



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIV APPLI 182 OF 2006

JOHN KAYELI OLAKA APPLICANT

AND

LAWRENCE MUINDE 1ST RESPONDENT

NATIONAL BANK OF KENYA LTD. 2ND RESPONDENT

GIRMAT AUCTIONEERS..... 3RD RESPONDENT

(Application to vary the order of this Court made at Kisumu on 29th day of March, 2006 stopping this appeal from being listed for hearing until and unless the official receiver gives a written undertaking to pay the costs of this appeal to an order that the security to pay the costs or undertaking be paid by a relative of the appellant namely Hoskin Indimula Olaka on behalf of the appellant and the same be a specified amount

in

H.C.BANKRUPTCY CAUSE NO. 35 OF 2003

RULING OF THE COURT

Before us is an application by way of Notice of Motion brought under **Rule 56(2)** of the **Court Appeal Rules** (the Rules) in which this Court is being urged to grant the following orders:-

“1. THAT this Honourable Court be pleased to vary its orders made on the 29th day of March 2006 requiring a written undertaking that in the event of this Appeal not succeeding the Official Receiver shall pay the cost and that until and unless such an undertaking is given and filed by the Official Receiver this Appeal shall not be re-listed for hearing. And in its place make an order as follows or to that effect be made:-

2. THAT a relative of the Appellant namely HOSKIN INDIMULA OLAKA undertakes to pay the costs for and on behalf of the Appellant and deposits to the court a specified fixed sum say Shs. 30,000/= (or such other fixed sum as this court may decide) to serve as security for the costs of this Appeal in the event of the Appeal not succeeding and on its being paid this Appeal do proceed to hearing.

3. THAT costs of this Application be costs in the Appeal”.

The application is brought on the following grounds:-

- “(a) That the Official Receiver has so far not given the written undertaking as ordered by this court.**
- (b) That there is a relative of the Bankrupt (Appellant) who is willing to pay the costs of the Appeal by depositing a specified sum in court to serve as security for this costs to enable this Appeal proceed to hearing if this Honourable court could order for the same.**
- (c) Other reasons to be given at the hearing hereof”.**

What has given rise to this application is the order of this Court made on 29th March, 2006 in which it was stated inter alia:”-

“We direct that the official receiver ought to give a written undertaking that in the event of this appeal not succeeding, the official receiver shall pay the costs. Until and unless such an undertaking is given and filed by the official receiver, this appeal shall not be re-listed for hearing.”

When this application came up for hearing before us on 30th November, 2006, Mr. Onyinkwa, the learned counsel for the applicant, told us that the application was necessitated by the fact that the bankrupt was anxious to have the appeal concluded and so he (*the bankrupt*) asked his relative to give the undertaking in the place of the official receiver. It was Mr. Onyinkwa’s contention that this application provides the way out for the situation and that the respondents would not be prejudiced if the Court granted the application.

Mr. Wasuna, the learned counsel for the 1st respondent, opposed the application on the ground that it was incompetent. In Mr. Wasuna’s view, it was only the official receiver who could bring this application as the applicant is a stranger in this matter.

Mr. Omay, the learned counsel for the 2nd and 3rd respondents, associated himself with the submissions of Mr. Wasuna adding that it was only the official receiver who had the capacity to handle the affairs of the bankrupt. He relied on **section 9** of the **Bankruptcy Act**.

We have now considered the submissions by counsel in this application and it is our view that the relevant provision is **section 9(1)** of the **Bankruptcy Act (Cap 53 Laws of Kenya)** which provides:-

“On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court impose.”

In view of the foregoing, we agree with Mr. Wasuna and Mr. Omay that the relative of the bankrupt who now seeks to undertake to pay costs for and on behalf of the appellant is a stranger to these proceedings. This application lacks merit. Accordingly we order that this application be and is hereby dismissed with costs to the respondents

Dated and delivered at Kisumu this 1st day of December, 2006.

E.O. ‘KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO-OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR