

UGANDA / JUDGMENT

Mohamed v El-Amri and Another (C.A. 8/1934) [1935] EACA 15 (1 January 1935)

[1935] EACA 15

COURT

East African Court of Appeal

BEFORE

Abrahams CJ, Ag P (Uganda), Law, C.J (Zanzibar),
Lucie-Smith Ag CJ (Kenya)

CASE / FILE NUMBER

C.A. 8/1934

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COURT OF APPEAL FOR EASTERN AFRICA.

Before ABRAHAM, C. J. (Uganda) Ag. P., LAW, C. J. (Zanzibar), and LUCIE-SMITH, Ag. C. J. (Kenya).

SHEIKH NASSOR BIN MOHAMED, Appellant. (Original Defendant No. 1) $\mathcal{L}$

1. ALI BIN AWATH EL-AMRI.
2. OFFICIAL RECEIVER FOR THE COLONY OF KENYA. Respondents (Original Plaintiff).

C. A. 8/1934 .

Practice-Execution-Power to make Receiving Order in lieu of Order of Committal—Appeal from Receiving Order—Civil Procedure Ordinance, sec. 38 (d)—Bankruptcy Ordinance. sections 99 and 100, Civil Procedure Rules. 0.19, r. 37 (1) $\mathcal{L}$.

A judgment creditor applied under sec. 38 $\mathcal{L}$ of the Civil Procedure Ordinance for execution by the arrest and committal to prison of the judgment debtor. The debtor made an offer to pay Sh. 20 per month which was not accepted. No evidence of means was given but the debtor was cross-examined as to whether he had not disposed of certain property prior to the institution of the action. The Court, with the consent of the judgment creditor, in lieu of making an order of committal, made a receiving order under sec. 99 of the Bankruptcy Ordinance.

- Held (24-9-34).—That a receiving order can only be made under section 99 of the Bankruptcy Ordinance, when the facts are such as would have justified the Court in making an order for committal, and that as, in the present case, it had not been proved that the debtor had been guilty of conduct touching any of the matters provided for in Order 19 r. 37 (2), an order for his committal to prison would not have been justified. *Markus v. Czeczowiczka* (1934, 1 E. A. Rep. 17) followed.
- Held Further.—That, whatever rights may be conferred on an insolvent by section 31 of the Bankruptcy Ordinance, he has also the right under section 100 to appeal from a receiving order as well as from an adjudication order.

Budheo for Appellant.

Ross for Respondents.

Budheo.—Section 38 (d) Civil Procedure Ordinance and Order XIX r. 37 (1) govern the matter. The judgment debtor cannot pay, he has not the means and until he is shown to

have means to pay and refuses, he cannot be committed; section 99 of the Bankruptcy Ordinance, therefore, cannot be invoked if a judgment debtor cannot, from poverty or other sufficient cause, pay the amount due.

In re *Markus v. Czeczowiczka* (Vol. 1 Ct. App. R. 17).

In re a debtor ex parte the debtor (1905, 1 K. B. 374).

Ross.—Appeal premature. Debtor should have applied to Court for amendment of order of adjudication under section 31 of the Bankruptcy Ordinance.

Budheo replied.

JUDGMENT.

LAW, C. J.—This is an appeal against a Receiving Order made against Appellant under the provisions of section 99 Bankruptcy Ordinance, 1930. The facts of the case are not disputed. On the 25th November, 1933, a suit was filed against the appellant on several promissory notes, which he did not contest, and judgment by default was given against him. On the 5th January, 1934, a notice to show cause was issued to the appellant under Order 19 Rule 34, and, in compliance therewith, he duly appeared before the Court on the 11th January, 1934, when he was examined as He then made an offer of Sh. 20 per mensem. to his means. His cross-examination was directed to show that he had disposed of certain property prior to the institution of the suit against him. As a result of this examination the Court made a Receiving Order against appellant under section 99 Bankruptev Ordinance in lieu of committing him to prison under Order 19 Rule 37. The ground of appeal is that there was no material on which to commit the appellant to prison and consequently the Receiving Order in lieu thereof was bad. It is quite clear from the evidence of the appellant that there was no allegation on the part of the decree-holder, which can be regarded as having been satisfactorily proved, that the appellant had been guilty of conduct

touching any of the matters provided for in Order 19 Rule 37(2)\$.

