

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
IN THE MATTER OF THE BANKRUPTCY ACT CAP 67

AND

THE MATTER OF A PETITION FOR A RECEIVING ORDER BY MARIA K MUTESI
(DEBTOR)

BANKRUPTCY PETITION NO 5 OF 2011

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from a bankruptcy petition lodged under sections 4, 7, and 10 of the Bankruptcy Act cap 67 sections 2 (f), (g), (h), 2 (2), 7 (1), and 9 and 28 (1) of the Bankruptcy Act cap 67 and section 40 (4) of the Civil Procedure Act.

The facts in the petition are that the Petitioner is a resident of Munyonyo at Kampala and a property agent dealing in buying and selling of real estate and had been earning a living while still at her office premises at Kibuli in Kampala. The petition shows that she is unable to pay her debts on the basis of which she seeks a receiving order in respect of her estate and order of discharge. The Petitioner is a judgment debtor pursuant to a judgment in **Civil Suit No. 814 of 2011 at Mengo Chief Magistrate's Court** between **Mushana Julius vs. Maria K Mutesi (the petitioner herein)**. She owes the judgment creditor a sum of **Uganda shillings 7,216,000/=** as the taxed costs of the suit and **Uganda shillings 36,760,000/=** being the decreed amount. The Petitioner avers that she is unable to pay her debts and her effort to persuade the judgment creditor to give her time were futile in that she was arrested on 23 November 2011 pursuant to execution proceedings before the Registrar Execution Division of the High Court. She

declares that she is unable to pay debts and to satisfy her creditor's claims against her. The Petitioner lodged with the Official Receiver a statement of her affairs and has duly paid the prescribed fees thereof. The statement of affairs shows that she has no assets whatsoever. In addition to the judgment creditor she owes another **Uganda shillings 11,000,000/= to Mr. Richard Byamugisha, Uganda shillings 150,000,000/= to M. Pesa Micro Finance Ltd and Uganda shillings 29,600,000/= to Mr. George Okot.** By the time the petition was presented the petitioner was in prison in respect of her civil debt to the Judgment Creditor mentioned above. The Petitioner filed M.A. No. 706 of 2011 for stay of execution and an order for her release from civil prison pending the hearing of the bankruptcy petition. I granted the application and execution proceedings were stayed pending the hearing of the bankruptcy petition on the 21st day of December 2011. The Petitioner's petition was accordingly argued on 22 February 2012.

At the hearing the Petitioner was in court and represented by Counsel John Toa. Learned Counsel submitted that the Petitioner had fulfilled the requirements of the Bankruptcy Act for being adjudged bankrupt in that she committed an act of bankruptcy under section 2 of the Bankruptcy Act and prayed that a receiving order be made in respect of the petitioner and estate and an order of discharge be granted.

I have carefully considered the petition, the affidavit in support and attachments thereto together with the submissions of counsel. I have also considered the authorities cited by learned Counsel. In my previous ruling I posed the question as to whether the petitioner who clearly indicates that she has no assets should be granted a receiving order in respect of her estate. I also held that bankruptcy proceedings take precedence over execution proceedings. I was persuaded by the three precedents cited in that ruling and the Bankruptcy Act. In the case of **Marley Tile Co Ltd v Burrows and another [1978] 1 All ER 657**; at page 661 Lord Denning MR said:

“It comes to this: when the money is paid in order to avoid a sale, it is vested in the execution creditor. The sheriff holds it for that execution

creditor, and is liable to be sued by the execution creditor if the money is not received by him. On the other hand, an embargo is put on it for 14 days. If within that 14 days notice of bankruptcy is received, the money does not go to the execution creditor, it goes to the trustee in bankruptcy for the benefit of all the creditors. But if notice of bankruptcy is not received within the 14 days, then the title of the execution creditor becomes absolute and is not liable to be divested.”

The decision of Lord Denning MR turned on the wording of section 41 of the English Bankruptcy Act which is in *pari materia* with section 43 of the Ugandan Bankruptcy Act. The statutory provisions dealt with the question of whether the bankrupt estate vests in the court bailiff or the trustee in bankruptcy or official receiver. The question of whether the attachment and execution was made and whether the judgment creditor was paid and the time for the obtaining of the bankruptcy receiving order are relevant questions on the issue of vesting of property. Once the execution bailiff has been notified of the bankruptcy notice the provision ensures that bankruptcy proceedings take precedence over execution proceedings. It is necessary to set up section 43 of the Bankruptcy Act of Uganda in its entirety. It provides as follows:

“43. Restriction of rights of a creditor under execution or attachment.

