



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NYARANGI, MASIME & COCKAR JJ A)**

**CIVIL APPEAL NO 111 OF 1990**

**PAUL JOSEPH NGEI ..... APPELLANT**

**VERSUS**

**OFFICIAL RECEIVER..... RESPONDENT**

(Appeal from a Ruling and Order of the High Court at Nairobi (Akiwumi J) dated 14th June 1990 in High Court Bankruptcy Cause No 14 of 1988)

**JUDGMENT**

This is an appeal by the debtor, Mr Paul Joseph Ngei, against a ruling and order of Akiwumi, J whereby he adjudged the debtor bankrupt pursuant to section 20(1) of the Bankruptcy Act, cap 53 (the Act). The petition was filed on August 11, 1988 on a debt of Shs 133,457.15 being the amount due to the Middle East Bank Limited as at March 31, 1988 on a final judgment obtained against the debtor in High Court Civil Case No 2598 of 1988 together with interest thereon at the rate of 15% per annum from the said date until payment in full. On November 30, 1988, a receiving order was made on that petition.

An affidavit in support of the application that the court adjudge the debtor bankrupt states, *inter alia*, that on April 17, 1989 a state counsel attached to the official receiver addressed a letter to the debtor pointing out to him that he was required under section 16 of the Act to submit to the official receiver his statement of affairs within fourteen days from the date of the letter. Learned state counsel personally took the letter to the debtor who read it but declined to accept service. On May 11, 1989, the state counsel addressed another letter to the debtor. The letter was sent by registered post to the debtor's office within Uajiri House. By June 19, 1989, when the affidavit was sworn, the letter had not been returned. The affidavit states, further, that the debtor owes the firm of Continental Credit Finance a sum of Shs 15,302,184.35 as at May 15, 1989. The firm is under interim liquidation and the official receiver is the interim liquidator of the firm. By June, 1989 the debt had not been paid. The debtor was also indebted to seven other creditors namely, Income Tax Shs 389,323; Middle East Bank Shs 133,457.15; Arab Africa Finance Ltd Shs 134,421.00; Agricultural Development Corporation Shs 24,795.50; Kenya Commercial Bank, Moi Avenue Shs 78,785.00; Bank of Oman Shs 20,845.20 and Pan African Credit Finance Ltd Shs 16,856,307.00. According to the affidavit the total indebtedness of the debtor as at June 1989 was Shs 32,940,068.20. The debtor paid only Shs 20,000 to the official receiver on May 17, 1989 for distribution to the creditors.

The ruling the subject-matter of this appeal was as a result of the official receiver's report to the court dated May 4, 1990, and contains the following statements:

1. That a receiving order was made against the ..... debtor on the 30th day of November, 1988;
2. That at the first meeting of creditors of the said debtor held at the official receiver's office on the 30th day of May, 1990, the following resolution was passed: That Honourable Paul Joseph Ngei the above named debtor shall be adjudged bankrupt and that the official receiver do apply to the court to make the adjudication.
3. The official receiver accordingly, in pursuance of section 20 of the Bankruptcy Act, hereby makes application to the court to adjudge the said debtor bankrupt and to specify the period at the expiration of which the debtor shall apply for his discharge. We have already mentioned that on November 30, 1988, a receiving order was made on the petition filed in the superior court on August 11, 1988. A stay of the receiving order was made on May 18, 1989 following an application by the debtor for that order to be set aside. On November 9, 1989, Pall, J dismissed the debtor's said application for non-appearance and set aside the interim stay after the hearing had been adjourned on eight different occasions thereby enabling the official receiver to proceed with the instant bankruptcy proceedings.

On January 24, 1990, Sheikh Amin, J heard and granted the official receiver's application for a creditors' meeting to be held sixty days from January 24, 1990.