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In the circumstances the Court could not exercise a proper judicial discretion by committing the appellant to prison. It follows, therefore, that the Court had no jurisdiction to make a Receiving Order under section 99 Bankruptcy Ordinance. Apart from Order 19 Rule 37 (2), to ground such a committal there must first of all be an order to pay that amount which the debtor is shown to be capable of paying, and secondly a refusal or neglect to pay the sum so ordered, means to pay having been established. (*Otto Markus v. Bracia Czeczowiczka*, 1934, 1 E. A. Court of Appeal Reports, p. 17, at p. 21). The appellant's offer to pay Sh. 20 monthly was the only evidence in the case as to his means; this was not accepted and consequently there could be no question of his failure to pay.

It was urged, on behalf of the respondents, that no appeal lay from the Receiving Order, by reason of section 31 Bankruptcy Ordinance, and that appellant should first have had recourse to the Court to annul the Order for Adjudication which had followed the Receiving Order. Also, that the Receiving Order no longer existed but had become exhausted in the Adjudication Order which has not been appealed. I am unable to agree with these argu- An Adjudication Order is merely a further order in bankruptcy proceedings, and a Receiving Order must be regarded as continuing to stand till discharged. Further, whatever rights may be conferred on an insolvent by section 31, he nevertheless also has the right to appeal under section 100, from a Receiving Order as well as from an Adjudication Order. Both orders are orders in bankruptcy matters. The appellant asks, however, for this appeal to be treated as an appeal against the Adjudication Order as well as against the Receiving Order, as both are appeal-I would agree that it must be so regarded. It able Orders. would be improper, in my view, to allow the appeal only so far as the Receiving Order is concerned and to require the appellant to return to the Court for the annulment of the Adjudication Order.

In the circumstances, I would allow the appeal with costs and direct the Receiving Order to be set aside and the Adjudication Order to be annulled. Under Rule 17 of the Court of Appeal Rules, 1925, I direct that the Appeal Fees be a first charge on any monies which may be recovered under this judgment.

LUCIE-SMITH, Ag. C. J.-I agree.

ABRAHAMS, C. J., Ag. P.-I agree. It is obvious that the respondents' contention is untenable. Section 100 (2) of the Bankruptcy Ordinance gives a right of appeal against orders of the Court in bankruptcy matters. This incidentally grants specifically what section 66 of the Civil Procedure Ordinance grants in general terms, and I am unable to see how there is anything in section 31 of the Bankruptcy Ordinance which negatives these provisions or compels resort to them to be postponed. To say that application should first have been made to the Supreme Court in bankruptcy for anulment of the Adjudication Order on the refusal of which an appeal against the order of refusal could then have been made to this Court is to say that the Legislature designed

that a judge should be permitted to make a wrong decision twice before the decision can be corrected on appeal, I prefer a less circuitous method of doing justice.

As to the submission that the Receiving Order in some way vanishes when an Adjudication Order follows, I agree with my brother Law that a Receiving Order persists until set aside. But even if it no longer exists, that cannot avail the respondents as the appellant has asked that all proceedings in bankruptcy subsequent to the Receiving Order and all orders in bankruptcy arising out of or consequent in the Receiving Order be set aside, and therefore he is entitled to require us to set aside the Adjudication Order, to do which we must perforce inquire into the validity of the Receiving Order which is the ultimate foundation of the adjudication—I would allow the appeal, with an order for costs as suggested by my brother Law.

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