IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, GATEMBU & M'lNOTI, JJ.A)
CIVIL APPEAL NO. 214 OF 2007
BETWEEN

CAPTAIN MUSA HASSAN BULHAN.....APPELLANT

AND

KENYA AIRWAYS LIMITED.....1st RESPONDENT

THE OFFICIAL RECEIVER.....2nd RESPONDENT

(An Appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (Kasango, J) dated 1st December, 2005

in

Bankruptcy Cause No. 14 of2000)

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JUDGMENT OF THE COURT

The appellant herein, (Bulhan), is a professional pilot. He is also a major shareholder and Chief Executive Officer (CEO) of several airlines including African Airline International (AAI). In the 1990s, AAI and the 1st respondent (KQ) were collaborating well and doing good business between themselves in the airline industry, despite being competitors. KQ would maintain the aircrafts of AAI and provide other services while AAI would supply KQ with spare parts and provide other services for its aircrafts. However, things went south in 1999 when KQ claimed that it was owed over KSh.51 million by AAI and demanded payment at the pain of legal action. It did in fact file suit against AAI being HCCC No. 4125 of 1993 for recovery of the balance of KSh.27,749,037.30 and obtained judgment for an admitted sum of KSh.3,590,385.75 on 21st May, 1994. The rest of the claim was to go for trial but Bulhan came to the rescue of AAI and signed a guarantee as a primary obligor on 22nd December, 1994 for the sum of KSh.20,910,825 after denying the balance of the claim made against AAI. KQ then abandoned the suit against AAI and preferred to pursue the amount admitted and guaranteed by Bulhan.

When Bulhan failed to make good the guarantee, KQ filed HCCC No. 1033 of 1995 and obtained summary judgment against him from Pall, J. on 25th January, 1996 (the Pall judgment). An attempt by Bulhan to have the Pall judgment reviewed and set aside on the basis that KQ owed more money to AAI, was dismissed by Pall, J. on 24th July, 1996. A notice of appeal to challenge the dismissal of the application was filed on 5th August, 1996 but nothing further has been done for the last 22 years to challenge the Pall judgment. The decree for payment of KSh.21,617,135.10 together with interest at 4% above the base rate of Barclays Bank compounded monthly with daily rests was issued by the Deputy Registrar on 6th March, 1996.

The court file then disappeared from the court registry for some time until an order for reconstruction was obtained and the process of execution of the decree commenced. At first KQ took out a notice on 21st January, 1999 for Bulhan to show cause why his immovable property should not be attached to pay the decretal amount then outstanding as at 31st January, 1999 in the sum of KSh.51,827,834.80 but that process appears to have fizzled out. Instead, a Bankruptcy Notice No. 20 of 1999 issued by the court on 13th July, 1999 was served on Bulhan on 21st July, 1999. He moved to challenge the bankruptcy notice on 27th July, 1999 but Mbaluto, J. dismissed the challenge on 20th January, 2000 (the Mbaluto ruling). KQ then proceeded to take out Bankruptcy proceedings against Bulhan under section 7 of the Bankruptcy Act (Cap 53) (the Act) and filed Cause No. 14 of 2000 which culminated in this appeal.

Responding to the Bankruptcy Cause, Bulhan conceded that he guaranteed the amount of KSh. 19,834,812.20 owed by AAI to KQ, but only as a matter of business good will gesture. He claimed that the amount together with other amounts allegedly owed by AAI to KQ had been paid or were disputed. He further asserted that AAI had sued KQ in HCCC No. 2072 of 1999 for a claim of USD 2,460,000 (in excess of KSh. 170 million), which amount, he contended, ought to be set off against what was being sought from him. A defence and counterclaim was filed by KQ in that suit but surprisingly, the suit has never been set down for hearing for the last 19 years.

As for the bankruptcy proceedings, Bulhan asserted, among other technical objections, that they were a nullity because they were based on a judgment of Pall, J. which was not signed or dated. In his view, a decree extracted from such judgment for enforcement would also be a nullity. He also claimed that he was not served with any affidavit verifying the debt, and that there was no proof of the creditor's debt as by law required.

Upon hearing the documentary and oral evidence placed on record on both sides and tested in cross examination, Kasango, J. found that Bulhan had voluntarily signed the guarantee for the debt sought against him; that a judgment was obtained in respect of the guaranteed amount; that apart from the impugned Pall judgment, there was a valid decree emanating from the judgment which had not been challenged or set aside; that Bulhan was properly served with a Bankruptcy Notice No. 20 of 1999 which he did not comply with and therefore committed an act of bankruptcy under section 3 (1) (g) of the Act; and that KQ had satisfied the requirements for issuance of a receiving order. The order was issued on 1st December, 2005 and the Official Receiver was constituted as Receiver of the Estate of Bulhan.