In the present appeal, Mr Mwirichia on behalf of the debtor Mr Paul Joseph Ngei asks that the order of June 14, 1990 adjudicating the debtor bankrupt be annulled with no order as to costs. First, it is said that the trial judge wrongly exercised his discretion in refusing an adjournment on June 14, 1990 and that it was an error for the judge to hold that no arguments are necessary under section 20(1) of the Act. Secondly, it is said that the application for the debtor to be adjudged bankrupt was incompetent having been made by Chamber Summons instead of by Notice of Motion. Mr Mwirichia further submits that the official receiver's application upon which Sheikh Amin, J ordered for the filing of a statement of affairs to be dispensed with and a meeting of creditors to be held within sixty days was *ex parte*, was not served on the debtor and was not a matter for rule 5(1) of the Bankruptcy Rules (the Rules). Counsel complained that the appellant was prejudiced as he was not heard and that in those circumstances the appellant could not move to set aside the order under the proviso to rule 16 of the Rules.

The essence of Mr Mwirichia's case on behalf of the appellant under ground eight of the Memorandum of Appeal is that the proceedings consequent upon the receiving order were contrary to rule 138(2) of the Rules. There was no notice requiring the appellant to attend on the official receiver so that the receiver could give instructions as to the furnishing of a statement of affairs. The official receiver should also have served the receiving order on the appellant as is required of him by rule 141.

Moreover, submitted Mr Mwirichia, the verified copy of a statement of affairs which the appellant submitted to the official receiver was not, contrary to rule 149(3) filed in court. Mr Mwirichia submitted that the official receiver ought to have filed the statement of affairs and thereafter proceeded to apply to the court for a mandatory public examination of the debtor as is required under section 17 of the Act. As matters stood, argued Mr Mwirichia, the appellant was not served to attend a public examination, no such examination was carried out by the court and the subsequent adjudication is rendered null and void. On that point, we were referred to paragraph 400 *Halsbury's Laws of England*, Fourth Edition, Volume three. Mr Mwirichia further developed his contention and submitted that as the first meeting of the creditors was held and also before a statement of affairs was filed, it meant that the creditors did not have before them material on which to decide whether or not to pass a resolution that the debtor be adjudged bankrupt. In those circumstances, said counsel for the appellant, any resolutions by the creditors contravene section 17 of the Act and is void.

With regard to total indebtedness, Mr Mwirichia refers us to rule 204 and says that no copy certified by the official receiver of the resolution of the first meeting of creditors was sent to the registrar to enable the court to be informed if any debts were admitted. This court was asked to note that Pan African Credit Finance Ltd filed their case against the appellant after the receiving order and that the claim of Shs 15,967,868/- is still pending for a decision. Yet the amount of that claim is part of the total amount owed. Also, that had the trial judge perused the statement of affairs as at March 31, 1990, it would have become

clear that several debts do not feature in the statement and that the just debt owed by the appellant is about one million shillings. It would then have become necessary to hold a public examination so as to ascertain the debts in which the issue of proof of debts would have surfaced.

Mr Mwirichia traced back the history of Continental Credit Finance Ltd to point out that this firm was under interim liquidation, a fact known to the official receiver. The proofs of debt in respect of the firm were secured and so Continental Credit Finance Ltd was not entitled to prove for the entire debt but were required under the rules to give credit for the sums assessed to be the value of the securities. It was submitted that the proofs do not comply with rules 9, 10 and 11 and that the official receiver improperly admitted them. The official receiver as liquidator could not do the proofs. A director of the firm as agent of the liquidator ought to have done the proofs. A conflict of interest could not be ruled out. Because the suit by Pan African Credit Finance Ltd is pending, the admission of any proof thereof would be improper.

Finally Mr Mwirichia took the procedural point. He said it was the duty of the High Court to ensure that the proceedings in bankruptcy are proper right from the start. Counsel told us that that was not done and as an example referred to the payment of Shs 117,000/= and of Shs 7,022/= by the appellant before the adjudication, a matter not disclosed to the court by the official receiver.

