



**Skylark Impex Limited v Cytonn Investment High Yields  
Solutions LLP & 2 others (Commercial Cause E022 of 2021)  
[2022] KEHC 13268 (KLR) (Commercial and Tax) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13268 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CAUSE E022 OF 2021  
A MABEYA, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**SKYLARK IMPEX LIMITED ..... APPLICANT**

**AND**

**CYTONN INVESTMENT HIGH YIELDS SOLUTIONS LLP .. 1<sup>ST</sup> RESPONDENT**

**CYTONN INVESTMENTS MANAGEMENT PLC ..... 2<sup>ND</sup> RESPONDENT**

**EDWIN HAROLD DAYAN DANDE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before court are two applications for determination. The first one was by the claimant dated October 6, 2021. It was brought under order 22 rules 35, 44(2), 48(1) and 55, and order 51 of the [Civil Procedure Rules](#).
2. It sought to prohibit the 3<sup>rd</sup> respondent from dealing in any way whatsoever with the property known as Villa No 7 measuring 495 sqft erected on IR No 199616 (“the suit property”) pending the hearing of the application. It also sought to have the 3<sup>rd</sup> respondent examined as to the means of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to satisfy the decree herein that arise from an arbitral award of Kshs 25 million.
3. The claimant also prayed that leave be granted to execute the said decree against the respondents and for the suit property to be sold in execution of the said decree.
4. The grounds for the application were set out on the face of the motion and in the supporting affidavit of Patrick Mwenda Bucha sworn on September 30, 2021. The claimant’s case was that an arbitral award was entered in its favour on July 12, 2021 and leave granted on September 14, 2021 to enforce the same



as a decree. The decree remained unsettled despite reminders to the 3<sup>rd</sup> respondent who was a partner of the 1<sup>st</sup> respondent and director of the 2<sup>nd</sup> respondent.

5. It was contended that the 3<sup>rd</sup> respondent had conducted the business of the 1<sup>st</sup> and 2<sup>nd</sup> respondent fraudulently to the detriment of the claimant. The claimant was unaware of any free assets of the judgment debtors and the 3<sup>rd</sup> respondent had a duty to settle the decree. That the 3<sup>rd</sup> respondent was the owner of the suit property and upon being requested to settle the arbitral award, he only continued to send statements to the claimant claiming that its investment was thriving and attracting interest at 18% pa.
6. It was further contended that in a scheme to confuse investors, the 3<sup>rd</sup> respondent had registered various entities bearing the name Cytonn Investments, including Cytonn Investments Three Partners LLP which held a title over IR No 199616. That the said entity transferred the suit property to the 3<sup>rd</sup> respondent and yet he had failed to ensure that the claimant was paid. In this regard, the claimant was entitled to execute against him.
7. The respondents opposed the Motion vide the replying affidavit of Edwin Harold Dayan Dande sworn on November 2, 2021. He admitted that the claimant had obtained orders to enforce the arbitral award as a decree of this court against the 1<sup>st</sup> and 2<sup>nd</sup> respondents on September 14, 2021. However, he stated that the claimant had amended the title of the proceedings and joined the 3<sup>rd</sup> respondent as a party in order to execute against him. That there was no evidence of fraud in the running of the 1<sup>st</sup> and 2<sup>nd</sup> respondent whose financial troubles were caused by the Covid 19 pandemic.
8. He further deposed that the 2<sup>nd</sup> respondent was run by five other board members before Covid 19. That the 3<sup>rd</sup> respondent had acquired the suit property vide a loan from Standard Chartered Bank he, the 3<sup>rd</sup> respondent, was servicing until Covid 19 struck leading to a restructuring agreement which he produced as annexed as ED2.
9. The 1<sup>st</sup> and 2<sup>nd</sup> respondent had separate legal personality from their members and shareholders and it was improper to make the 3<sup>rd</sup> respondent personally liable to settle the decree. Finally, that the claimant had not provided any basis for the piercing of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's corporate veil to make the 3<sup>rd</sup> respondent personally liable for their obligations.
10. The 2<sup>nd</sup> application was by the 3<sup>rd</sup> respondent dated October 18, 2021. It was filed together with a preliminary objection of even date. It was brought under the inherent jurisdiction of the court. It sought to stay the prohibitory orders issued on October 6, 2021 against the 3<sup>rd</sup> respondent and to have the name of the 3<sup>rd</sup> respondent be struck out from these proceedings.
11. The grounds were set out on the face thereof and on the supporting affidavit of the 3<sup>rd</sup> respondent sworn on October 18, 2021. He deposed that he did not participate in the arbitral proceedings and could not have been therefore enjoined as a party after those proceedings. That in the application dated August 17, 2021 for leave to enforce the award, he was not a party and he ought not have been joined in the present application.
12. As regards the order for stay, he contended that this court had no jurisdiction to grant the prohibitory orders against the suit property as Standard Chartered Bank had a charge over the same. That such a stay order could be conceived as an event of default leading to the exercise of the statutory power of sale by the bank. That the orders were irregularly sought and obtained as they were issued against a third party. That there was no evidence to the claimant's claim that the 3<sup>rd</sup> respondent had diverted the 1<sup>st</sup> and 2<sup>nd</sup> funds for his own use.