Those orders aggrieved Bulhan and he proceeded to file this appeal on 8th October, 2007. Before then he sought from this Court and was granted an order for stay of any further proceedings founded on the judgment of Kasango, J. and stay of execution of the receiving order. The order was issued on 13 th October, 2006.

In his memorandum of appeal, Bulhan put forth 13 grounds, basically challenging the procedural propriety in conducting the bankruptcy proceedings. At the hearing of the appeal, the appellant's counsel did not make appearance but there were written submissions filed by M/s S. Musalia Mwenesi Advocates, which were not highlighted. The written submissions urged the grounds of appeal in four tranches.

The first major procedural challenge was that the judge did not consider the impact of an unsigned and undated judgment on which the bankruptcy proceedings were hinged--that is the Pall judgment. Citing the criminal appeal decisions in Richard Kamisoi & Another vs Republic [2007] eKLR and Simon Lokwacharia vs Republic [2005] eKLR which dealt with the application of section 169 (1) of the Criminal Procedure Code, counsel submitted that an unsigned judgment was no judgment at all as held in those appeals. He also referred to Order XX Rule 3 of the Civil Procedure Rules which provided for the signing of judgments. He observed that although the trial court appreciated the fate of an unsigned judgment, it erred in going further and holding that there was a decree emanating from such judgment which could sustain the bankruptcy proceedings. In his view, no decree could emanate from such judgment. The court further erred, in his submission, in shifting the burden of proving that the original judgment was not signed, which burden should have been on the respondent.

The second procedural omission urged by counsel was the failure to file a verifying affidavit of the creditor and non-service of such affidavit or the decree on the debtor as required in section 7 (1) of the Act and Rules 110 and 114 of the Bankruptcy rules (the Rules). Counsel contended that the whole petition had not been served on the debtor and therefore the court proceeded without jurisdiction.

Furthermore, he submitted, the petition proceeded under section 7 (5) of the Act which requires proof of the debt. This was never done since the purported decree was not final owing to notices of appeal filed to challenge the Pall judgment and the Mbaluto ruling. The appellant had also provided enough evidence to show that the debt was not due. In that case, according to counsel, the petition should have been stood over until the debt was proved but instead the trial court proceeded to issue a receiving order without any legal or factual basis.

Counsel emphasized the nature of bankruptcy proceedings as quasi-criminal and therefore the need for courts to scrutinize closely the documents presented in support of the petition. According to him, the failure to comply with the procedures required by the Act vitiated the entire petition. Counsel further urged that the trial court was under a duty to examine the guarantee which was the basis of the Pall judgment and the Mbaluto ruling to satisfy itself whether there was a liquidated debt that was being pursued. In point of fact, he stated, there was no liquidated debt but a disputed debt.

To underscore the seriousness of a bankruptcy petition, he cited the case of Ngei vs Official Receiver [1982] KLR where Potter, JA stated thus:

> '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 vs Munshi Ram & Co Ltd [1965] EA 753.'

Finally, counsel submitted that the trial court was biased against the appellant and was in a hurry to issue the receiving order. The court failed to appreciate what the Bible says, in Mathew Chapter 18, about forgiveness of debts which principle is consonant with Article 159 of the Constitution on alternative dispute resolutions. The biblical wisdom, according to counsel, was dismissed willy nilly. He concluded that there was no purpose for the respondent to seek a receiving order, and the trial court failed to see the malicious intent of the respondent but instead aided it in oppressing the appellant.

Responding to those submissions, the 1st respondent, through their advocates M/s Kaplan & Stratton filed written submissions too. Learned counsel Mr. Fred Ojiambo, assisted by Ms. Nazma Malik attended the hearing of the appeal and relied fully on the written submissions with no highlights.

