



Printwell Printers Ltd v Nsemia (K) Publishers Limited (Miscellaneous Application E255 of 2023) [2023] KEHC 26174 (KLR) (Commercial and Tax) (24 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E255 OF 2023
FG MUGAMBI, J
NOVEMBER 24, 2023**

BETWEEN

PRINTWELL PRINTERS LTD APPLICANT

AND

NSEMIA (K) PUBLISHERS LIMITED RESPONDENT

RULING

1. This ruling determines the application dated 6th March 2023 brought under sections 1A, 1B, 3A, 63(c) and (e) of the *Civil Procedure Act* and order 22 rule 35 and 51(1) of the *Civil Procedure Rules* and sections 148, 787, 996, 1002 of the *Companies Act*.
2. The application seeks to have the directors of the respondent company attend court for purposes of examination as to the business and affairs of the respondent, and to produce books of account on oath. In default, the applicant prays that the corporate veil of the respondent be lifted and that the directors be held personally liable. The application is premised on the grounds on the face of it and supported by the affidavit and further affidavit sworn by Sharmilla Hilda D’cunha. The applicant also filed written submissions dated 15th May 2023 in support of their case.
3. The applicant’s case stems from a decree in Milimani SCCCOMM Case No. 976 of 2021 Printwell Printers Limited v Nsemia (K) Publishers Ltd of Kshs. 920,279.00/= issued on 2nd September, 2022. The applicant argues that the respondents have scaled down or closed the business of the respondent company. It is also argued that the directors of the respondent have left the jurisdiction of the court all in a bid to frustrate and obstruct the execution of the decree.
4. Vide a further affidavit sworn by Josephine Munene a duly licensed auctioneer trading as Icon Auctioneers, the auctioneer confirms having received instructions from the applicant pursuant to the said decree of 2nd September 2022. The auctioneer confirms having proclaimed some items on 20th of



September 2022 and served the Proclamation Notice upon the respondent. Upon expiry of the notice period the auctioneer states that he was unable to cart away the proclaimed goods as the respondent had closed down its offices and carted away most if not all of the proclaimed items.

5. The application was opposed by way of Grounds of Opposition dated 23rd April 2023 and a replying affidavit sworn by Dr. Matunda Nyanchama, one of the two directors of the respondent, on 23rd April 2023. The respondent also filed written submissions dated 5th June 2023 in support of its case.
6. The respondent's case is that the decree herein was extracted while the respondent's application for stay of execution was still pending in court and is therefore premature and irregular. The respondent argues that subsequently, the Honorable Adjudicator directed vide a ruling delivered on 16th December 2022 that the respondent pays to the applicant the decretal sum in monthly instalments of Kshs. 100,000/ = until payment in full.
7. The respondent also denied having scaled down or closing the business or dealing with its assets in any way adverse to the respondent. It also denied that any of its two had directors left the jurisdiction of the Honourable Court and confirmed that the respondent maintains its offices at 5th Floor, Ufundi Plaza.
8. The respondent avers that while the court has power to issue the orders sought, the same ought to be based on good faith by the decree holder who must demonstrate that that they have made efforts to recover the decretal sum to no avail. The respondent confirms that the applicant's auctioneers had proclaimed several assets belonging to the respondent, which assets included furniture, electronics, and stationery. The respondent finally confirms that it remains willing to settle the decretal sum in reasonable instalments upon service of the updated decree and upon being furnished with payment details.

Analysis

9. I have carefully considered the pleadings and rival submissions filed by parties in support of their claims. It is my view that there are 2 issues to be determined:
 - i. Whether the respondents' directors George Matunda Nyanchama and Carren Kerubo Meshack should be orally examined on the state of affairs of the respondent and
 - ii. Whether the respondent's corporate veil should be lifted and the said directors held personally liable to pay the judgment debt herein.

Whether the respondents' directors George Matunda Nyanchama and Carren Kerubo Meshack should be orally examined on the state of affairs of the respondent

10. Order 22 rule 35 of the [Civil Procedure Rules](#) provides as follows with respect to an application of this nature:

“Where a decree is for the payment of money, the decree- holder may apply to the court for an order that—

- (a) the judgment-debtor;
- (b) in the case of a corporation, any officer thereof; or
- (c) any other person, be orally examined as to whether any or what debts are owing to the judgment debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for



the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents.”