We wish to add that additional evidence was admitted with consent under rule 29 of the Rules of this Court. The additional evidence consisted of minutes of meetings of creditors held on:

23rd February, 1990

6th March, 1990

18th April, 1990 and

3rd May, 1990

Also, a copy of the Chamber Summons dated May 4, 1990 bearing the appellant's signature at the back of it, a copy of a letter dated February 6, 1990 sent by the then advocate for the appellant to the Attorney General, receipts for the payments of Shs 117,000/=, a statement of affairs in Bankruptcy Cause No 14 of 1988 dated March 31, 1990, with annexures, and proofs of debt for Shs 2,118,374/=, Shs 99,684/=, Shs 113,568/=, Shs 11,426,747/= and Shs 3,767,656/=. Mr Mwirichia took us through the minutes and submitted that as the time for submitting a statement of affairs was extended, no order could properly be made under section 20(1) of the Act, that the judge erred in holding that no statement of affairs was submitted by the appellant, that the first meeting of creditors was held on February 23, 1990 and that if the resolution to adjudge the debtor bankrupt had been passed on March 6, 1990, he would have had no quarrel with it.

We must now turn to counsel for the respondent's submissions. Mr Ole Keiwua contends that in considering the appellant's case that the judge erred in refusing to grant an adjournment on June 14, 1990, this court ought to bear in mind the nature of the appellant's conduct. Counsel said that the appellant's application for the receiving order to be set aside was adjourned eight times. All those adjournments were at the request of counsel for the appellant each of whom cited lack of instructions from the appellant. Basically, Mr Ole Keiwua's argument is that the judge exercised his discretion properly in refusing to adjourn any more. Replying to the complaint that the minutes of the meeting of creditors were not received in good time to enable the appellant to prepare his case, Mr Ole Keiwua said there is evidence that the appellant attended those meetings contrary to what learned state counsel told the judge and he was therefore in a position to brief his advocate. Besides, the application before the judge had attached to it the minutes of the meeting of May 3, 1990. The appellant was served with the application on May 16, 1990.

It is the respondent's case that even if the judge had had access to the minutes of the three meetings of creditors, he would still have refused to adjourn the hearing.

With reference to a statement of affairs, Mr Ole Keiwua submitted that dispensation of that statement before the first meeting of creditors meant that it could not be produced later. Also, that by June 14, 1990, the two weeks allowed for the submission of a statement of affairs had expired. In any case, argued Mr Ole Keiwua, a statement of affairs which was not duly verified was returned to the appellant because it did not comply with rule 149(2). We were referred to the affidavit in support of the Chamber Summons dated May 4, 1990 and informed that the appellant declined to accept service of a copy of the receiving order and two sets of statement of affairs forms. For that reason, submits Mr Ole Keiwua, the official receiver could not comply with rule 149(1), and so the official receiver had to apply to the court to dispense with the receipt of a statement of affairs.

As to the point on rule 204, Mr Ole Keiwua told us that it should be read with section 14 of the Act. It was submitted that as the appellant did not submit a scheme of composition, no resolution in terms of rule 204 was passed. There is no basis, therefore, for the complaint that the minutes were not sent to the Registrar. Mr Ole Keiwua said that looking at the minutes of the creditors meeting of April 18, 1990, the time for filing a scheme of arrangement expired on April 25, 1990 so that as at May 3, 1990 the appellant had lost his opportunity of extension of time to file a scheme of arrangement. So far as the respondent is concerned, resolutions under section 14 of the Act were passed for the first time on May 3, 1990 and as that resolution was attached to the application the subject-matter of this appeal, rule 204 was taken care of.

Of the illness of Mr Mwirichia for three days prior to the hearing date, Mr Ole Keiwua says the appellant should have instructed his advocate earlier, having been served with a copy of the Chamber Summons on May 16, 1990.

Nor could Mr Ole Keiwua accept that it was an error for the Chamber Summons to be supported by a report of the official receiver instead of by an affidavit.

In relation to the question whether the appellant was prejudiced by the adjournment of a meeting of creditors from February 23, 1990 to March 6, 1990, Mr Ole Keiwua urged us to notice that the meeting scheduled for March 6, 1990 had to be put off at the request of the appellant. On April 18, 1990 no resolution was passed. The appellant had so requested. The first resolution was therefore passed on May 3, 1990.

Even if the appellant was not served with the order made on January 24, 1990, the appellant yet attended the meeting of February 23, 1990. For that reason, Mr Ole Keiwua concluded that no injustice was occasioned. Counsel for the respondent argued that all the matters specified in section 20(1) of the Act had been met and therefore the judge had to adjudge the debtor bankrupt. Counsel disagreed that there were issues which required arguments before the judge could make the order of adjudication.

