



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**BANKRUPTCY CAUSE NO 4 OF 1989**

**IN RE AL-MOODY (A DEBTOR)**

**JUDGMENT**

This is a debtor's petition that as petitioner Saleh Ahmed Al Moody is unable to pay his debts, a receiving order in respect of his estate be made and that he be judged bankrupt. He has filed a Declaration of inability to pay his debts. He has also filed a receipt for shs 700/- paid to the Deputy Official Receiver. List A of the Statement of Affairs shows that the only debts that the debtor owes are the decretal sums in two civil suits, the total of which is shs 799,340/-.

This is the second Bankruptcy Cause filed by the petitioner. The first Cause was No. 3 of 1989 which was filed on 29/11/1989. The first cause was filed after the petitioner was arrested in execution of the decree in HCCCC. No. 26 of 1988.

That petition was dismissed on 1/12/89 for non-compliance with the Bankruptcy Act and Rules.

The debtor was then called to show cause in HCCC No 26 of 1988 as to why he should not be committed to civil jail.

He was committed to civil jail on 7/12/89.

He filed this second petition on the same day. The intention is certainly to enable the petitioner to be released from civil jail. But the mere presentation of a petition by the debtor to evade a committal order is not an abuse of the process of the court and the debtor's petition is a proper case should be allowed – *Re Betts –v- Official Receiver* [1901] 2 KB 39.

In *Re A. Debtor (No. 17 of 1966)* [1967] 1 All ER 668, the Chancery Court reviewed several English decisions and stated at page 672, that the ratio decidendi those cases was that the debtor was entitled to use the machinery of the Bankruptcy Act for his own purpose so as to shield himself from further liability to committal or other harassment.

Mr. Ogola, the learned counsel for the petitioner submits that once the petitioner has complied with the Bankruptcy Act and the Rules, the Bankruptcy court has no discretion to refuse to make a receiving order. The case of *Re Betts* (supra) however shows that there is a limit to debtors immunity and if it appears as a fact that a debtor is on the habit of filing bankruptcy petitions to get rid of his liabilities so as to defraud the creditors, then he should not be protected by the Bankruptcy Act.

In *Re A. Debtor* (supra), the Court refused to give protection to the debtor on the ground that as the

debtor had obtained an order to pay the debt by instalments, the presentation of the Bankruptcy Petition was an abuse of the process of the Court.

The word used in section 5 of the Bankruptcy Act is “may” giving the Court discretion to make or not to make a receiving order either on a creditor’s petition or a debtors’ petition.

*In Re Bond* (1888) 21 QBD 17, the court in interpreting section 8 of the English Bankruptcy Act 1888 which was in *para materia* with section 8(1) of our Bankruptcy Act, stated at page 20:-

“Now, having regard to that section, it is undoubtedly, the imperative duty of the court to make a receiving order where the petition is a proper petition; but, where the petition is, as it is in this case, an abuse of the process of the court ... the court has power to refuse to make the receiving order, and when it appears that the receiving order has been wrongfully made, to rescind it.”

So, if the petition is proper and is not an abuse of the process of the Court, then it is imperative that the Court should make a receiving order but not otherwise.

The petitioner has filed a Statement of Affairs. The Statement of Affairs as provided by section 16(1) of the Bankruptcy Act should among other things, show the particulars of the debtors’ assets.

List “H” of the Statement of Affairs where the debtor is required to indicate whether or not he possesses the properties listed, is partially completed. He has not indicated whether or not he possesses the properties listed as (e) to (n) in that form. The same error was made in respect of Bankruptcy Cause No 3 of 1989 and I pointed it out.

The debtor has not fully disclosed his properties and to that extent, the Statement of Affairs is not in accordance with the provisions of s 16 of the Bankruptcy Act. The proviso to section 8(1) of the Bankruptcy Act gives court jurisdiction to refuse to make a receiving order in those circumstances.

Secondly, in HCCC No. 26 of 1988, the Court found that the petitioner owns a shop and that he is not poor. The Court further found that the petitioner had dishonestly transferred a motor vehicle and received shs 180,000/- after the judgment in that suit was entered to defeat execution.

The court further considered in that case whether it was proper to issue a receiving order under s 102 of the Bankruptcy Act instead of making a committal order. The Court found that it was not a proper case to make a receiving order.

The petition was filed on the same day soon after those findings.

If this petition is entertained in the above circumstances, the result will be that this court will be sitting on appeal against the refusal to make a receiving order in HCCC No 26 of 1988 and indeed against its finding regarding the conduct of the petitioner and his Statement of financial affairs. I think that the proper procedure was for the petitioner to seek leave to appeal against the committal order in HCCC No 26 of 1988.

In the light of the above circumstances, I conclude that this petition is an abuse of the process of the Court.

In para. 324 note No. 1 of *Halsbury’s Laws of England*, Vol. 3, page 194, 4th Edn., the case of *Re Bachelor*, where the Court having dismissed the first petition for fraud, dismissed the second petition with

an order that no further petition be filed without leave, is referred to. This is the second petition.

In HCCC 26 of 1988, the Court refused to make a receiving order under s 102 of the Bankruptcy Act. This is in effect the third time the court has considered whether or not a receiving order should be made against the petitioner and refused to it.

The whole intention of these petitions is to avoid compensating victims of accident injured in the petitioner's improperly insured *matatu*.

It is just in the circumstances to debar the petitioner from continuing to flood the Court with similar petitions.

I dismiss the petition with an order that the petitioner should not file any other Bankruptcy petition without leave of the Court.

Dated and Delivered at Mombasa this 15<sup>th</sup> December, 1989

**E.M. GITHINJI**

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**JUDGE**



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