



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAMBUZI, PLAW, V.PMUSTAFA, J.A)

CIVIL APPEAL 58 OF 1972

**CHARN SINGH S/O KESAR SINGH.....APPELLANT
AND**

1. THE OFFICIAL RECEIVER

2. HARNAM SW/O ATTAR SINGH

3. GURCHARN SINGH S/O KESAR SINGH.....RESPONDENTS

(Appeal from the judgment of the high court of Kenya at Nairobi (Simpson, J.) dated 20th January, 1972

In

Bankruptcy cause No.28 of 1963)

JUDGEMENT OF WAMBUZI, P.

I have had the benefit of reading in draft the judgment prepared by Law, V.P. and I agree that this appeal must fail.

It is not easy to understand why the appellant who filed his own petition in bankruptcy and subsequently filed a consent order that he be adjudged a bankrupt should now claim that the adjudication should be annulled because his estate was never insolvent. If indeed he had filed the petition in bankruptcy to protect his assets from the claim of Fraudulent Creditors, why did he consent to be adjudged a bankrupt? The suggestion at this stage and for the first time, that the consent order made with the concurrence of the Official Receiver is a forgery is too flimsy to be taken seriously. There is ample evidence that the appellant grossly over-valued his estate.

In my view, the only point worth consideration is whether the Official Receiver as trustee of the appellant's estate is guilty of mismanagement and should be removed. The learned trial judge considered the same allegation raised before us and concluded that they were without foundation. I entirely agree. The impression I get of this appellant is that he seems to suffer from a sense of persecution of fraud by anyone who has had anything to do with his property. I entirely agree with the orders proposed by law, V.P. and as Mustafa J.A. also agrees, it is accordingly so ordered.

Dated at Nairobi this 23rd day of June, 1977.

PRESIDENT

JUDGEMENT OF LAW, V.P.

On 20th September, 1963, the appellant filed a petition in bankruptcy praying that a receiving be made in respect of his estate. A receiving order was accordingly made and the Official Receiver was constituted receiver of the estate. On 23rd September, 1963, the appellant filed consent under section 20(1) of the Bankruptcy Act (cap 53) to be adjudged a bankrupt, and the Official Receiver concurred in the application for adjudication. On the 11th October, 1963, the appellant was duly adjudged bankrupt. By an application dated 12th March, 1970, stated to have been reissued on 8th December, 1971, the appellant applied to the high court to annul the adjudication, and to revoke the appointment of the official receiver as trustee and to appoint a new trustee. The application was heard by Simpson, J. on various dates in January, 1972, the learned judge delivered his judgment dismissing the application. From that judgment the appellant has appealed to this court. He appeared in person in the high court and in this court. The hearing of this appeal has been delayed by a series of adjournments by consent.

The appeal is based on a number of grounds of complaint, raised both before the learned judge in the high court and before us. The appellant's basic complaint is that his estate never was insolvent, and that he should not therefore have been adjudicated bankrupt. He had filed his petition to protect his assets from the claims of fraudulent creditors. The answer to this is that the appellant himself, with the concurrence of the official receiver, consented in writing to be adjudged bankrupt, so that adjudication was an automatic consequence of his own action. Faced with that document, the appellant claimed before us that it was a forgery perpetrated by some unknown person with the apparent connivance of the official receiver whose concurrence is endorsed on the same document. This allegation of forgery, made for the first time more than 13 years after the event, is quite obviously without foundation, and has been made recklessly and without any regard for the truth. The fact that the appellant consented to be adjudged bankrupt is a complete answer to this appeal against the dismissal by Simpson, J. of his application for annulment of the adjudication.

The second part of the application, under which the substitution of another trustee in place of the Official Receiver was sought, was based on a number of allegations of maladministration and breach of duty on the part of the Official Receiver as trustee of the estate in bankruptcy. One of these allegations is that the Official Receiver disposed of the assets for a mere fraction of their value as shown in appellant's statement of affairs. As to this, the learned judge found that the appellant had grossly over-valued his assets, and that the Official Receiver had taken all necessary action to obtain the best possible price for them. The assets had been valued by the court broker, at the Official Receiver's request. Dealers likely to be interested in the assets were circularized and invited to make offers, and the highest offers were accepted. I have no doubt that these findings are correct. Another complaint made by the appellant is that the official receiver had failed to continue litigation commenced by the appellant. In one case, the appellant filed an appeal against a judgment adverse to him in civil Case 411 of 1962 but the official receiver abandoned the appeal as being unlikely to succeed. In the other case, civil case 900 of 1962, the Official Receiver decided not to proceed with the appellant's suit, on the advice of counsel. In any event, the decision whether or not to proceed with litigation is a matter within the trustee's discretion as to the management of the estate, under section 81 (4) of the Act, and I have no reason to think that the official Receiver wrongly exercised his discretion in this respect. The appellant would also have us re-open a criminal prosecution instituted of his complaint against his brother Gurgharam Singh, the 3rd respondent. In that case, No.717 of 1965, the attorney general entered a nolle prosequi, and Gurgharam Singh was discharged. The right of attorney general to enter a nolle prosequi is not subject to question in the courts.

Then the appellant contended that the claims of two of the creditors, the 2nd and 3rd respondents, were fraudulent creditors and ought not to have been accepted. The appellant objected to these claims, and the Official receiver took the advice of a senior counsel, as a result of which part of the 2nd respondents claim only was admitted, and the whole of the 3rd respondents claim was rejected as being that of a relative by

consanguinity, under section 41 of the Bankruptcy Act, so that it will only rank for payment when all claims or other creditors have been settled. I am been satisfied that the official receiver has taken all reasonable precautions against the possibility of fraudulent claims being preferred against the estate. I do not propose to deal in detail with the many other vague and baseless charges brought up by the appellant against the Official Receiver, whose counsel Mr. Muchae informs us that the estate is now solvent, and that there is a surplus which will be handed back to the appellants including a house valued at over Kshs.65, 000/- which is now clear of mortgage and which brings in over Kshs.10, 000/- a year as rent. All that is required is for the appellant to apply for his discharge, in which he will be supported by the Official Receiver. This application should have been made many years ago, but the appellant has preferred to prosecute this hopeless, time-consuming and misconceived appeal, which in my opinion should be dismissed. The Official Receiver does not ask for costs. I would dismiss this appeal, and grant the 2nd and 3rd respondents their costs of the appeal.

Dated at Nairobi this 23rd day of June, 1977.

E.J.E. LAW

VICE PRESIDENT

JUDGEMENT OF MUSTAFA, J.A.

I agree with the judgment prepared by Law, V.P. the appellant may be genuinely suffering from a deep sense of grievance, but his allegations that the document of consent to be adjudged bankrupt filed by him had been forged and that the Official Receiver as trustee had committed a serious breaches of duty and deliberately grossly undervalued his assets are completely baseless and without foundation. His appeal is without any merit, and I agree with the order proposed by Law, V.P.

Dated at Nairobi this 23rd day of June, 1977

A.MUSTAFA

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JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(T.T.M Aswani)

REGISTRAR