



**Kariuki t/a Gachiri Kariuki & Company Advocates v Invesco Assurance Company Limited (Miscellaneous Civil Application 447 of 2019) [2022] KEHC 16563 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION 447 OF 2019  
OA SEWE, J  
DECEMBER 16, 2022**

**BETWEEN**

**JOHN GACHIRI KARIUKI T/A GACHIRI KARIUKI & COMPANY  
ADVOCATES ..... APPLICANT**

**AND**

**INVESCO ASSURANCE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. The Notice of Motion dated May 19, 2022 was filed by the applicant under Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 22 Rule 35 and Order 51 Rule 1 of the *Civil Procedure Rules*. It seeks that:
  - (a) The Court be pleased to issue summons to the respondent's directors, namely Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadia Kioko Kavivya, Albert Karakacha Muhavani and Henry Nganga, for the purpose of attending court to be orally examined as to the respondents' assets and to produce the respondent's books of accounts or any other documents in proof of the respondent's financial position;
  - (b) In the alternative, the Court be pleased to grant an order for the lifting of the respondent's corporate veil; and that the directors of the respondent be held personally liable for the decretal amounts due to the applicant together with interest thereon up to the date of full payment;
  - (c) The directors of the respondent, namely, Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadia Kioko Kavivya, Albert Karakacha Muhavani and Henry Nganga, jointly and severally, be ordered to personally satisfy the outstanding decretal amount of Kshs 2,693,947.47 plus costs and interest thereon up to the date of payment in full;



- (d) The costs of the application be borne by the respondent.
2. The application was premised on the ground that judgment was entered herein in favour of the applicant on February 10, 2020 against the respondent; and a decree issued thereupon on February 12, 2020 for Kshs 3,043,947.47. It was further the contention of the applicant that the respondent thereafter paid Kshs 350,000/= only, leaving a balance of Kshs 2,693,947.47 which the respondent has neglected and/or refused to settle despite several demands and execution processes. The applicant further averred that the respondent remains a thriving company in the insurance sector; but has devised a fraudulent scheme to avoid paying the decretal sum; and therefore that it is in the interest of justice for the orders sought to be granted.
  3. The aforesaid grounds were adverted to in the Supporting Affidavit sworn by John Gachiri Kariuki, to which he annexed copies of the records relating to the respondent company, furnishing the respondent's particulars, including the list and names of its directors and shareholders. At paragraph 11 of the Supporting Affidavit, the applicant averred that, this application is the only avenue available for him to establish the means and assets of the respondent for purposes of execution.
  4. As far as the court record goes, the application was duly served on the respondent on the June 7, 2022. An affidavit of Service to that effect, sworn by Fredrick Omondi Osino, was filed herein on June 10, 2022. The said process server annexed to his affidavit duly stamped copies of the Notice of Motion and its annexures, thereby confirming receipt of service on June 7, 2022 by the respondent. The respondent opted to not defend the application.
  5. Order 22 Rule 35 of the [Civil Procedure Rules](#) which is the principal provision relied on by the applicant, provides that:

“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”.
  6. In this instance, the applicant presented uncontroverted evidence to the effect that the applicant obtained judgment against the respondent in this matter on February 10, 2020 and a decree issued in that regard on February 12, 2020 for Kshs 3,043,947.47. Out of that sum, the applicant has acknowledged payment of Kshs 350,000/= only, per paragraph 3 of his Supporting Affidavit. It follows therefore that there is an outstanding balance of Kshs 2,693,947.47 due to the applicant on account of his taxed fees, which the applicant contends the respondent has neglected and/or refused to settle despite several demands and execution processes. In support of this posturing, the applicant deposed that the respondent is otherwise a thriving company in the insurance sector but has intentionally declined to settle the decretal sum. The applicant went further to state that the respondent has devised a fraudulent scheme to avoid paying the decretal sum by hiding its assets; hence the need for the orders sought by him.



7. In addition to the foregoing, the applicant demonstrated that Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadia Kioko Kavivya, Albert Karakacha Muhavani and Henry Nganga are all directors/shareholders of the respondent company and are therefore in a position to furnish the Court with the information required.
8. In the foregoing circumstances, I am satisfied that sufficient cause has been shown for the issuance of prayer (2) of the Notice of Motion dated May 19, 2022 for the oral examination of the respondent's directors. Indeed, as was observed by Hon Kimaru, J (as he then was) in *Masefield Trading (K) Ltd V Ruskmore Company Limited & Another* [2008] eKLR, it is only after such examination that the court would be in a position to determine whether or not to lift the veil of incorporation. Hence, in this regard, I entirely agree with the position taken by Hon Ringera, J (as he then was) in NBI HCCC No 1287 of 2000: *Ultimate Laboratories vs Tasha Bioservice Limited* (Unreported) that;

“...the power of the Court to summon a person to attend and be examined under Order 22 Rule 35 is circumscribed within the purpose set out in the Rule. That is; ...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... 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.”

9. Accordingly, I find merit in the application dated May 19, 2022. The same is hereby allowed and orders granted as hereunder:
- (a) That summons be and are hereby issued to the respondent's directors, namely Joseph Njogu Mungai, Stephen Wamukoya Murunga, Simon Kimutai Chepkwony, Obadia Kioko Kavivya, Albert Karakacha Muhavani and Henry Nganga, for the purpose of their attending court to be orally examined as to the respondents' assets and to produce the respondent's books of accounts or any other documents in proof of the respondent's financial position;
- (b) Costs of the application be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF DECEMBER 2022.**

.....

**OLGA SEWE**

**JUDGE**