On the matter of public examination, Mr Ole Keiwua has urged us to look at section 17(1) and (2) of the Act to gather the purpose of a public examination. Counsel suggested that a statement of affairs is important for a public examination to enable the official receiver to know about dealings and property of the debtor. Without a statement of affairs it would be impossible to hold a public examination. It was submitted that section 16(1) and (2) do not require that a public examination be held before adjudication and the failure to hold such examination is not fatal to an adjudication.

Then Mr Ole Keiwua took another point concerning proofs of debt. Suffice it if we say that in the opinion of counsel, the appellant attended all the three meetings of creditors. The appellant did not challenge the proofs of debt. The quantum of the debts did not matter. There was, after all, a unanimous resolution for adjudication.

Dealing with the admission of proofs of debt claimed by Continental Credit Finance Ltd, Mr Ole Keiwua argued that the firm was under interim liquidation. The company was still functioning and had a board of directors. That is why the proof of debt was signed by Mr Philip Wahome.

We can now turn to the last ground. Counsel for the respondent conceded that there were payments

totalling Shs 117,000/= made to the official receiver and not disclosed to the court. Counsel submitted, however, that the total was a very insignificant sum against the whole claim of Shs 38 million and that even if the sum paid was disclosed to the court, it would not have mattered in the decision of the court to adjudge the debtor bankrupt. Counsel said that for the appellant to succeed in this appeal, he should indicate that he will pay the debts. We were urged to dismiss the appeal.

We hope we have done justice to the arguments advanced. At this juncture we must say that it is a grave matter for a man (including a woman) to be adjudged bankrupt. To make anyone bankrupt has immediate disabilities. As bankruptcy has quasi-penal consequences, the procedural steps contained in the Act must be viewed strictly – see *In the matter of Mota Singh*, [1934] KLR 33, *Nandra and Others v M Ram & Co Ltd* [1965] EA 753 and *Paul Joseph Ngei v Official Receiver*, Civil Appeal No 51 of 1981.

In this appeal, we have adopted a broad approach in the exercise of the unfettered discretion. For the appellant, any adjudication of bankruptcy would have adverse consequences under the Constitution of Kenya and under the National Assembly (Powers and Privileges) Act, cap 6.

We go on to add that, on the application of counsel, we allowed under rule 29 of the Rules of this Court additional evidence to be adduced. All that evidence was in the form of documents, will have an influence in the result and is credible and was produced by the appellant with the consent of the respondent. We shall include the additional evidence in our reappraisal of all the evidence.

We desire to add one more important matter. This is that, this is an appeal from a decision of the High Court (Akiwumi, J) in the exercise of its original jurisdiction. We therefore emphasise that it is within jurisdiction to re-appraise the whole evidence and draw our own inferences. In addition it is open to us where appropriate to invoke sub-section (2) of section 3 of the Appellate Jurisdiction Act, cap 9 which provides that:

“For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”

Turning now to the question of adjournment, it is clear from the proceedings before the High Court (Owuor, J) on May 23, 1990 that the appellant was allowed a short adjournment to brief some other lawyer after Mr Musili who had appeared for the appellant was permitted to withdraw from the proceedings. That afternoon, the appellant and his advocate Mr Mwirichia appeared and an application for an adjournment for one month was made. Owuor, J adjourned the hearing for three weeks. There was no reasonable explanation offered to us as to why the appellant did not adequately brief his advocate between May 23, 1990 and June 14, 1990. The appellant had knowledge of what had taken place about the bankruptcy cause. For instance, he had attended all the meetings of creditors, was in possession of or had access to the minutes of those meetings and on April 14, 1990 was served with the receiving order to which were attached two sets of statement of affairs forms. Besides, the appellant knew that the hearing of the matter had already been adjourned eight times. Owuor, J made it clear to the appellant that the hearing would go on after three weeks. These were her words:

“This matter shall go on to hearing not in one month’s time but in 3 weeks’ from today’s date. Hearing on June 14, 1990 at 9.30 am.”