(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him or her, he or she shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he or she has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the

debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the bailiff shall, in all cases, acquire a good title to them against the trustee in bankruptcy.”

The provisions provide that where bankruptcy proceedings have been commenced, the judgment creditor who has issued execution proceedings cannot retain the benefit of the execution proceedings unless the execution has been completed. And execution is deemed to be completed by seizure and sale of the judgment debtor's goods if the seizure and sale itself does not constitute an act of bankruptcy. In this case we are dealing with a situation where the Petitioner was arrested in pursuance of the judgment debt and put in a civil prison. Before we conclude this matter which must keep in mind the fact that the Petitioner avers that she has no assets. Additionally section 44 of the Bankruptcy Act provides as follows:

“44. Duties of a bailiff as to the goods taken in execution.

(1) Where any goods of a debtor are taken in execution, and before the sale of the goods, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the bailiff that a receiving order has been made against the debtor, the bailiff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part of the goods, for the purposes of satisfying the charge.

(2) Where, under an execution in respect of a decree for a sum exceeding four hundred shillings, the goods of a debtor are sold or money is paid in order to avoid sale, the bailiff shall deduct his or her costs of the execution

from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him or her of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor on the bankruptcy petition or on any other petition of which the bailiff has notice, the bailiff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor.

(3) Where any goods in the possession of an execution debtor at the time of seizure by a bailiff are sold by the bailiff without any claim having been made to those goods, the purchaser of the goods so sold shall acquire a good title to the goods, and no person shall be entitled to recover against the bailiff or any other person lawfully acting under his or her authority, for any sale of the goods or for paying over the proceeds of the sale prior to the receipt of a claim to the goods, unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor.

(4) Nothing in subsection (3) shall affect the right of any claimant, who may prove that at the time of sale he or she had a title to the goods, to any remedy to which he or she may be entitled against any person other than that bailiff.”

The summary of the provisions are that:

- The Bailiff is obliged to hand over goods to the Official Receiver where execution is not completed.
- Where the goods of the judgment debtor are sold or money has been paid to save it from being sold and the bailiff receives notice under the Bankruptcy Act, he or she shall be obliged to hand over the money to the Official Receiver less his or her costs of the execution.

- Where goods are sold without notice of the bankruptcy proceedings, the purchaser acquires good title without prejudice to the rights of any claimant having good title to the goods.

In the case of Re Andrew, Official Receiver, v Standard Range and Foundry Co Ltd [1936] 3 All ER 450. The Court of Appeal considered the construction of the Bankruptcy Act 1914 section 40 thereof and the question of the true meaning of the words "the benefit of the execution or attachment" The section considered provides in sub-s (1) that the creditor is not entitled to retain the benefit of attachment:

‘against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.’

The definition in sub-s (2) provided:

‘For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.’

The Official Receiver, as trustee in the bankruptcy, claimed a sum of £53 11s 6d, being sums paid to the respondents on account of a judgment debt up to 13 May 1935. The issue was whether he has a right to do so:

Lord Wright MR at page 465:

“...The operation of the section in such cases is limited to cases where there is at the date of the receiving order, or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy, still on foot a subsisting execution, and is limited to the balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the

still incomplete execution, which may be affected by the operation of s 40(1). In this connection the result is the same whether the payment has been made to avoid seizure or to avoid sale, or whether the partial discharge of the debt has been effected by a sale of goods under an execution which is kept on foot in order, if possible, to realise enough to pay the balance of the debt.” (Emphasis added)

The question in this case is whether execution was completed by the arrest and detention of the judgment debtor in a civil prison. In my ruling in the petitioner’s application for stay of execution proceedings I considered the provisions of the Civil Procedure Act at length.

Section 40 (4) Civil Procedure Act provides:

“(4) Where a judgment debtor expresses an intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the court, that he or she will within one month so apply, and that he or she will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he or she was arrested, the court shall release the judgment debtor from arrest, and, if he or she fails so to apply and to appear, the court may either direct the security to be realised or commit the judgment debtor to prison in execution of the decree.

What is critical in section 40 (4) of the Civil Procedure Act as far as the appropriate forum is concerned is the fact that the court may release the judgment debtor from arrest upon application for declaration of insolvency and furnishing of security for due performance or appearance. In such cases the court which releases the judgment debtor is the execution court. Secondly, section 42 of the Civil Procedure Act which deals with release from detention provides that detention may not exceed six months.

