

“You are specifically to note that the consequences of not complying with the requisitions of this Notice are that you will have committed an Act of Bankruptcy, on which Bankruptcy proceedings may be taken against you. If however you have a counterclaim, setoff or cross demand which equals or exceeds the amount claimed by Central Purchasing Company Limited in respect of the Judgment/Decree obtained and which you could not set up in the High Court Civil suit in which the said Judgment or Decree was obtained you must within seven (7) days apply to this Court to set aside this NOTICE by filing with the Registrar of the High Court of Uganda at Kampala an affidavit to that effect”

As a response, the Judgment Debtor filed a document entitled “NOTICE OF INTENTION TO OPPOSE BANKRUPTCY PETITION” on the 19/8/04; accompanied by an affidavit.

The Registrar set down the application for hearing on 5/10/04. When the advocates appeared before him on that day, he instead directed them to me in chambers. I was unable to entertain the matter on that day due to pressure of work and the short notice, so I adjourned it to 8/10/04 with consent of both counsel.

On 8/10/04, however, both the Judgment Debtor and his advocate did not attend Court and no reason was given to me for their none-appearance. Counsel for the Judgment Creditor Mr. Dennis Owor applied and I allowed him to present the application exparte under Order 9 rule 17 (1) (a) of the CPR.

The Law:

It is necessary for the purpose of this Ruling to remind ourselves of the procedure allowed by a Bankruptcy Notice. Section 2 of the Bankruptcy Act Cap 67 of the Laws of Uganda (Revised) begins with the words. “A debtor commits an act of bankruptcy in each of the following case –” and then follow a number of cases which in the view of the Legislature result in the conclusion that the debtor must be made liable. In sub - section 1 (g) we find the part material to this case which provides:

“(g) if a Creditor has obtained a final decree or final order against him or her (that is the debtor) for any amount and execution on the final decree or final order not having been stayed, has served on him or her a bankruptcy notice under this Act, and he or she does not within seven days after service of the notice, is affected either comply with the requirements of the notice or satisfy the Court that he or she had a counterclaim, set off or demand which equals or exceeds the amount of the decree and which he or she could not set up in the action in which the decree was obtained or the proceedings in which the order was obtained. For the purpose of this paragraph, and section 3, 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”

Under S.2 (1) (g) therefore, non compliance with the Bankruptcy Notice is an act of bankruptcy on which a bankruptcy petition can be founded.

Section 3 of the Act lays down conditions to be attended to in a Bankruptcy Notice. Section 3 (1) provides that:

“1. A bankruptcy notice under this Act shall be in the prescribed form and shall require the debtor to pay the amount in the decree or sum ordered to be paid in accordance with the terms of the decree or order or to secure or compound for it to the satisfaction of the Creditor or the Court, and shall state the consequences of non-compliance with the notice, and shall be served in a prescribed manner.”

The Bankruptcy Rules 1915, (U.K.) still regulate bankruptcy proceedings in Uganda by virtue of S.162 of the Act:-

The form for Bankruptcy Notices on Judgments or Orders of the High Court is found in Form No. 6 of the Appendix of Forms.

Rule 140 (2) says:

“There shall be indorsed on every bankruptcy notice an intimation to the debtor that if he has a counter claim, set off or cross demand which equals or exceeds the amount of the Judgment debt, and which he could not have set up in the action in which the Judgment debt, or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the Registrar.”

The format for this application is found in Form No. 9 of the Appendix of Forms to the Rules. If he does so, the filing of such affidavit operates as an application to set aside the bankruptcy notice. Form No. 9 is actually entitled:

“Affidavit on Application to set aside Bankruptcy Notice.”

There upon the Registrar has to fix a day for hearing the application. What the Court has to hear and determine upon such affidavit is:

“Was there a counterclaim, set off, or cross — demand which equals or exceeds the amount of the Judgment debt?”

Application of the law to the matter before Court gives the following conclusions:

The Bankruptcy Notice complied with section 3 of the Act and Rule 140 (2) of the Bankruptcy Rules. It is based on Form No. 6.

There is however, no affidavit as required by Rule 140 (2). Instead of filing the affidavit required by rule 140 (2), the Judgment Debtor filed a Notice of Intention to Oppose Bankruptcy Petition.”

As Mr. Owor rightly pointed out, this document is misconceived and does not comply with Rule 140 (2). It is a response to a non - existent Petition since there is no Petition filed in Court yet. What was issued by the Registrar and served on the Judgment Debtor is merely a Bankruptcy Notice and not a petition.