Counsel opened by acknowledging that at the hearing of a bankruptcy petition, the court has very wide powers or duty to inquire into the consideration of a judgment debt, but submitted that the validity of the judgment debt can only be inquired into where there is evidence of fraud or collusion, or miscarriage of justice. According to counsel, where the act of bankruptcy relied on is non-compliance with a bankruptcy notice, the judgment or order is conclusive. The court may only inquire into the cause of action or substance of the claim but cannot go behind the form or validity of the judgment. In support of those submissions, counsel relied on the treatise Williams and Muir Hunter on Bankruptcy, 19th edition pp. 57-59; and Halsbury's Laws of England, 4th Edn. Vol. 3 pg 213 para 357. The case of Re Beaucamp, ex parte Beaucamp [1904] 1 K.B. 572 was also relied on for the proposition that 'the fact that the judgment may be irregular or wrong in

form is no sufficient reason for going behind the judgment and dismissing the petition'. Counsel further relied on the rule in Re Flatau; ex parte Scotch Whisky Distillers Limited, (1888) 22 QB 83 that "when the act of bankruptcy relied on is the failure to comply with a bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending from the judgment is not a sufficient ground for staying the proceedings in the petition ".

Counsel further referred to section 133 of the Act which provides as follows:

> "133 (1) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court". (emphasis supplied).

From the above authorities, counsel submitted that the appellant was precluded from questioning the Pall judgment on the technicality that it was not signed or dated. It was obtained in open court against a debtor who was represented by counsel, and there was no fraud or collusion to justify any inquiry. There was no appeal pending, and even if the notices of appeal were in existence, they could not bar the bankruptcy proceedings.

Counsel then referred to Order XX Rule 3 (1) of the CPR which requires that "a judgment pronounced by the judge who wrote it shall be signed by him in open court at the time of pronouncing it" and submitted that it can only apply to the original manuscript of the judgment. The contention that copies, such as the one produced before the bankruptcy court, should have been signed, is outside the ambit of the rule. Support for that submission was found in Mulla - The Code of Civil procedure Vol. II 11th Edn stating that a judgment pronounced in court is final if the 'transcript' is signed. According to counsel, the emphasis in rule 3 is on the original rather than copies. Indeed, counsel noted, the authorities relied on by the appellant on the issue dealt with original judgments which were unsigned.

As for burden of proving that the original judgment was unsigned, counsel pointed out that it was the appellant who wanted the court to believe in the existence of that fact. Section 109 of the Evidence Act was relied on. All indications on record show that the original Pall judgment was signed upon delivery, such as: the presence in court of all counsel for the parties when the judgment was delivered; acceptance of a copy of the judgment by the appellant's counsel; extraction of a decree following that judgment; certification of the decree by the Deputy Registrar; and the unsuccessful attempt by the appellant to have the Pall judgment set aside. At no time was any question raised by the appellant about the validity of the judgment. According to counsel, the issue was only raised during the hearing of the petition several years later when the appellant knew that the original court file had mysteriously disappeared and had to be reconstructed. Estoppel by words and conduct must therefore apply to the appellant.

At all events, counsel submitted, all the references made to the Civil Procedure Rules were irrelevant by dint of Rule 317 of the Bankruptcy Rules which ousts the application of CPR to bankruptcy proceedings.

Finally on that issue, counsel submitted that the objection raised on the Pall judgment was a red herring. That is because under section 3 (1) (g) of the Act, an act of bankruptcy is committed where a creditor has obtained 'a final decree or order' to enforce against the debtor and has served the debtor with a bankruptcy notice which is not complied with within seven days. In this case, there was a final decree issued on 6th March, 1995 which satisfied the definition of a 'Decree' in section 2 of the Civil Procedure Act. There has been no appeal challenging that decree and so, in counsel's view, there was nothing to stop the trial court from relying on it as it did.

Turning to the complaints that the verifying affidavit proving the debt was not served on the appellant, counsel submitted, firstly, that section 133 (1) of the Act downplays formal defects and irregularities in bankruptcy proceedings. He further observed that there was no complaint that a verifying affidavit was non-existent.

Counsel referred to section 7 of the Act which only requires proof of the debt, service of the petition, and the act of bankruptcy before a receiving order can be issued. The proof of debt merged in the judgment and there was no requirement that a separate service of a verifying affidavit be made. The bankruptcy notice was duly served and there was no compliance, thus satisfying the requirements of the law and the jurisdiction of the court to deliver substantial justice to the parties.

Finally, counsel rebutted the claims on bias by the trial court against the appellant submitting that they were unfortunate and unfair, made against a judge who acted with decorum and a great sense of restraint when giving the parties the necessary opportunity to articulate their respective cases, and to cross examine witnesses. According to counsel, there was no evidence of such bias and the matters complained of can be discerned from the record.

The 2nd respondent, represented by Ms. Judy Mugo and Mr. Etemesi Elpas, did not file any written submissions and declared at the hearing of the appeal that they were taking a neutral stand in the appeal.

