing been given, the appellant debtor could not have shown circumstances and given reasons why it was not in the best interests of the creditors that he be adjudicated bankrupt on that day. As in a criminal trial, however overwhelming the evidence against the accused person may seem, it cannot be said with justice that he had no defence if he has been denied the opportunity to present it. For that reason the order of 10th July, 1981 is a nullity.

It is also clear in this case that if service of the notice of motion on the appellant's advocate was good service, the document should have been served on other advocates and not on Mr Sharma. See rule 72, I am not however persuaded by Mr Sharma that the rules required this notice of motion to be served personally on the appellant. As I read the rules, service of a notice of motion _

> (a) must be effected by personal service in the cases specified in the Rules, e.g in Rules 70, 103 and 114 (none of which apply to this case);
>
> (b) may always be effected by personal service, because that is service on the party affected, as required by Rules 16 & 17;
>
> (c) may be effected by service on a party's advocate, if that advocate qualifies under Rule 72 (which Mr Sharma did not), and if personal service is not required in the particular case.

The appellant also appeals against the dismissal by the learned judge of the appellant's application, made by notice of motion filed on 29th September, 1981, for the annulment of the adjudication of bankruptcy. The basis of the application was that the appellant debtor had paid to the Official Receiver sufficient money to pay all this creditors in full. The learned judge, in reliance on *In re Taylor, Ex parte* Taylor [1901] 1 KBD 744, and in my opinion correctly, viewed the matter as being one in his discretion to grant or refuse the application. In that case the applicant debtor was refused an annulment, although he had paid his creditors in full, because in the words of Wright J, -

> "This debtor admittedly was guilty of two of the worst crimes which a bankrupt can commit – the crime of falsifying his statement, and the crime of substantial concealment of assets".

We have not been referred to any subsequent case in which a bankrupt who has discharged his debt in full has been refused an annulment. In this case no bankruptcy offences were admitted or proved, although there were some alleged mistatements in the appellant's statement of affairs which were only partly explored at the public examination and perhaps for that reason only partly explained. The annulment was not opposed by the creditors or the Official Receiver, on this or any other ground. The learned judge appears to have based his decision mainly on what he saw as the principle underlying the decision in *In re Taylor*, namely that an applicant seeking a favourable exercise of the court's discretion must show good faith and be candid about his affairs. In his ruling the learned judge said:-

> "There is no explanation whatsoever of how the debtor suddenly came into possession of dequate funds, having been impecunious for so long a period. Candour about all his affairs is in my view required from the debtor before the Court should exercise its discretion otherwise the whole of the extremely serious process of bankruptcy is meaningless".

In my judgment the decision in *In re Taylor* is not an authority for so wide a proposition as this, and no other authority has been found. Where a bankrupt has paid his debt in full, and the annulment of his bankruptcy is not opposed by the creditors or the Official Receiver, it must, with the rarest of exceptions, be both just and in the public interest that the applicant debtor should be freed from the stigma and disqualifications of bankruptcy.

I feel sure that the man in the street and in the market place would have little respect for a system of law

which provided otherwise.

While I have no reason to doubt the justification for the learned judge's criticism of the appellant's conduct in relation to his creditors, I am compelled to the conclusion that the judge exercised his discretion in a manner which was wrong and contrary to principle, and which cannot be supported.

I agree with the orders proposed by the Acting Chief Justice.

February 16, 1982

SIMPSON AG CJ, LAW & POTTER JJ A