11. The essence of an order under this provision is to assist with discovery. This observation was made by Ringera J, in HCCC No. 1287 of 2000 *Ultimate Laboratories v Tasha Bioservice Limited* where the Learned Judge stated as follows:

“The objective of an examination of a company’s director or officer under order XX1 rule 36 is to obtain discovery, for the purpose of execution of a decree against the company, as to whether any or what debts are owing to the judgment debtor and whether the judgment-debtor has any and what property or means of satisfying the decree.”

12. With respect to the duty of the Court, the Learned Judge went on to state that:

“The court’s duty under the order and rule in question is limited to ensuring that the person being examined answers all the questions which are fairly, pertinent and properly asked and it is thereafter up to the decree holder to use the said information to proceed with execution where the examination unearths assets or other means of satisfying the decree.”

13. Finally, the Court also discussed what factors the Court should consider in granting the orders sought which is that:

“...as long as the Applicant has shown that the Respondent is in a position to provide information in the nature of discovery....as to whether any or what debts are owing to the judgment debtor, and whether the judgment debtor has any and what property or means of satisfying the decree, the Court should summon the person to attend and be examined in relation to the purpose stated in the rule.

... I do not think, the rule places such a high and onerous standard as it has been argued by the respondent, that the applicant must establish; 1) the debtor’s debts and properties; and 2) that the person to be examined has knowledge of or interest in or connection with the judgment debtor’s identified debts and properties which are subject of investigation. That kind of approach will defeat the entire purpose of the rule because the rule enables the applicant to seek for information in the nature of discovery to assist the decree holder to follow through on the execution. If the decree holder already has such definite information of the debts and properties of the judgment debtor, there will be need of applying for examination of a person on what is already available. In such situation, the decree holder should just proceed and execute on the judgment debtor’s known properties.”

14. It was further held in the case of *Postbank Credit Limited (in Liquidation) v Nyamangu Holdings Limited*, (2015) eKLR that:

“A person to be summoned under order 22 rule 35 (c) of the *Civil Procedure Rules*, to provide information on the property of the Company will also be required to produce any relevant documents or copies thereof on the assets of the Company or books of accounts including but not limited to the Judgment Debtor’s annual financial statement, documents of title property of the Company in his possession and which he may have obtained as a director and/or shareholder of the judgment-debtor.”

15. I agree entirely with the holding and observation of the Court in both decisions. Against this background, the applicant has proved that he has a valid decree issued by this Court on 2nd September,



2022 for the sum of Kshs. 920,279.74 which it seeks to execute. The respondent has failed to provide any prove to demonstrate that the said decree is irregular or premature. There is also no evidence that the decree has been satisfied. The applicant has annexed a copy of the CR12 which confirms the directorship of the respondent. For these reasons I therefore find that it is in the interest of justice that the prayers sought herein be granted.

Whether the respondent's corporate veil should be lifted and the said directors held personally liable to pay the judgment debt herein.

16. As to whether or not the corporate veil should be lifted at this point and the respondent's director(s) held personally liable for debt, I find that this is an issue that the court can only determine after the examination, under oath, of the director and after considering the documentary evidence tendered on the affairs of the company.
17. It is upon the directors and shareholders of a defendant company to show that the company has assets that are capable of satisfying the decree and that there is no fraudulent dealing involving the Company, with an intention of defeating the decree. I say so further concurring with the decision taken in the case of *Masefield Trading (K) Ltd v Rushmore Company Limited*, [2008] eKLR. Kimaru J stated as follows:

“ ... By examining such an officer, the court may or may not lift the veil of incorporation.”

Determination

18. In conclusion, and for all the reasons that I have stated, I find and direct as follows:
- i. Prayers 3 and 4 of the application dated 6th March 2023 are allowed. The directors of the respondent company, George Matunda Nyanchama and Carren Kerubo Meshack shall attend court to be examined on oath in regard to the respondent's means and assets.
 - ii. To assist the court in reaching a determination whether the respondent has assets to satisfy the decree, the said George Matunda Nyanchama and Carren Kerubo Meshack shall produce the respondent's book of accounts, audited financial statements, annual returns, VAT returns, bank statements, cheque books, title deeds, bank guarantees and other statutory/relevant documents relating to the operations, property ownership and transactions of the respondent for the last five (5) years.
 - iii. Prayer 4 in the said application shall be considered after the said George Matunda Nyanchama and Carren Kerubo Meshack have been orally examined by the court.
 - iv. The applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF NOVEMBER 2023.

F. MUGAMBI

JUDGE