We have anxiously considered the record of appeal and the submissions of counsel. The standard of review on a first appeal from the High court, as this Court stated in the case of Paul Joseph Ngei vs Official Receiver [1990] eKLR is:

> to re-appraise the whole evidence and draw our own inferences.

In addition it is open to us where appropriate to invoke sub-section

(2) of section 3 of the Appellate Jurisdiction Act, cap 9 which provides that:

> "For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in additional to any other power, authority and jurisdiction conferred by this Act, the power,

authority and jurisdiction vested in the High Court."

As always, we shall respect the findings of fact made by the trial court especially where they are based on credibility of witnesses which that court had the advantage of seeing and hearing. We would only interfere where it is shown that the findings are based on no evidence, or the court is shown demonstrably to have acted on wrong principles in making the findings. See Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278.

Where, and in so far as the findings depend on judicial discretion, there is little room for interference. As Madan, JA (as he then was) stated in the case of United India Insurance Co Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR-

> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. (It) is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong. "

Guided by those standards of review, we shall consider what we perceive to be the main issue that arises in the appeal: whether the receiving order issued by the trial court was in accordance with bankruptcy law.

We begin by acknowledging the general and stark reality stated in such cases as In the matter of Mota Singh, [1934] KLR 33, Nandra and Others vs M. Ram & Co Ltd [1965] EA 753 and the Ngei case (supra), that it is a grave matter for one to be adjudged bankrupt as such declaration has immediate disabilities. It also has quasipenal consequences, and therefore bankruptcy courts have a duty to ensure that the procedural steps contained in the Act are followed before a receiving order is issued. But the law allows the courts to declare bankruptcies and issue receiving orders as long it is done within the law. And the law applicable is the Bankruptcy Act (Cap 53) Laws of Kenya, whose commencement date was 3 September, 1930. It was repealed by the Insolvency Act No. 18 of 2015 but in this matter, the latter Act does not apply because the events in issue occurred prior to the repeal.

Under section 5 of the Act, the court has the power to issue a receiving order for the protection of the estate of a debtor who commits an act of bankruptcy, such as enumerated in section 3 of the Act. The act of bankruptcy relied on in this matter is under section 3 (1) (g) which provides in relevant part as follows:

> "If a creditor has obtained a final decree or final order against him for any amount, and, execution thereon not having been stayed, has served on him in Kenya, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, and he does not within seven days after service of the notice..... either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the decree or sum ordered to be paid, and which he could not set up in the action in which the decree was obtained, or the proceedings in which the order was obtained; and for the purposes of this paragraph and of section 4, any person who is, for the time being, entitled to enforce a final decree or final order shall be deemed to be a creditor who has obtained a final decree or final order. "

Section 4 then proceeds to provide for service of a bankruptcy notice requiring the debtor to pay the amount stated in the decree at the pain of facing bankruptcy proceedings. As for the proceedings relating to a creditor's petition, section 7 applies and provides as follows:

> "7. (1) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner.
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> (2) At the hearing the court shall require proof of the debt of the debt of the petitioning creditor, of the service of the petition and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.
>
> (3) If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.
>
> (4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, or sum ordered to be paid, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment or order.
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> (5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.
>
> (6) Where proceedings are stayed the court may, if by reason of the delay caused by the stay of proceedings or any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed.
>
> (7) A creditor's petition shall not, after presentment, be withdrawn without the leave of the court."

There are procedural rules in Part III of the Bankruptcy Rules governing the conduct of bankruptcy proceedings.

In line with the above provisions, the 1st respondent's case is simply this: the appellant was indebted to it through a guarantee voluntarily executed by him for payment of a liquidated sum; when the debt was not paid, a suit was filed and summary judgment obtained as there was no substance in the defence filed; an attempt to set aside the judgment failed and it therefore became final; notices of appeal filed more than 20 years ago without further action being taken are deemed to have been withdrawn; a decree was issued for execution; a bankruptcy notice was obtained from court and served on the appellant; the bankruptcy notice was issued and served in accordance with the rules but was not complied with, hence the commission of a bankruptcy act and the filing of the petition; the parties were fully heard on the petition and findings made justifying the issuance of a receiving order.

As stated earlier, the major challenges to the findings were on the validity of the judgment upon which the petition was based, and compliance with the rules on proof of the debt. The trial court applied the Civil Procedure Rules which provides in Order 20 Rule 3 that "A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it." In the trial court's view, however, the creditor was enforcing a final order or decree which was exhibited and was therefore in compliance with section 3 (1) (g) of the bankruptcy rules which defines a creditor entitled to petition, thus:

> "..... any person who is, for the time being, entitled to enforce a final decree or final order shall be deemed to be a creditor who has obtained a final decree or final order."