Consequently we do not consider that the appellant and his advocate regarded the order made on May 23, 1990 as seriously as the circumstances warranted. It was his duty and that of his advocate to prepare for the hearing on June 14, 1990 in good time. Mr Mwirichia had ample time to receive the files from the appellant’s previous advocate and to obtain information from the appellant’s accountants.

The power of adjournment is given to the court by section 104(2) of the Act. That power is very wide indeed. The court is expected, of course, to exercise its discretion judicially. In the case of *Beck v Value Capital Ltd* (No 2) (Note) [1976] 1 WLR 572 at page 574, it was stated as follows:

“Where a trial judge is not shown to have erred in principle his exercise of a discretion should not be interfered with unless the appellate court is of opinion that his conclusion is one that involves injustice or, to use the language in *Evans v Bartlam*, [1937] AC 473 at page 486, the appellate court is clearly satisfied that the judge of first instance was wrong.”

In the circumstances, we do not accept that the result of the refusal of an adjournment has been to defeat the rights of the appellant. For that reason we decline to reverse the decision of the judge.

We were pressed to hold that the application by Chamber Summons upon which the judge adjudged the appellant bankrupt was incompetent. Mr Mwirichia observed that there was no affidavit in support and that the application was supported by a report of the official receiver. Counsel for the appellant urged us to find that the procedure followed contravened the Rules.

The existence, however, of the procedure followed by the official receiver is admitted by rule 264 which allows evidence in support of such an application to be given by a report of the official receiver to the court and need not be given by affidavit. The report however, is received by the court as *prima facie* evidence of the contents of the report. That is to say, the report may be challenged by evidence. Here the report was not even queried.

All the same under rule 15, the application for an order to adjudge the appellant bankrupt, should have been made by motion. The main question therefore is if the appellant was prejudiced by the course taken by the official receiver. We should state that the appellant was served with the application on May 16th, 1990. The appellant had an opportunity to brief his advocate. Notwithstanding that it was irregular to make the application by Chamber Summons, we do not consider that substantial injustice has been caused by the irregularity which will not therefore invalidate the proceedings of June 14th, 1990: see section 133(1) of the Act.

The question was raised whether the appellant filed a statement of affairs as required under the Rules. In this connection we must mention that on April 17th, 1989, a state counsel in the official receiver’s offices addressed and handed a letter to the appellant pointing out to him the statutory requirement for submission of a statement of affairs. The appellant was expected to hand in a statement of affairs by April 31st, 1989. The appellant, in his wisdom, declined to accept service. Another letter was sent to the appellant by registered post on May 11th, 1989.

The relevant section provides as follows:-

“16.(1) The debtor shall make out and submit to the official receiver a statement of and in relation to his affairs in the prescribed form, verified by affidavit, and showing the particulars of the debtor’s assets, debts and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

(2) The statement shall be so submitted:

(a) before, but not more than three days before, the date of the presentation of the debtor’s petition, and, upon such submission, the official receiver shall certify to the court under his hand that the statement has been duly submitted to him;

(b) within fourteen days of the date of the receiving order made on the petition of a creditor, but the official receiver may, for special reasons, extend the time.

(3) In the case of a creditor’s petition, if the debtor fails without reasonable excuse to comply with the requirements of this section he shall be guilty of an offence and the court may, on the application of the official receiver or of any creditor, adjudge him bankrupt and the debtor shall, in addition to any other punishment to which he may be liable, be guilty of a contempt of court and may be punished accordingly.”

The official receiver complied with that provision on April 17th, 1989. The appellant has not resisted the affidavit evidence that he declined service of the receiving order together with two sets of a statement of affairs. That being the factual position, the appellant cannot be heard to complain that rule 149 was not adhered to.

It was argued for the appellant that on April 18th, 1990 he submitted a statement of affairs. The true position is that the statement of affairs which the appellant attempted to submit to the official receiver was not in duplicate and no copy was verified as is required by rule 149(2). One has only to read section 16(1) of the Act to realise the necessity for verification. The particulars which have to be shown on a statement are so diverse and so vital for a public examination and a composition or scheme of arrangement that only a verified statement would be credible as arrangement showing assets, debts and liabilities and the other equally crucial particulars.

The particulars of a verified statement of affairs are so important that admissions made by a debtor in his statement of affairs can be used as evidence in criminal proceedings against him: *R v Pike*, [1902] 1 KB 552.

We were referred to the minutes of a meeting of creditors held on 6<sup>th</sup> March, 1990. The appellant and his advocate were present. The appellant's advocate informed the creditors present that the debtor's statement of affairs would be ready in the course of four weeks. The creditors resolved that the debtor should submit his statement of affairs to the official receiver within two weeks from the date of the meeting. The unverified statement of affairs produced by the appellant as additional evidence is dated April 18th, 1990.

The time for the submission of a statement of affairs is provided for under section 16(2)(a) of the Act and only the official receiver may extend the time: (section 16(2)(b)) and rule 150. The official receiver did not after May 11th, 1990, extend the time for submission of a statement of affairs. It was on May 11th, 1990 that a second letter was sent on behalf of the official receiver to the appellant in connection with a statement of affairs. The registered letter was not returned undelivered. The appellant is deemed to have received it. Despite that, he did not submit a verified copy of a statement of affairs.

It is, we hold, obvious that the appellant failed to submit a statement of affairs and so the official receiver could not file in court a verified statement of affairs.

It was agreed by counsel on both sides that no public examination of the debtor was held as provided in section 17(1) of the Act. Rule 151 states:

“When a receiving order has been made against a debtor, it shall be the duty of the receiver to make an application to the court to appoint a day and hour for holding the public examination of the debtor, and upon application being made, the court shall, by an order, appoint the day and hour for the public examination, and shall order the debtor to attend the court upon that day and at that hour.”

If the debtor, having been served, fails to attend without good cause, the court may, without any further notice to the debtor, issue a warrant of arrest.

During a public examination, a debtor is examined as to his conduct, dealings and property. A public examination of a debtor is therefore a necessary step in bankruptcy proceedings. It is clear from the account we have given that the appellant did not submit a statement of affairs. A public examination of him as to his conduct, dealings and property would not, in our view, be meaningful without his statement of affairs. Nor could the appellant be expected to make a proposal for a composition in satisfaction of his debts under section 18 of the Act without a statement of affairs. Mr Mwirichia contends that the failure to hold a public examination is fatal and renders the adjudication null and void. There was no authority directly covering that submission. It will be observed that section 17(1) is expressed to be:

“save as provided in this Act”.

The other provisions which limit the requirement of public examination are to be found in section 17(10)

and section 18(7) of the Act. But by section 33(1) of the Act the court has authority to halt the normal process of bankruptcy by annulling the adjudication.

It seems to us that where the court exercises its discretion under section 33, the provisions of section 17(1) are by implication displaced. If the court is satisfied of the fact that no statement of affairs was submitted and therefore that a crucial step in the ordinary process of bankruptcy was not undertaken, we find it difficult to suppose that the legislature intended that a public examination must, in all cases, be held before adjudication. Paragraph 399, *Halsbury's Laws of England*, Fourth Edition, Volume 3 states *inter alia* that a public examination is held as soon as

“conveniently may be after the expiration of the time for the submission of the debtor’s statement of affairs. See also section 17(2) of the Act.”

In our judgment, therefore, there is no reason why a public examination could not be held after a debtor submits his statement of affairs and when the debtor intends to make a proposal under section 18 of the Act.

So we are satisfied that in this case it is not fatal to the adjudication that a statement of affairs was not submitted. It would be unfair to creditors for a debtor’s refusal to submit a statement of affairs to be permitted to interfere with, delay or frustrate the process of bankruptcy.

On the facts of this case, creditors resolved that the appellant be adjudged bankrupt without having received a statement of affairs. Counsel for the appellant contends that the resolution of creditors cannot stand.

The appellant of course knew that creditors would deliberate whether or not he should be adjudged bankrupt. The appellant attended the meeting of February 23rd, 1990. Agenda number three concerned that particular issue. On March 6, 1990 the appellant was informed to submit his statement of affairs within two weeks from that date. His advocate was present at the meeting. On April 18th, 1990 another meeting of creditors was held. The appellant had still not submitted his statement of affairs. In those circumstances it does not lie in the mouth of the appellant to urge that creditors could not resolve as they did. The fact of the matter is that creditors wanted to be paid their money, the sum of money which the appellant had on March 6, 1990 promised to repay in full.

It is common ground that suit number HCCC No 1528 of 1990 by Pan African Credit Finance Ltd for a claim of Shs 18,543,070.00 against the appellant is still pending before the High Court. In view of that, it was an error for that amount to be included in the proofs of debts. We exclude that claim from these proceedings.

We do not think that anyone would quarrel with the accommodating decision of creditors to allow the appellant four weeks from March 6, 1990 to prepare and present his scheme of composition for discussion by creditors. At the meeting held on April 18th, 1990, the appellant earnestly pleaded for more time from the creditors so as to prepare his scheme of composition.

The creditors present agreed to give the appellant time to April 25th, 1990. The appellant was told that was the last chance they were extending to him. So, on May 3rd, 1990 creditors resolved that the appellant be adjudged bankrupt.

In our judgment, for the purpose of section 14 of the Act, the meeting of May 3rd, 1990 was the first meeting and as the resolution to adjudge the appellant bankrupt was attached to the Chamber Summons upon which the adjudication in bankruptcy was made, rule 204 was complied with.

Mr Mwirichia, on behalf of the appellant, mounted a lengthy argument on the issue of proofs of debt. The argument was partly based on the fact that the firm of Continental Credit Finance Ltd was under liquidation. The additional evidence adduced included a statement of affairs dated April 18th, 1990. Counsel for the appellant submits that if the judge had the statement of affairs before him, it would have

become evident that the just figure representing all debts owed was about one million shillings.

However, there is at least one fact of importance to bear in mind in this connection. That is that during the meeting of creditors held on March 6th, 1990, neither the appellant nor his advocate queried the proofs. Indeed, the appellant appealed to the creditors to give him time to arrange to pay them. And he promised to pay them all. Not once did he say or imply that as far as he was concerned he owed a total of about one million shillings. The next meetings of April 18th, 1990 and May 3rd, 1990 were concerned with the appellant's debts. Not once did the appellant question the total amount claimed. He has disputed the amount before us and he relies on a statement of affairs which we hold to be inadmissible in evidence for non-compliance with rule 149(2).

It appears unlikely that the appellant would have remained silent at the two meetings if he had reason to believe that creditors were presenting exaggerated or inaccurate figures. We are not persuaded that we should accept a contrary inference over the issue of proofs. The creditors were unanimous that the appellant be adjudged bankrupt.

The firm of Continental Credit Finance Ltd was under interim liquidation, had a board of directors and was functioning. The proofs of debt related to that firm were therefore properly signed for by a director of the company. It is correct that the appellant made payments totaling Shs 117,000/= which sum is not reflected in the proofs. That sum together with the claim of the Pan African Credit Finance Ltd are excluded from the total indebtedness. That means that the creditors are owed some Shs 19,252,467.00

Thus far, the position is that after the receiving order was made against the appellant, creditors held a meeting at which the appellant attended. The creditors considered the matter of scheme of arrangement, whether the debtor should be adjudged bankrupt, the mode of dealing with the debtor's property and the debtor's estate. The creditors resolved that the appellant be adjudged bankrupt.

In these circumstances, we think it is plain that there was compliance with section 14 of the Act.

Accordingly, on the additional evidence placed before the court and which we have re-appraised and drawn inferences of fact from, and pursuant to section 3(2) of the Appellate Jurisdiction Act, cap 9, we reach the conclusion that it is right, on different grounds from those which found favour with Akiwumi, J to adjudge the appellant bankrupt and we do so under section 20(1) of the Bankruptcy Act. The debtor shall apply for discharge after a period of two years from today. Thus, we uphold the decision of the High Court and dismiss the appeal.

That then is the order of this court.

We express our indebtedness to both counsel whose arguments have much assisted us in this appeal.

Dated and Delivered at Nairobi this 22<sup>nd</sup> Day of November, 1990

**J.O. NYARANGI**

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**JUDGE OF APPEAL**

**J.R.O. MASIME**

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**JUDGE OF APPEAL**

**A.M. COCKAR**

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**JUDGE OF APPEAL**