Secondly, and I agree with Mr. Owor, although the affidavit filed by the Judgment Debtor accompanying the Notice of Intention To Oppose the non-existent petition relates to the matter before Court, it is definitely not the kind of affidavit envisaged by Rule 140 (2) and Form No. 9. As pointed out earlier, the affidavit should on the face of it show a counter claim, set off or cross demand which equals or exceeds the Judgment debt which the debtor could not have set up in the action in which the Judgment or decree was obtained. The Judgment Creditor is not in Court to declare the Judgment Debtor bankruptcy yet, at this stage. The Judgment Creditor is only trying to show that the Judgment Debtor has committed an act of bankruptcy for which a bankruptcy petition may be brought against him consequently. See: (Re a Debtor (1935) 1 Ch. 347).

Under the law, once an affidavit fails to comply with Rule 140 (2) then the Judgment Debtor is held to have committed an act of bankruptcy. In this case, the affidavit filed by the Judgment Debtor states in the material part that:

“I Kahinda Otafire... do solemnly swear and state as follows: -

1. ...
2. ...
3. *That when the above decree was entered against me have been negotiating with the lawyers of Central Purchasing as to the mode and schedule of payment of the decretal sum as a way of settling the above debt.*
4. *I have obtained through Court Auctioneers an attachment warrant in HCCS No. 365/2000 and identified two plots of the Judgment Debtor on a case I won*

against him.

5. *That the proceeds from the above cell (sic) shall be remitted to the lawyers of the Judgment Creditors as soon as possible and the decree executed.*
6. *That I have other outstanding claims against Simon Kibule, Arthur Bosco Gidagui and Boniface Kakare which claims are being pursued.*
7. *That the above claims are substantial and when recovered will offset the debt of the Central Purchasing Company Limited.*
8. *That I have substantial assets and able to settle the debt.*
9. *That it is not true that I am unable to pay the above debt.”*

From the foregoing quotation, it is clear that there is no counter claim, set off or cross demand raised by the Judgment Debtor in the said affidavit. Under bankruptcy law, the only grounds that can be entertained in an application to set aside a bankruptcy notice are only those stated in the Act and the Rules aforementioned and no other. In fact the Registrar was wrong in setting this matter for hearing before me in the absence of such affidavit because in essence, there is no proper application within Rule 141 before this Court for setting aside the bankruptcy notice. See: *Re a Debtor* (supra).

In *re COLE Ex parte Attenborough* (1898) QB 29 Wright J. observed at page 193 as follows:

“The power to set aside a bankruptcy notice, it seems is confined to the grounds mentioned in the Act and Rules. In case of In re Easton, Ex parte Dixon Vangherd Willens J. said.”

“Where it is a bankruptcy notice, it seems to me the only reasons which can be entertained by the Registrar are reasons which are mentioned in S. 4, sub S. 1 (g) (equivalent to our 5. 2 (1) (g)) viz that the debtor has a counter claim, set off or cross demand which he could not set up in the action in which the Judgment was obtained.”

Further, in order to qualify under S.2 (1) (g) of the Act, the counter claim, cross demand or set off must be against the Judgment Creditor not third parties. The claim by the Judgment Debtor against other third parties including Simon Kibule, Arthur Bosco Gidagui or Boniface Kakare do not qualify for purposes of S. 2 (1) (g) of the Act.

See: In re A Bankruptcy Notice (1934) Ch. 141 (CA) Mangham L.J observed at page 141 that:

“Another thing which, in my opinion, is clear is, that the words “counterclaim, set off, or cross demand which equals or exceeds the amount of the Judgment debt” are words which refer to a counterclaim, set off or cross demand against the Creditor the statute does not use those precise words, but it is perfectly obvious that that is intended.

For instance it is possible, although the question does not arise here, if the Creditor possessed a bag of diamonds belonging to the Debtor of a value exceeding the amount of the Judgment debt, this bankruptcy notice would be set aside.”

In conclusion and for the reasons given therefore, it is clear that the Judgment Debtor has not complied with the requisitions of the Bankruptcy Notice served on him on 12/8/04. According to the Court record, the Notice has not been set aside by an affidavit. It still stands. It was not also complied with by either payment of the amount due although the Judgment Debtor has expressed his willingness to do so by affidavit and through correspondences on the Court record. The obvious consequence therefore follows that the Judgment Debtor, Hon. Col. Kahinda Otafire has committed an act of bankruptcy

under S. 2 (1) (g) of the Bankruptcy Act. In the circumstances, the Judgment Creditor may file a bankruptcy petition against him if it so wishes.

M.S. Arach - Amoko

JUDGE

12/10/04

Ruling delivered in Court in the presence of:

1. Mr. Owor Dennis for Judgment Creditor.
2. Okuni — Court clerk.

Absent: Judgment Debtor and counsel.

M.S. Arach — Amoko

JUDGE

12/10/2004