With respect, the trial court was right in so finding. The section does not make reference to a judgment but to a final order. The submission by the appellant that there was no final order since it arose from interlocutory proceedings is futile. An application for summary judgment, once upheld, conclusively determines the rights of the parties with regard to the matters in controversy between them and is therefore final. It results to a decree. We would go further and state that Order 20 Rule 3 though of doubtful application in view of the exclusion of civil procedure rules by Rule 317 of the Bankruptcy Rules, relates to the original manuscript pronounced by the judge who wrote it. The assertion that the original was not signed was made by the appellant and, in our view, he had the onus under section 109 of the Evidence Act to prove that fact. At all events, it is curious that the appellant would make such a claim several years after the event when he had taken action to challenge the Pall judgment without questioning its validity or authenticity. The suspicion that he deliberately made the claim after the original court file disappeared without trace is not an idle one. It is our finding that the decree certified by the Deputy Registrar was sufficient for purposes of enforcement of the bankruptcy proceedings.

The other challenge was on proof of the debt under section 7 (5). The trial court found that the guarantee for the debt which was the basis of HCCC No. 1033 of 1995 was voluntarily executed by the appellant. It further held that:

> "..(the) guarantee, having been the subject of HCCC No 1033 of 1995, whereby judgment was entered and decree drawn, cannot be the subject of this tribunal because that would be tantamount to this court sitting in appeal against the judgment of the late Hon Justice Pall."

In our view, that was a correct statement of the law. There was no question that the appellant executed the guarantee for the debt. He stated so in his defence and on oath before the trial court, thus:

> "I signed the guarantee. I did not have witness to guarantee. I was willing to issue and sign guarantee because of corporation (sic) between two airlines. AAI was always on upper hand on demand money from Kenya Airways i.e. it was always owed money by Kenya Airways so there was no danger of me having guarantee invoked (sic)."

The issue of validity of the guarantee and the debt also featured in the proceedings before Pall and Mbaluto, JJ. and a judicial pronouncement was made on it. It was too late in the day, we think, to raise the issue again before a bankruptcy court when an unchallenged judgment was already in place. We agree with the submissions of counsel for the 1st respondent that, in principle, the bankruptcy court will only inquire into a final judgment if there was evidence of fraud or collusion. As Fry L. J stated in the case of Boaler vs Power and Others [1910] 2 K. B. 229, at page 86:

> "It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it has been obtained by fraud, collusion or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a court. I entirely agree with what was said by the Master of Rolls in In re Saville: "It seems to me that...the mere fact of a judgment having been recovered does not prevent the Court of Bankruptcy, if sufficient reasons are given for doing so, from going behind the judgment. But it does not decide that, there being a judgment, on the mere suggestion of the debtor that the judgment is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt" (emphasis supplied).

We dismiss the complaint on proof of debt since there was a final decree on it.

The final complaint on service of a verifying affidavit was dealt with by the trial court as follows:

> "I find I do not accept the debtor's statement that, the debtor has shown by evidence why the petition should be dismissed. I ought to state that section 7 (1) and Rules 110 and 114 do not require a verifying affidavit to be served on a debtor. To the contrary the petitioner has proved that the debtor was served with a Bankruptcy Notice No. 20 of1999 and failure to respond to the same as required by section 3 (1) (G) Cap 53, the debtor has committed an act of Bankruptcy, which was committed on 20h January 2000. "

In view of our finding that the Pall judgment was final and unchallenged, it would be futile to flog the issue of a verifying affidavit. Nevertheless, we note that there is no complaint about the affidavit verifying the debt having been filed. The complaint is rather that it was

not served. Indeed, we have seen the affidavit of Lewis Kamau the 1st respondent's Company Secretary, sworn on 22nd May, 2000 in response to the complaint that there was no verifying affidavit and it clarifies that the appellant had been served with a lengthy affidavit sworn on 4th October, 1999 setting out how the debt arose, culminating in the Pall judgment and the Mbaluto ruling, and the execution proceedings that ensured. In our view, the issue of service of the verifying affidavit is tantamount to clutching at straws.

On the whole we discern no serious error in principle in the manner the trial court appreciated and considered the facts and the law in the bankruptcy petition. The claim of bias is a red herring lacking in supportive evidence. We reject it. We have no reason therefore to disturb the findings of the trial court and it follows that this appeal is for dismissal. We dismiss it with costs to the 1st respondent.

Dated and delivered at Nairobi this 7th day of December, 2018.

P. N. WAKI

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR