

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:HANCOX J)

BANKRUPTCY CAUSE NO 3 OF 1980

PAUL JOSEPH NGEI.....APPELLANT

VERSUS

OFFICIAL RECEIVER.....RESPONDENT

RULING

July 14, 1981, **Hancox J** delivered the following Ruling.

This is an application u/s 18 (16) of the Bankruptcy Act to adjudge the debtor bankrupt because of non-compliance by him with the scheme of composition dated 18.6.80 in 2 respects, namely -:

- 1) failure to pay the balance of 15/- in the Pound by 18.6.81.
- (2) Failure to make available the security of his property LR 4894/ 16 to the Trustee in bankruptcy as proposed which is the lynch pin of the whole scheme.

Mr Coward informed me that no issue arose today on the balance of the 5/- instalment due on 18.9.80, namely, 650,000/- which is as the subject of litigation before Gachuhi J earlier this year.

I have listened with great attention and indeed great sympathy to Mr Sharma, who has made his address on behalf of his absent client with ability and force. The court recognises that he has done his duty to the very best of his capacity in this respect.

Nevertheless the fact remains that this Scheme has not been adhered to. It was indeed, a variation or second proposal after the earlier one of 8.5.80, which was not accepted by the creditors. The petitioning creditors debt was outstanding for many years as was made clear in his proceedings of 3.4.80, when there was an application to vary the receiving order just made by Harris J.

At least one other sizeable creditor has had its debt owing for many years, the National Bank of Kenya, who is owed 1.8m. Mr Sharma seeks further time under the powers given in s108 of the Act but does not, as, I understand him, seek any variation, by way of extension of terms or otherwise of the Scheme itself, nor, as I read the law could he do so. Mr Sharma further submits that there will be no gain in the sense of advantage to the creditors to make this debtor bankrupt now and he cited a passage from *Williams* 19th Edition in support and the authority of *Ex parte Moon*, he said Mr Coward, as official receiver should have mentioned this matter in his statement in support. All I can say is while I do not agree with Mr Coward that the onus is on the debtor to show the adjudication will not benefit the creditors. I nevertheless think that it is self-evident that, had there been any such gain or advantage, it would have been mentioned by the official receiver who is after all the Trustee, and moreover, if there was no such gain, why mount the application anyway? The authority in question only goes as far as to comment that there might be no objection in making the debtor bankrupt, which is not quite the same as whether there is any advantage to the creditors.

I recognize that I have a discretion in the matter which must be exercised judicially but having so considered it and all the matters urged on behalf of the debtor, I cannot see any alternative to granting the application made by the official receiver, supported as it is by the petitioning and other creditors.

I accordingly annul the scheme of 18.6.80 under the powers under s.18(16) Bankruptcy Act cap 53 and adjudge the debtor bankrupt.

July 14, 1981.

HANCOX J