The procedure for arrest, detention, examination and release of a judgment debtor by the court executing the decree are provided for under order 22 rules 34 – 38 of the Civil Procedure Rules. Section 40 of the Civil Procedure Act deals with

the application for release from prison based on an intention to apply for a declaration of insolvency. It is the court executing the decree which is notified of that intention. What is important is that the court executing the decree may discharge the insolvent upon being satisfied that there is an application for a declaration of insolvency. The order of discharge is one of the orders sought in this petition under section 40 of the Civil Procedure Act.

I noted that in this case the judgment debtor has no security to give to assure her attendance in court. Secondly under the Civil Procedure Act proceedings for discharge are brought before the court executing the decree or the court to which the decree has been sent for execution. The committal Registrar of the Execution department is responsible as far as proceedings under sections 40 – 43 of the Civil Procedure Act are concerned.

As far as the bankruptcy petition is concerned the application was brought under section 10 of the Bankruptcy Act. A bankruptcy petition is an action for a receiving order of the estate of the debtor. Section 4 of the Bankruptcy Act provides that:

“...if a debtor commits an act of bankruptcy, the court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.”

The judgment creditor is a creditor and cannot be said not take priority over other creditors where execution has not been completed. The Petitioner was arrested on 23 November 2011 and a bankruptcy petition was filed on 5 December 2011. It cannot be said that execution had been completed. In any case, arrest and detention may not be an end but a means to an end. The judgment debtor may secure her release upon payment of the judgment creditor or the judgment debt. This has not happened and the petitioner has petitioned this court for a declaration of insolvency and for an order to be adjudged a bankrupt.

This court released the petitioner from civil prison under the provisions for stay of proceedings and execution under section 10 of the Bankruptcy Act which provides that:

“10. Power to stay pending proceedings

(1) The court may, at any time after the presentation of a bankruptcy petition, stay any action, execution or other legal process against the property or person of the debtor; and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.”

The court has power to stay legal process against the property or person of the debtor upon proof of presentation of a bankruptcy petition. Such order may be served on the plaintiff or other party prosecuting the execution proceedings. In this case the order of stay of execution was made on 21 December 2011. However, the affidavit of Bundu Richard avers that the ruling was obtained on 16 January 2012. The affidavit was sworn on 21 February 2012. It shows that the High Court office of the Committal Registrar was served on the 17th of January 2012. On the same day counsel for the judgment debtor Messrs Birungi and Co Advocates were served with a copy of the ruling of the court dated 21st December 2012. The record shows that an order was extracted 16th January 2012 and issued by the registrar of the commercial court on the same day. There is no plausible explanation if at all why the ruling of the court was not served immediately it was delivered on the 21st of December 2011.

The filing of a bankruptcy petition is an act of bankruptcy under section 2 (1) (f) of the Bankruptcy Act cap 67 Laws of Uganda. This section provides that the act of a court declaration of inability to pay his or her debts or the presentation of a bankruptcy petition as in this case constitutes an act of bankruptcy.

Whatever may have prompted the Petitioner to file her own bankruptcy petition it is the duty of this court to ensure that the petition is not used as an abuse of

the process of this court as a ploy to avoid execution proceedings. In other words, the circumstances of the petitioner has to be inquired into so as to establish whether she is hiding some assets and what could have happened to any transactions she may have been involved in as someone dealing in real estate. In the application for stay of execution proceedings I posed the question as to what purpose a bankruptcy petition for the appointment of the Official Receiver would serve if there is no property to be vested in the Official Receiver.

The petition avers on oath that the Petitioner is insolvent and has no assets to satisfy any creditors. It also indicates that there are several other creditors to whom the Petitioner owes money.

Proceedings in bankruptcy are meant to compulsorily administer a person's estate for the benefit of his or her creditors generally. The primary objective of bankruptcy law is to administer the estate of an insolvent so as to enable him or her pay his or her debts. The law facilitates a fair and equal distribution of available property of the petitioner among the creditors. Secondly the object of the law is to free the debtor of his or her debts in order that the debtor may make a fresh start as soon as the debtor is discharged by the court. Thirdly bankruptcy proceedings enable the court and the official receiver and the creditors as well to establish the reasons of the insolvency of the debtor and presumably deter people from rashly incurring debts which they are unable or unwilling to pay.

The act of avoiding creditors such as keeping house, leaving the jurisdiction of the court, the fraudulent conveyance of property to avoid creditors are acts of bankruptcy censured by the proceedings in bankruptcy. This protects the business community especially creditors who are disadvantaged by the above listed acts. Several laws such as the Constitution of the Republic of Uganda bar potential members of Parliament from running for office if ever they are adjudged bankrupt. One may not run for the office of the Local Council 5 Chairperson of a district etc.