13. The claimant opposed the application vide the replying affidavit sworn on November 5, 2021. It was contended that the prohibition order was necessary for the conservation of the suit property. That the 3<sup>rd</sup> respondent was the principal mover in 42 related firms with the name Cytonn Investment. He was the CEO and director of the 2<sup>nd</sup> respondent which had unequivocally guaranteed the payment of the principal investment of Kshs. 25 million made by the claimant plus interest. That the 2<sup>nd</sup> respondent had undertaken to pay the claimant vide an email dated March 18, 2018 but had failed to do so.
14. It was contended that the suit property was valued at Kshs 108,500,000/ which was more than the amount claimed to be owed to Standard Bank. There was no evidence that the entire purchase price was financed by the bank. Further, the purchase price was indicated as having paid to a related firm Cytonn Investment Three Partners LLP where the 2<sup>nd</sup> respondent was a partner.
15. The applicant's submissions were dated December 14, 2021 whereas the 3<sup>rd</sup> respondent filed two submissions dated November 22, 2021 and December 21, 2021. This court has considered those submissions as well as the affidavits on record.
16. The issue for determination is whether the 3<sup>rd</sup> respondent has been properly enjoined in these proceedings and if so, whether the 1<sup>st</sup> and 2<sup>nd</sup> respondent's corporate veil should be lifted and the 3<sup>rd</sup> respondent be held personally liable to pay the decretal sum herein.
17. Firstly, on joinder of the 3<sup>rd</sup> respondent, there was a preliminary objection that he was wrongly enjoined in these proceedings. That he had not participated in either the arbitral proceedings or the application for recognition of the award. The Court finds that to be the case. The inclusion of the 3<sup>rd</sup> respondent as a party was an anomaly. If the claimant intended to have him as a substantive party, it should have made a substantive application for that purpose.
18. In this regard, the inclusion of the name of the 3<sup>rd</sup> respondent as a party was a misnomer which however does not affect the claimant's application. The prayers for his examination and consequently being held liable can be proceeded with without him being made a party. It is a normal cause in execution proceedings.
19. Accordingly, his name is struck out from the proceedings as a 3<sup>rd</sup> respondent but shall henceforth be known by his own name, Edwin Harold Dayna Dande.
20. Order 22 rule 35 of the [Civil Procedure Rules](#) provides that: -

“Where a decree is for payment of money, the decree-holder may apply to the court for an order that the judgment debtor, in the case of a corporation, any officer thereof; or 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.”
21. There are two things that emerge from the foregoing. One, the power of the court to summon a person to attend and be examined as to whether any or what debts are owing to the judgment debtor, and two, whether the judgment debtor has any and what property or means of satisfying the decree. In this regard, as long as an applicant has shown that the person being summoned is in a position to provide information in the nature of discovery as aforesaid, the court should summon the person to attend and be examined in relation to the purpose stated in the rule.



22. In the present case, it is not in dispute that there is an unsettled decree dated September 20, 2021 against the 1<sup>st</sup> and 2<sup>nd</sup> respondent. The claimant also established that Edwin Harold Dayna Dande is an official of the 2 corporate judgment debtors.
23. Firstly, despite orders being sought against him, Edwin Harold Dayna Dande did not file any affidavit in response. Secondly, despite admitting the existence of the debt, there was no attempt to explain the financial status of the 1<sup>st</sup> and 2<sup>nd</sup> respondent. It was not denied that Edwin Harold Dayna Dande was an official and partner of the respondents. That he had crucial information which would assist the court in determining the financial position of the judgment debtors.
24. The basis of the summons under order 22 rule 35 of the *Civil Procedure Rules* is to enable the court establish the company's true financial position and not to penalize any party. In this regard, the court directs that summons be issued to Edwin Harold Dayan Dande to attend court to further assist the court in ascertaining the 1<sup>st</sup> and 2<sup>nd</sup> respondent liquidity.
25. As regards the issue of lifting the corporate veil in order to hold Edwin Harold Dayan Dande personally liable for the debt, this court finds that this issue can only be determined after the examination of Edwin Harold Dayan Dande as regards the debt owed and the conduct of the affairs of the 1<sup>st</sup> and 2<sup>nd</sup> respondent.
26. As regards the prayer to set aside the prohibitory orders, there was a contention that the property was a security held by a bank. That may be so but the owner did not disclose the amount for which it was given as security, the balance owing. This is important because, the claimant's contention that the amount owed is a pittance compared to the value of the property, was neither rebutted nor challenged.
27. Further, since orders are being sought against Edwin Harold Dayan Dande on the manner in which he conducted the affairs of the judgment debtors (he is alleged to have a web of 42 companies through which the investment by the claimant went through), it is proper to preserve the suit property.
28. As such, the application by the claimant is partially successful. The preliminary objection dated October 18, 2021 is unmerited. The respondents' application dated October 18, 2021 is also partially successful
29. In the end, the court makes the following orders: -
  - a. Edwin Harold Dayan Dande is hereby summoned to appear in court to be examined to tender evidence on oath as to the Judgment debtors means and assets for purpose of satisfying the decree in this suit.
  - b. Prayer No 3 of the motion dated October 6, 2021 is granted.
  - c. The claimant shall have the costs of the application.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**A MABEYA, FCIArb**

**JUDGE**

