



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**BANKRUPTCY CAUSE NO. 1 OF 2010**

**IN THE MATTER OF: BANKRUPTCY ACT CHAPTER 53 OF THE LAWS OF KENYA**

**ABUBAKAR A. H. MOHAMED.....RESPONDENT/CREDITOR/TRUSTEE**

**=VERUS=**

**AHMED MOHAMED SAID.....RESPONDENT/BANKRUPT**

**AHMED OMAR SAID.....OBJECTOR/APPLICANT**

**R U L I N G**

This Ruling is in respect of the Application dated 20<sup>th</sup> August, 2015, 21<sup>st</sup> August 2015, 26<sup>th</sup> August 2015 Preliminary Objections by the Judgment Creditor dated 26<sup>th</sup> August 2015 and 4<sup>th</sup> September 2015.

The Application dated 21<sup>st</sup> August 2015 was filed by the firm of Richard O. & Co. Advocates. It was brought on behalf of Mohamed Omar Mohamed and it seeks setting aside or vacation of the execution undertaken by the Judgment Creditor. It is supported by the affidavit of Mohamed Omar Mohamed sworn on the same date.

The Judgment Creditor filed a Preliminary Objection in respect of the application on 26<sup>th</sup> August 2015. It is submitted that the application is fatally defective, that the applicant lacks capacity to enjoin himself in the dispute without leave of the court, that the documents have not been approved by the Trustee and that the application violates the rule of law.

Mr. Otara, counsel for the applicant entirely relied on his application. Counsel submitted that the attached goods is a restaurant known as Shukran cafe which belongs to the applicant. The applicant leased the restaurant from the owner Ahmed Omar Said. The operating trade licence belongs to the applicant. Counsel further submit that a former trustee, Adan Decor filed an affidavit confirming that the Judgment Debtor had nothing that could be attached. No proclamation was done and there is no valid auctioneer undertaking the attachment. No warrants of attachment were issued by the court.

Mr. Obaga, counsel for the Judgment Creditor relied on his Preliminary Objection in respect of the application. Counsel maintains that in bankruptcy proceedings one does not need a proclamation. The Civil Procedure Rules do not apply to bankruptcy proceedings.

The application dated 26<sup>th</sup> August 2015 by the firm of Ndegwa Katisya Sitonik & Associates seeks to have the applicant Ahmed Omar Said to be enjoined as an Interested Party, an order of injunction in respect of the utilisation of the house without land on plot number 4090 along Mombasa-Malindi road as well as an order de-linking the above property from the debtor's property.

The application is supported by the affidavit of Ahmed Omar Said sworn on 26<sup>th</sup> August 2015. The same grounds and Preliminary Objection were raised by the Judgment Creditor. Mr. Kariuki, counsel for the applicant relied on the application. Written submissions were also filed by the firm of Ndegwa, Katisya & Sitonik Advocates in respect of that application.

The record also shows that there is an application dated 20<sup>th</sup> August 2015 filed by Omar Mohamed Said in person. It seeks to restrain the Judgment Creditor from attaching the house without land on plot number 682 Barani as well as the goods in the house and the staying of the warrant of seizure.

There is an application dated 1<sup>st</sup> October 2015 by the firm of Richard O & Co. Advocates seeking to compel the Judgment Creditor to avail his medical report from any Government Psychiatrist before any proceedings take place. I do outrightly dismiss the application. The Judgment Creditor has appeared before me several times and has been able to clearly and competently prosecute his case without the assistance of an advocate. That is why this court found him to be fit enough to be a trustee. Further, section 11 of the Penal Code stipulate that **everyone is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved**. I do find that this particular application lacks merit and is hereby dismissed.

The pleadings herein refer to three plots namely house on Plot No. 4090, house number 17, U.S.A.I.D Malindi and house without land on Plot Number 682, Barani Malindi. None of the objectors have exhibited documents showing proof of ownership. There are sale agreements in relation to house on plot number 4090. The house belonged to the bankrupt and he transferred it to his wife on 13<sup>th</sup> November 2008. Its alleged that a consideration of Kshs.700,000 was paid. This is highly suspect. The bankrupt's wife sold the home to Said Mbarak Said in 2010 who in 2013 sold it to Ahmed Omar Said. In his application dated 20<sup>th</sup> August 2015, Omar Mohamed Said indicate that the house without land on plot number 682 Barani Malindi belongs to himself and his brother Said Mohamed Said. He has only allowed the bankrupt to live in the said house since he lost all his property having been declared bankrupt.

Given the pleadings herein, I do find that there is serious attempt aimed at shielding the bankrupt from settling his liabilities. Although it is indicated that the property on plot number 4090 was transferred to the wife in 2008, there is need to establish through the taking of oral evidence as to whether the transfer of the house in 2010 was aimed at defeating payment of the bankrupt's liabilities. Section 47 of the Bankruptcy Act, Chapter 53 laws of Kenya makes certain transactions void if the same are made not more than two years before the date of the commencement of the bankruptcy. No stamp duty was paid for the transfer other than registration before the then Municipal Council.

With regard to house number 17 at U.S.A.I.D Malindi, no sale transaction document was exhibited. The bankrupt seems to be living in that property and Omar Mohamed Said alleges that he has only accommodated him. I do find that all the objectors need to be sworn and cross examined on oath on the alleged ownership of the properties they alleged to own. This will enable the court make a well informed decision.

Section 82 of the Bankruptcy Act allows anyone aggrieved by the actions of a trustee to apply to court. The court is empowered under Section 100 of the same Act to decide on all questions in any bankruptcy

case. Ordinarily anyone who is not a party to bankruptcy proceedings requires leave of the court before he/she can be enjoined as was held by the Court of Appeal in **John Kayeli Olaka V Lawrence Muinde & 2 Others [2006] Eklr**. Ahmed Omar Said sought leave to be enjoined and leave is hereby granted to that applicant to be enjoined.

I do find that there is need to hear oral evidence from Ahmed Omar Said, Mbarak Said and Mohamed Omar Mohamed. It is indicated that Said Mohamed. It is indicated that Said Mohamed Said is currently in Saudi Arabia.

The bankruptcy herein seems to have been shrouded with collusion by family members aimed at defeating the settlement of the Creditors claims. This was a self declared bankruptcy and the court cannot be used to shield the bankrupt from settling his liabilities if it is found that he is hiding his properties. I do hold that all the objectors adduce oral evidence and be cross examined by the Judgment Creditor or his advocate. The Judgment Creditor shall be at liberty to adduce his own evidence if need be.

The Application by the objector herein are hereby put in abeyance pending the taking of the oral evidence. Thereafter the court will make its final ruling on the Applications. Mr. Otara's client is hereby enjoined in these proceedings despite the fact that no application for enjoinderment has been made. The provisions of Section 82 of the Bankruptcy Act calls for such enjoinderment. I have read the affidavit of Aden Dekon Kossar sworn on 5<sup>th</sup> May 2015. The same is hereby excluded from the current applications as there are allegations that having been a previous trustee, he was compromised by the bankrupt.

Dated, signed and delivered at Malindi this 3<sup>rd</sup> day of **December** 2015.

**SAID J. CHITEMBWE**

**JUDGE**



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