I have carefully considered the purpose of the law and the petitioner's petition. The Petitioner has not, by bringing this petition per se, dodged the execution proceedings in respect of **civil suit number 814 of 2011 the case of Mushana Julius versus Maria K Mutesi**. Execution proceedings were merely stayed. As noted earlier, it is the court executing the decree that may discharge the petitioner. I need to revisit section 40 of the Civil Procedure Act. Section 40 (3) provides that the court executing the decree may inform the debtor that he or she may apply to be declared an insolvent. The petitioner applied to be declared an insolvent by lodging bankruptcy proceedings in this court. It cannot be said that stay of execution is the release of the judgment debtor under the provisions of section 42 (2) of the Civil Procedure Act. I have already noted that proceedings under the Civil Procedure Act are proceedings before the court executing the decree. Such proceedings by necessary implication have to be conducted with the participation of the judgment creditor. The bankruptcy petition on the other hand has been presented ex parte and the Official Receiver who was originally a party requested to be struck off. The Official Receiver was accordingly struck off on 21 December 2011 and the petition proceeded ex parte and in the absence of the Judgment Creditor. In my ruling on the 21st of December 2011 I noted that it would be a serious impediment to justice if the Judgment Creditor was not heard in proceedings under the Civil Procedure Act which proceedings are conducted before the court executing the decree. The provisions of the Bankruptcy Act section 10 thereof however, allow the High Court to stay proceedings in any other suit pending the hearing of the bankruptcy petition. This is what happened in this case. For the reasons stated above the petitioner's petition for an order of discharge which is presumably an order issued under the Civil Procedure Act section 40 thereof is disallowed. She can only be discharged by the court executing the decree, though the proceedings thereof were stayed under section 10 of the Bankruptcy Act cap 67.

I am satisfied that the debtor has committed an act of bankruptcy in that she presented a bankruptcy petition declaring her inability to pay her debts as and when they fell due. She has additionally failed to pay the Judgment debt hence

her committal to a civil prison. The Petitioner is a debtor as defined under S. 2 (2) of the Bankruptcy Act as follows:

“In this Act, unless the context otherwise requires, “debtor” includes any person, whether domiciled in Uganda or not, who at the time when any act of bankruptcy was done or suffered by him or her—

(a) was personally present in Uganda;

(b) was ordinarily resident or had a place of residence in Uganda;

(c) was carrying on business in Uganda, personally, or by means of an agent or manager; or

(d) was a member of a firm or partnership which carried on business in Uganda, and for the purposes of Part IX of this Act includes a person against whom bankruptcy proceedings have been instituted in a reciprocating territory and who has property in Uganda”.

As a debtor the Petitioner was personally carrying on business in Uganda and was personally present in Uganda at the time the act of bankruptcy was committed. The filing of a bankruptcy petition by the debtor himself or herself amounts to an act of bankruptcy under section 2 (1) (f) of the Bankruptcy Act.

Under S.2 (1) (f) of the Bankruptcy Act,

“A debtor commits an act of bankruptcy in each of the following cases—

(f) if he or she files in the court a declaration of his or her inability to pay his or her debts or presents a bankruptcy petition against himself or herself;”

Furthermore section 7 of the Act provides that the debtor's petition shall allege that he or she is unable to pay his or her debts and presentation of the petition shall be deemed to be an act of bankruptcy. A bankruptcy petition filed by a

debtor cannot be withdrawn without the leave of court under section 7 (2) of the Bankruptcy Act.

In the circumstances I am satisfied that the petitioner has committed an act of bankruptcy and a receiving order is hereby issued in respect to her estate in terms of section 4 of the Bankruptcy Act. Whatever her state of affairs, this shall be the subject of enquiry by the Official Receiver who will give opportunity in due course to all the creditors as provided by the law. Inquiry of affairs is supposed to establish the truth i.e. what did she take the money for and what happened to it in actual fact etc. The costs of this petition are in the cause of the administration of the estate of the Petitioner if any.

This ruling shall be served on the Judgment Creditor in Mengo Chief Magistrate's Court **Civil Suit No. 814 of 2011 Mushana Julius versus Maria K Mutesi** through the advocates Messrs Birungi and Company Advocates. The receiving order shall also be served on the registrar. Service must be effected within two days of this ruling.

Ruling delivered in open court this 28th day of February 2012.



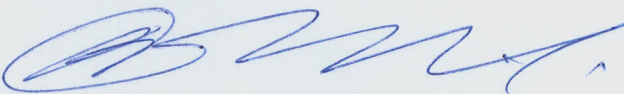
Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

John Toa for the Petitioner

Petitioner in Court

Ojambo Makoha Court Clerk



Hon. Mr. Justice Christopher Madrama

28th February 2012